

Eden Refuge Trust & Ors v Hohepa & Anor

(2010) 3 NZTR ¶20-009

High Court Auckland, CIV 2003-404-000539.

Hearing: 3-7 March, 4-5, 12, 27 & 28 August, 1-5 September; 24, 25 & 27 November, 1 & 16 December 2008, 1 April, 8-9 June 2009.

Judgment: 17 March 2010.

Trusts (charitable) – Trustees – Misapplication of trust funds – Claims against trustee for breach of trust and conversion – Claims against solicitor acting for trustee for breach of fiduciary duty, knowing receipt and dishonest assistance – Whether solicitor owes fiduciary duty to the trust – Trust provision requiring majority approval of congregation before trust property sold or mortgaged – Trust partly charitable, partly private – Whether such provision inconsistent for charitable trust – Whether terms inconsistent with a charitable trust can be excised – Whether omission to mention charitable purpose or object in deed affects charitable character of trust – Whether if a private trust, invalid by virtue of the perpetuity rule – Whether “life or lives in being” applicable – Plaintiffs with different degrees of standing – Whether congregation had standing – Fiduciary duties on solicitors acting for a trust/trustee – Conflict of interest, solicitor/client – Whether a positive duty to report a trustee’s actions to the Attorney-General – Whether dishonest assistance – Legal fees paid from trust property in breach of trust – Whether knowing receipt – Restitutionary remedy, whether in specie or in value at time property sold – Charitable Trusts Act 1957, ss 10, 14(1), 61B – Land Transfer Act 1952, s 145 – Perpetuities Act 1964, s 4 – Trustee Act 1956, s 31.

These proceedings were claims against a trustee for breach of trust and conversion, and against the solicitor for the trustee and trust for breach of fiduciary duty, knowing receipt and dishonest assistance.

A 1962 declaration of trust created the Peoples Worship in Freedom Mission trust (PWF trust). The PWF trust owned a building at New North Rd, Auckland (the Property) for the religious congregation, Peoples Worship in Freedom Mission (PWF Mission). The Property was purchased from funds provided by the congregation of the PWF Mission. The PWF Mission registered under the Charitable Trusts Act 1957 as the PWF Mission Trust Board in November 1978, the two surviving trustees of PWF trust being the board members. In 1999 its name changed to the Eden Refuge Trust (the first plaintiff).

The parties

In 1984 Mr Hohepa (the first defendant) was appointed a trustee of the PWF trust. By November 2001 he was the sole surviving trustee. In 2002 Mr Hohepa, who was then living in Spain, arranged through a solicitor, Mr Fletcher (the second defendant), for the Property to be sold. Of the \$350,000 sale price more than \$237,600 was paid by Mr Fletcher to Mr Hohepa. Of this latter amount, more than \$52,500 was to offset payments already made on Mr Fletcher’s American Express card for Mr Hohepa’s

hotel accommodation costs in Spain in anticipation of the sale of the Property. At no relevant time did the defendants meet each other.

The first plaintiff and the second plaintiff (a court-appointed representative of the congregation of worshippers who had used the Property as their church for approximately 15 years) both contended that they represented the PWF Mission. The third plaintiff is Mr MacDonald, the current trustee of the PWF trust, and the fourth plaintiff is the Attorney-General. In an interim judgment (*Eden Refuge Trust v Hohepa* HC Auckland CIV 2003-404-000539, 7 March 2008 Duffy J), Mr Hohepa was removed as a trustee and judgment by default was entered against him.

The PWF trust deed

The PWF trust deed recital provided that the Property was to be held on trust for the congregation. Under cl 1 any sale or mortgage of the Property was to be by an executive committee confirmed by a simple majority resolution of the congregation. Under cl 2 any funds on disposition of the Property were to be accounted to the executive committee. Clause 4 provided that on the PWF Mission ceasing to be a practising religion, the trustees or their survivors were empowered to transfer the trust assets to the New Zealand branch of the Oral Roberts Evangelistic Movement (Oral Roberts NZ). Failing the existence of this entity, then the trust assets were to be used for such religious purposes determined by the trustees pursuant to the Charitable Trusts Act 1957.

Mr Fletcher's legal opinion

In September 2002 when Mr Hohepa wished to sell the Property, Mr Fletcher provided him with a written opinion on the PWF trust deed and the legal ramifications for Mr Hohepa, the Property being subject to two caveats, one registered by the first plaintiff. The opinion advised that failing the existence of the original congregation referred to in the PWF trust deed and Oral Roberts NZ, Mr Hohepa should determine an appropriate religious purpose for the trust property. The opinion also advised that Mr Hohepa needed to consider why the first plaintiff and congregation, would not qualify as an appropriate beneficiary. It was recommended that in the event of a dispute over ownership, recourse for directions should be made to the High Court. Advice was also given as to the removal of caveats under s 145 of the Land Transfer Act 1952.

The mortgage and sale of New North Rd property

Mr Hohepa instructed Mr Fletcher to act on the sale of the Property. The caveats were removed under s 145. In December 2002 Mr Fletcher obtained mortgage finance from ASB Bank for Mr Hohepa on security of the Property. Mr Hohepa had at that time also used the property as security for a loan from two different parties, Adrian Mays and Dave Barton and Ian and Margaret Iria. One of those parties, Messrs Meys and Barton and IBG, an entity associated with Mr Barton, had its loan protected by a caveat. Settlement for the sale of the Property finally occurred in March 2003. It was only then that Eden Refuge Trust learned that the property from which the church operated had been sold. The other party, Mr and Mrs Iria, did not have protection of a caveat and received nothing.

Dissipation of sale proceeds

In November 2002 Mr Hohepa asked Mr Fletcher to forward 5,000 euros for his hotel expenses in Madrid, Spain, and to deduct payment from the Property sale proceeds. Mr Fletcher allowed his American Express credit card to be used to pay Mr Hohepa's hotel bills on a number of occasions. Mr Fletcher prepared a deed of debt with Mr Hohepa as lender in his capacity as trustee of the PWF trust to Mr Hohepa as borrower in his personal capacity. Mr Hohepa claimed that he was using the funds (payment of the hotel bills freed up his personal funds) to finance humanitarian projects. On receipt of the ASB mortgage, Mr Fletcher on 12 February 2003 sent 50,000 euros to Mr Hohepa. In April 2003 the first plaintiff obtained an interim injunction restraining Mr Fletcher and Mr Hohepa from further dealings with the remaining sale proceeds of \$95,297.

Submissions

The plaintiffs argued that the PWF trust deed created a bare trust in favour of the PWF Mission.

Mr Fletcher challenged the standing of the first and second plaintiffs. He also argued that putting Mr Hohepa in possession of realised trust funds made no difference to Mr Hohepa's legal position vis-à-vis the PWF trust. He argued that the Property was run down and that a sale was in the trust's best interests.

Held: Claim against first and second defendants proven.

1. The more serious the allegation, the higher the degree of probability that is required to prove it [56].

The nature of the PWF trust

2. The PWF trust deed does not readily meet the legal requirements for a charitable trust. The recital that the Property be held for the congregation is consistent with the trust having a religious purpose [60]-[61]. The requirement for the trustees to take direction from the congregation and obtain confirmation of a majority of the congregation before the Property is disposed of is inconsistent with a charitable trust. Trustees must not permit others, including beneficiaries, to dictate the manner in which they exercise discretionary powers unless expressly provided for in the trust deed, and such a provision would be inconsistent with the general law of charitable trusts for religious purposes. Trusts with such provisions are more likely to be classified as private and bare trusts [62]-[63].

3. The first part of cl 2, which permits the return of sale proceeds to the congregation, is inconsistent with what the law requires of charitable trusts, but the last part of cl 2 with the default provisions in cl 4 (once PWF Mission ceases), undoubtedly provides for qualifying religious purposes [64]-[65]. A benevolent construction is taken of charitable bequests. Section 61B of the Charitable Trusts Act allows parts that are inconsistent with the trust being charitable to be removed [68]. Whether an institution is charitable or not is determined by its primary or main purpose: *Re Twigger* [1989] 3 NZLR 329 (HC) at 338. PWF Mission carries out Christian missionary work. Its activities can be seen as advancing religion. The omission to mention the religious purpose in the PWF trust deed is therefore of no effect, the gift being for the pursuit of the charitable institution's purpose. The PWF

trust deed creates a charitable trust, despite the absence of an expressed charitable purpose and object [71].

4. As to the submission that the PWFM trust deed creates a bare trust in favour of PWF Mission, the task of determining if a trust was a bare trust requires an assessment of the nature of the trustees' obligations, ascertained from the trust deed and the factual and legal matrix of the trust's creation: *Re Estate Kirkpatrick; Burns v Steel* (2005) 1 NZTR ¶15-017, [2006] 1 NZLR 559 (HC). Clause 4 of the PWFM trust deed imposes active duties on the trustees and its terms are not consistent with a bare trust [74]-[75], [78].

5. This would still leave open the view that the PWFM trust deed creates an express private trust for a designated group of persons with a conditional charitable gift. However, such a view would have problems with the rule against perpetuities and would arise where there is a conditional gift to charity and the condition is not satisfied within the perpetuity period. The trust deed pre-dates the Perpetuities Act 1964: see s 4. To come within the common law rule on perpetuities, it is required that the property must vest within a life or lives in being and 21 years. Since the membership of a congregation can change over time, under the PWFM trust deed the precise duration of the lifetime of the congregation for the purposes of the rule against perpetuities cannot be known. The wait-and-see rule under the Perpetuities Act is not possible under the common law [79]-[81].

6. The PWFM trust deed is either a badly drafted charitable trust with some provisions inconsistent with charitable trust law, or a badly drafted private trust (with a conditional charitable adjunct), which fails to comply with the rule against perpetuities. Once the Court is satisfied there has been an intention to dispose of property for a charitable purpose, a liberal approach is taken to the construction of the instrument. Inconsistent terms can be excised under s 61B of the Charitable Trust Act [83]-[85].

7. An issue not properly addressed during the hearing was the impact of PWF Mission registering as a charitable trust board. Section 14(1) of the Charitable Trusts Act provides that on incorporation of a trust as a charitable trust board, all property held by the trustees vests in the charitable trust board, which is given its own legal personality. It may well be that the Property vested with the board which is now the first plaintiff [86], [88].

Mr Hohepa's liability

8. By August 2002 Mr Hohepa had no intention of using the sale proceeds of the Property for the benefit of the PWFM trust. The advice he received from Mr Fletcher in September 2002 made it clear that the Property was trust property and neither it nor its sale proceeds could be used for Mr Hohepa's benefit. Mr Fletcher's advice that Mr Hohepa could determine an alternative religious purpose for the PWFM trust was wrong. All he could do was prepare a scheme for the Court to approve. Where there are competing claims between religious congregations it is for the Court and not the trustees to determine which congregation qualifies under the trust deed: *Newsome v Flowers* (1861) 10 WR 26 [91]-[94].

9. Mr Hohepa's correspondence with Mr Fletcher refers to planned uses for the sale proceeds, none of which are consistent with being used for religious purposes in New Zealand. Once the funds were remitted to Mr Hohepa in Spain, they disappeared without trace. Paying his hotel accommodation was a personal benefit. The deed of debt shows he was lending money to himself in his personal capacity [96]. The planned sale of the property, removal of the caveats and borrowing against the property are not the actions of a genuine trustee [98]. The actions of Mr Hohepa resulted in a breach of trust and breach of fiduciary duty [101]-[102].

10. The Court proposed to leave aside the issue of the first and second plaintiffs' standing to bring proceedings against the defendants. As a general principle a congregation has no standing to enforce a charitable trust under which they may derive some benefit. However, in *Newsome* the Court found the congregation had standing to resist an ejection action by the trustees and get new trustees appointed. Perhaps the interim injunction to stop the remainder of the trust funds being sent to Mr Hohepa comes within the *Newsome* exception. It is sufficient that the other two plaintiffs, Mr MacDonald and the Attorney-General have standing [104]-[105].

Mr Fletcher's liability

11. By the time Mr Fletcher wrote his opinion of 26 September 2002 to Mr Hohepa, he knew the PWF trust was charitable and he had a reasonable knowledge of charitable trust law, he was aware of the claims of Eden Refuge Trust to the property, that it had registered a caveat and that the default provisions of the trust might become applicable [106]-[108]. Instead of advising Mr Hohepa to make direct and open enquiries of Eden Refuge Trust and Oral Roberts NZ as to their eligibility to enjoy benefits under the trust he provided general trustee advice and recommended challenging the caveats registered against the Property so that they would lapse by default. It seems Eden Refuge Trust did not realise the effect that the lapsing of its caveat would have. At no time was it clearly put on notice that Mr Hohepa had formed the view that it represented a different congregation from that referred to in the PWF trust deed. Eden Refuge Trust was not astute to the full implications of the threat which the s 145 notice conveyed [109]-[112]. Although requested, Mr Hohepa never provided any reliable evidence to Mr Fletcher which confirmed the divide between the original PWF Mission congregation and Eden Refuge Trust. Given the uncertainty and Eden Refuge Trust's long-time occupation, Mr Fletcher should have recommended approaching the Attorney-General; instead a s 145 notice was used to handle any possible contest over the property [113]-[114]. The proper course of action was for Mr Fletcher to have advised Mr Hohepa that, as trustee of the PWF trust, he needed to take active and transparent steps to ascertain how the trust property should be applied [115].

12. Following the lapse of the caveats, Mr Fletcher assisted Mr Hohepa with the sale and conveyance of the property, preparing the deed of debt and transferring money to Mr Hohepa, mortgaging the property for a loan to Mr Hohepa personally, and arranging the discharge of the mortgage and loan against the Property. The requirement in the PWF trust deed that the trustees obtain the approval of the PWF Mission congregation before the Property was sold was inconsistent with the legal requirements of a charitable trust. There can be no legal complaint against Mr Hohepa in that regard. But Mr Hohepa could not sell the Property and benefit himself. The

sale could have been voided but it proceeded because Mr Fletcher acted on Mr Hohepa's instructions [117]-[119].

13. On 22 November 2002 Mr Hohepa sent Mr Fletcher a memorandum detailing his grandiose plans for "humanitarian projects", but it is no more than an incomprehensible rambling. By 3 December 2002 when Mr Fletcher wrote to the purchasers' solicitors confirming the sale of the property, he knew Mr Hohepa was not a reliable or trustworthy person, that the sale was not being undertaken for the purposes of the PWF trust and would result in the trust funds' misuse [121], [127]-[128], [129]. Because of settlement delays Mr Fletcher had ample time to reconsider what was happening and to withdraw [130].

14. With the deed of debt and the use of his American Express card, Mr Fletcher was well aware that trust money was being used indirectly to benefit Mr Hohepa personally. Mr Hohepa's financial plight was made known to Mr Fletcher by direct requests for payment by the Spanish hotel [131]-[133]. With the ASB loan there was nothing to show it was being used for the purposes of the PWF trust. Mr Fletcher had full knowledge of the details of the transaction. He knew these dealings were in breach of trust [136]-[137]. With the Meys/Barton loan Mr Fletcher allowed trust funds to be used to repay the loan, even though by raising the loan Mr Hohepa was in breach of trust [139].

15. In explanation Mr Fletcher said that at times he was acting for PWF trust and at other times for Mr Hohepa in his role as trustee. The Court considered that Mr Fletcher was acting for the PWF trust. He therefore owed duties as a solicitor to the trust. He could only act on instructions from Mr Hohepa that were congruent with Mr Hohepa's role as trustee and the duties he owed to the trust. As it was a charitable trust he would have been able to recognise when those instructions were not congruent with the trust's purposes and objects. As the trust's solicitor it was incumbent on Mr Fletcher to ensure that nothing he did harmed the trust's financial interests [141-142]. The lack of standing of the first and second plaintiff does not affect how Mr Fletcher was to conduct himself in relation to the trust. He owed a duty to the PWF trust to ensure that the legal services he provided did not result in outcomes contrary to the trust's purposes and objects [143]. Mr Fletcher accepted that once the proceeds of sale were sent to Spain there was nothing to restrain Mr Hohepa from applying the funds for his own purposes [145].

16. While Mr Fletcher may have initially formed the view that the sale of the property was in the trust's best interests, there were a number of incidents suggesting that Mr Hohepa's intentions for the trust property were dishonest. Mr Fletcher took no steps to extricate himself from participation in Mr Hohepa's illegal conduct nor did he inform others with an interest in that property, including the Attorney-General [149]. Mr Fletcher has refuted having any knowledge at the time of Mr Hohepa's dishonest intentions. His explanations are difficult to believe [151]-[152]. Several incidents reveal the state of Mr Fletcher's knowledge and that Mr Hohepa was advancing his own interests. These were:

(a) He knew that it was trust property, and that the funds would be sent offshore. He willingly participated in an underhanded process to deal with the caveats rather than following the direct and transparent court process under the Charitable Trust Act.

(b) Despite the well-established principle of trust law that trustees do not obtain personal borrowings from trusts of which they are a trustee, Mr Fletcher facilitated the transfer of trust funds to Mr Hohepa with the deed of debt and his credit card.

There was nothing consistent with the conduct of a trustee acting in good faith. Mr Fletcher's attempts to explain his conduct are unbelievable.

(c) Using the property as security for a loan from the ASB, when it was under a sale and purchase agreement was an odd thing to do. From Mr Fletcher's point of view the sale proceeds were the funds of a charitable trust which had lost its primary purpose and required a new court-approved purpose. There would be no urgent need for funds to be advanced to Mr Hohepa,

(d) Despite knowing about the raising of the Meys/Barton loan by Mr Hohepa, the caveat on the property and the use of trust funds to clear this debt, Mr Fletcher knowingly allowed trust funds to be misapplied,

(e) The manner in which Mr Hohepa represented himself to Mr Fletcher suggested he was a liar or fantasist or both.

(f) Neither the relationship which developed between Mr Hohepa and Mr Fletcher nor the communications from Mr Hohepa were consistent with a trustee wanting to promote the purposes and objects of the PWF trust [155]-[182].

If Mr Fletcher genuinely believed the religious groups referred to in the PWF trust deed were defunct, he should have been strongly advising Mr Hohepa of his legal duty to apply to the Court to approve a new scheme [187]. When Mr Fletcher wrote to Mr Hohepa on 12 December 2002 he advised of the correspondence from lawyers for the Oral Roberts Evangelistic Association. The partisan language Mr Fletcher used was unusual in a letter from a solicitor acting for a trust to a trustee and the suggested response is not consistent with a solicitor and trustee who have learned of the possible existence of one of the religious groups that were a specified substitute purpose of the trust [188].

Legal analysis

17. Equity requires solicitors to act with loyalty and fidelity to their clients, *Sims v Craig Bell & Bond*; (1992) 2 NZ ConvC 191,099 [1991] 3 NZLR 535 (CA). At all material times Mr Fletcher was a solicitor for the PWF trust. He owed fiduciary duties of loyalty, fidelity and utmost good faith towards the trust and, as the trust had no separate legal personality, to the trust's trustee or trustees [191], [194]. With a charitable trust there are not the natural persons to protect the trust should the trustee advance his own interests. The general fiduciary duties of solicitors would require them:

(a) to refuse to act on instructions from the trustee which they could foresee would be likely to result in harm to the trust

(b) to ensure the trust's property is dealt with in accordance with the law, and

(c) to ensure that the trustee's instructions if acted upon are not contrary to the trust deed [197].

Mr Fletcher placed himself in a direct conflict of interest by becoming a creditor of Mr Hohepa through using his credit card. Any potential opportunity for Mr Fletcher to revisit the propriety of his actions and be protective of the PWF trust placed him in conflict with his own interests. At every material step Mr Fletcher acted to the benefit of Mr Hohepa and not of the PWF trust [199]-[201]. There is also room for finding a positive obligation to report the trustee's conduct to the Attorney-General. Discharging the obligations of good faith and loyalty can include taking active steps to protect the trust from having its funds misapplied [204]. While the Court accepted that Mr Fletcher did not owe a fiduciary duty to the first two plaintiffs, he does owe them to Mr MacDonald, the trustee of the PWF trust and to the Attorney-General.

Dishonest assistance

18. Applying the key elements of dishonest assistance as found in *Burmeister v O'Brien* (HC Tauranga CIV 2005-470-3396, 1 December 2009, Asher J), Mr Fletcher's actions helped Mr Hohepa gain access to the trust funds and misapply them. Mr Fletcher's help was essential as a person based in New Zealand and as a solicitor [207], [208]. Sending trust funds offshore for Mr Hohepa was not consistent with the terms of the PWF trust deed and was not the action of an honest person or honest solicitor. An objective assessment is that Mr Fletcher acted dishonestly and dishonest assistance is proven [211].

Knowing receipt

19. Knowing receipt can arise where a stranger to a trust knowingly receives trust property traceable to a breach of trust or breach of fiduciary duty. Notice that the trust property is being misapplied may be actual or constructive knowledge [212]-[213]. In the present case Mr Fletcher knew the terms of the trust, that the money received was trust property and that it was used to pay the trustee's personal expenses in breach of trust. The highly probable inference is that Mr Fletcher actually knew that the reimbursement of the credit card debt from trust funds was a breach of trust. Liability for knowing receipt has been proven [215], [217], [218]. There were also Mr Fletcher's legal fees. Other than the fees for the written opinion of September 2002, the bulk of the legal fees Mr Fletcher received all came from trust property and were incurred through the wrongful conduct on his or his employees' part. He must have known his fees were not legitimate expenses of the PWF trust and were paid from trust property in circumstances where there was knowing receipt that the payments were in breach of trust [219], [220].

Relief

20. The Court proposed to deal with the restitutionary based remedies and reserve leave to the plaintiffs to return to the Court for fault based remedies, should the need arise [221]. The fundamental question is what is required to restore the parties to their former positions. The circumstances of the sale and the length of time since the sale mean that a restitution of the property is no longer possible. When restitution in specie is not possible, the approach is to take the value of the lost property at the time it was sold inequitably and its sale price as the starting point. Mr Fletcher's fees were met from the sale price. The plaintiffs will also be entitled to

interest with the possibility of compound interest [223], [225]-[228]. Leave is reserved to the parties to file further submissions on relief [229].

Result

21. Liability for breaches of trust, fiduciary duty and conversion have been proved against Mr Hohepa and liability for breaches of fiduciary duty, knowing receipt and dishonest assistance have been proved against Mr Fletcher [221], [231], [232].

[Headnote by John Brown, Barrister]

G Bogiatto for First and Second Plaintiffs
JF Armstrong for the Third Plaintiff
CRW Linkhorn for the Fourth Plaintiff
No Appearance of or for the First Defendant
DA Wood for the Second Defendant

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

CIV-2003-404-000539

BETWEEN

EDEN REFUGE TRUST
First Plaintiff

JOANNE LYDIA MALETINO
Second Plaintiff

CALLUM MACDONALD
Third Plaintiff

ATTORNEY-GENERAL
Fourth Plaintiff

AND

CHARLES HOHEPA
First Defendant

CHARLES FLETCHER
Second Defendant

Hearing: 3-7 March, 4-5, 12, 27 and 28 August,
1-5 September, 24, 25 and 27 November, and
1 and 16 December 2008; and 1 April and
8-9 June 2009

Appearances: G Bogiatto for the First and Second Plaintiffs
J F Armstrong for the Third Plaintiff
C R W Linkhorn for the Fourth Plaintiff
No Appearance of or for the First Defendant
D A Wood for the Second Defendant

Judgment: 17 March 2010

JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 17 March 2010 at 4.30 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

[1] This proceeding is about the mishandling of property belonging to a trust. During the course of the proceeding, including the trial, there were a number of procedural complications and complexities that protracted its resolution. Nonetheless, the core issues are quite simple. A 1962 deed of declaration of trust created the Peoples Worship in Freedom Mission trust (PWF trust) and entrusted the trustees with ownership of a building at 44 New North Road. By early 2003, the building had been sold and a substantial part of the sale proceeds consumed through the actions of the then sole surviving trustee. It is the conduct of the trustee, and the solicitor who acted under his instructions that lie at the heart of the proceeding.

[2] There are four plaintiffs. The first plaintiff, the Eden Refuge Trust (Eden Refuge), is a charitable trust board registered under the Charitable Trusts Act 1957. It was originally registered on 23 November 1978 under the name of the PWF Mission Trust Board. The change of name to Eden Refuge was made on 26 May 1999. The second plaintiff, Lynda Maletino, is the court appointed representative of a congregation of worshippers who have used the New North Road property as their church. Ms Maletino was appointed to this role on 12 June 2006. Both the first and second plaintiffs contend that they represent adherents of a Christian faith known as the Peoples Worship in Freedom Mission (PWF Mission). The third plaintiff, Callum MacDonald, is the current trustee of the PWF trust. He was appointed to this office on 7 March 2008, pursuant to an interim judgment (*Eden Refuge Trust v Hohepa* HC Auckland CIV-2003-404-000539, 7 March 2008) I delivered at the close of the first and second plaintiffs' case. By then, I had heard sufficient evidence to persuade me that the first defendant, Charles Hohepa, could no longer continue to hold office as trustee of this trust. The trial was then adjourned part heard until August 2008. Mr MacDonald was joined as third plaintiff on 12 August 2008. The fourth plaintiff is the Attorney-General, who appears in his role as protector of charitable trusts. The Attorney-General was joined as fourth plaintiff on 16 December 2008, at a time when the trial was adjourned yet again part heard and with the closing submissions of some of the parties yet to be delivered. The late recognition of the need for the Attorney-General to be joined as a party, and the appropriateness of his joinder at such a late stage in the proceedings is akin to what occurred in *Jamison v Chalmers Church* (1933) 14 NZLR 862 (SC).

[3] Mr Hohepa was the sole trustee of the PWFm trust at the time the trust property was mishandled. The second defendant, Charles Fletcher, is a barrister and solicitor who acted on instructions from Mr Hohepa, which have resulted in the loss of the trust property. Mr Hohepa appears to have been residing in Madrid, Spain, throughout the time he was dealing with Mr Fletcher. At no relevant time did the defendants meet each other in person.

[4] When I delivered my oral interim judgment in which I removed Mr Hohepa as a trustee of the PWFm trust, I did not enter judgment against him, despite his having taken no steps to defend himself, other than filing a statement of defence in 2003. This was because I did not want any findings I made in relation to Mr Hohepa to prejudice Mr Fletcher, who at all times has actively defended the claims made against him. However, on 28 August 2008, I decided, for the reasons set out in the Minute of that date, that I should formalise Mr Hohepa's position in relation to the proceeding. It was suggested by Mr Fletcher that Mr Hohepa might appear as a witness via video link for him. My concern was that Mr Hohepa should not have the opportunity of appearing and defending his own position, given his failure to take any steps in his own defence prior to this time. Accordingly, I struck out his defence and entered judgment by default against him on liability. As matters turned out, he did not appear as a witness for Mr Fletcher. Against Mr Hohepa, therefore, the only outstanding issues are quantification of the monetary claims made against him. As regards Mr Fletcher, there are live issues in relation to both liability and quantification of the monetary claims against him.

Facts

[5] By a deed of declaration of trust dated 29 October 1962 (PWFm trust deed), William Bloomfield, William Wilson and Hapi Pihema declared that they were purchasing a property (44 New North Road, Auckland) upon trust for "the members for the time being of the religious congregation known as the Peoples Worship in Freedom Mission".

[6] By December 1984, Mr Pihema was the sole surviving trustee of the original trustees. By a deed dated 20 December 1984, he appointed Violet Wilson and Charles Hohepa as trustees. Mr Pihema died on 26 July 1986. Mrs Wilson died on

10 November 2001. This left Mr Hohepa as the sole surviving trustee. Nothing of relevance eventuated with regard to the PWFm trust or its property until August 2002, when Mr Hohepa set in train a series of events that culminated in the sale of the property and him gaining access to a substantial portion of the sale proceeds.

[7] The first event was when associates of Mr Hohepa, Alan Haley and Monty Smith, approached Mr Fletcher on 26 August 2002 and informed him that Mr Hohepa wanted to sell the New North Road property to Mr Haley, or to a trust. Nothing was said about the property being subject to a trust. At the time, there were two caveats registered on the property's title. They were a caveat in favour of the first plaintiff (registered on 19 December 2000) and a caveat in favour of Colleen and Bryan Hicks (registered on 14 April 2002). On 10 September 2002, Mr Fletcher had telephone contact with Mr Hohepa. From then on there was regular contact between them, either by telephone or email.

[8] By 14 September 2002, Mr Fletcher was aware of the existence of the PWFm trust deed, and that ownership of the New North Road property was subject to the PWFm trust deed. By then, both defendants knew that this property was being occupied by the first plaintiff and a congregation of persons who worshipped at the church on the property.

[9] On 26 September 2002, Mr Fletcher provided Mr Hohepa with a written opinion on the status of the PWFm trust deed and the legal ramifications for Mr Hohepa. The opinion reveals:

- a) the terms of the PWFm trust deed;
- b) that Mr Hohepa was the sole surviving trustee under the PWFm trust deed;
- c) the registration of caveats on the title of the New North Road property;

- d) the existence of the first plaintiff as a board registered under the Charitable Trusts Act, which had previously held the registered name of the PWF Mission trust board;
- e) the first plaintiff and the congregation associated with it having been in occupation of the New North Road property for approximately 15 years;
- f) the possibility that there was more than one congregation practising the faith of the PWF Mission, with the original congregation referred to in the PWF trust deed being separate from the persons associated with the first plaintiff;
- g) there being some links between the membership of the original congregation and the first plaintiff; and
- h) there having been an “extensive exchange of correspondence between lawyers” acting for the first plaintiff and other persons associated with the PWF Mission regarding the PWF trust and its New North Road property.

[10] The opinion advised Mr Hohepa that failing the existence of both the original congregation referred to in the PWF trust deed, and the New Zealand branch of the Oral Roberts Evangelistic Movement (Oral Roberts NZ) (which the PWF trust deed named as a recipient of the trust property in the event of the congregation no longer being in existence), it would fall to Mr Hohepa to determine an appropriate religious purpose for the trust property. Mr Fletcher identified as a primary issue for Mr Hohepa the question why the first plaintiff and the congregation associated with it, which had been using the New North Road property since 1984, would not qualify as an appropriate beneficiary under the PWF trust deed.

[11] The opinion also contained advice on Mr Hohepa’s rights, duties and obligations as a trustee. There was a recommendation that if there was a dispute over ownership of trust property, recourse to the High Court for directions was the best course of action. Advice was then given on how to remove caveats on the title

of the New North Road property, using the procedure provided for in s 145 of the Land Transfer Act 1952. The opinion concluded by advising Mr Hohepa that it raised serious issues, and requested him to provide information and instructions in respect of the matters raised therein.

[12] On 9 October 2002, Mr Hohepa responded to Mr Fletcher's opinion by inserting his own comments in certain passages. But when it came to the passages in which Mr Fletcher advised Mr Hohepa on his rights and obligations as a trustee, including dealings with trust property, there were no comments or queries from Mr Hohepa. He did not respond to either Mr Fletcher's request for instructions, or the various alternatives for dealing with trust property that were listed in the opinion.

[13] From the time Mr Fletcher received Mr Hohepa's comments on the legal opinion, they each embarked on a course of action that resulted in Mr Hohepa being treated as if he was entitled to determine what was to be done with the trust property, and any proceeds of its sale. The relevant events can be divided into two groups: first, those directly associated with the sale of the New North Road property; and secondly, those associated with the dissipation of the sale proceeds.

Sale of the New North Road property

[14] Mr Hohepa instructed Mr Fletcher to act on the sale of the New North Road property. During October 2002, Mr Fletcher took steps to progress the sale of this property. He corresponded with solicitors, Morrison Kent, for the purpose of obtaining historic legal files relating to the PWF trust. A limited power of attorney, for the specific purpose of selling the trust property, was prepared and executed in favour of Alan Haley. The power of attorney specified that the sale proceeds were to be held in the trust account of Fletcher Law (Mr Fletcher's firm) for the credit of the "PWF Trust". Notices were issued under s 145 of the Land Transfer Act to commence the process for removing the caveats on the title to the New North Road property. Neither of the caveat holders took steps to oppose the removal of the caveats.

[15] On 25 October 2002, a sale and purchase agreement for the New North Road property for the sum of \$350,000, with settlement on 3 February 2003 was

purportedly executed by Mr Haley. Mr Fletcher's file note of 7 November 2002 records his discussions with Mr Haley and with Mr Hohepa about this agreement. Mr Haley denied signing the agreement and said that the real estate agent had signed it, using Mr Haley's signature. Mr Fletcher's advice was to void the agreement as a forgery, or confirm it. Mr Hohepa decided to proceed with the sale under the agreement.

[16] By November 2002, the transmission which left Mr Hohepa as the sole registered proprietor on the title, together with the power of attorney in favour of Mr Haley, had been lodged with Land Information New Zealand. Mr Fletcher had received the signed sale and purchase agreement, and had made contact with the purchaser's solicitors. A deposit of \$17,500 for the sale price was paid into Fletcher Law's trust account.

[17] On 8 November 2002, Mr Fletcher wrote to Duthie Whyte, who were the firm of solicitors that had registered the first plaintiff's caveat, and Alistaire Hall, who had formerly been with that firm and was now practising on his own account. The letter advised that Mr Hohepa was now the sole trustee of the PWFm trust, and that he did not recognise the first plaintiff as having any connection with the Peoples Worship in Freedom Mission (the congregation named in the PWFm trust deed). The letter ended by describing the first plaintiff and its congregation as squatters on the PWFm trust's property at New North Road, and advised them to find alternative premises.

[18] On 22 November 2002, Oral Roberts NZ registered a caveat against the title of the New North Road property. By then (perhaps as a result of correspondence from Mr Fletcher to the solicitors who had previously acted for Oral Roberts NZ), it had realised it needed to register its interest in the New North Road property.

[19] In December 2002, other issues arose regarding the claims of Eden Refuge and Oral Roberts NZ to the New North Road property. However, these issues were never anything more than an interim obstacle to the progress of the sale.

[20] In December 2002, Mr Fletcher took steps to obtain mortgage finance from the Auckland Savings Bank (ASB) for Mr Hohepa. On 7 December 2002, the ASB

confirmed by letter that it was willing to lend funds to Mr Hohepa. The bank instructed Mr Fletcher to act for it in relation to the preparation and execution of the relevant legal documents to achieve a secured loan registered against the New North Road property. On 11 December 2002, Mr Hohepa executed a power of attorney giving Mr Fletcher the power to raise mortgage funds against the security of New North Road. On 20 December 2002, Mr Fletcher produced a mortgage to the ASB for registration against the title of the New North Road property, as well as a s 145 notice to effect the removal of Oral Roberts NZ's caveat from the property's title. The circumstances behind the arranging of this mortgage are discussed at [37]-[45] of this judgment. The ASB mortgage was registered on the title on 31 January 2003. Oral Roberts NZ took no steps to prevent the removal of its caveat from the title.

[21] On 5 February 2003, Adrian Meys registered a caveat against the title of the New North Road property. The basis of the caveat was a loan that Mr Hohepa had arranged with Adrian Meys and Dave Barton that was to be secured by a mortgage on the title of the New North Road property. This was a further obstacle to the settlement of the sale of the property. Mr Fletcher only learned of the existence of this caveat on 18 February 2003, two days before the contractually agreed settlement date. The effect of this loan on the money received from the sale of the New North Road property is dealt with in greater detail at [44]-[47] of this judgment.

[22] The settlement was delayed beyond the contract date, and did not occur until on or about 5 March 2003. On that day, the purchaser's solicitor deposited the balance of the sale price (\$334,073.50) in Fletcher Law's trust account. The caveat in favour of Mr Meys was still registered on the title. After certain interactions between Fletcher Law, the solicitor for the purchaser, the solicitor for Mr Meys, Dave Barton and an entity associated with Mr Barton (IBG), on 12 March 2003, Mr Fletcher wrote to Mr Meys' solicitor confirming that he had paid them \$55,518 on account of a debt Mr Hohepa allegedly owed to Mr Meys. In return, Mr Meys' solicitor was, on receipt of this payment, to send the notice releasing the caveat to the purchaser's solicitor to secure its removal from the title. At about this time, Mr Fletcher arranged for the locks at the New North Road property to be changed.

[23] On 12 March 2003, Eden Refuge learned for the first time that the property from which their church had been operating was sold. On 13 March 2003, the

solicitor acting for Eden Refuge contacted Mr Fletcher to discuss how the property had come to be sold, and what Mr Hohepa's intentions were in relation to the sale proceeds. On that occasion, Mr Fletcher confirmed that he was holding the proceeds of the sale in his trust account. Later, on 4 April 2003, Eden Refuge obtained an interim injunction restraining Mr Fletcher and Mr Hohepa from further dealings with the sale proceeds.

Dissipation of the sale proceeds

[24] In late November 2002, the first of an unusual series of events occurred. These events led to the dissipation of a large part of the sale proceeds, both in advance of, as well as following their receipt.

[25] The first such event was on 20 November 2002. Mr Hohepa telephoned Mr Fletcher, and followed this up with a letter of the same date, instructing Mr Fletcher to arrange for "the immediate part payment of 5,000 Euro for my hotel's expenses here in Madrid, Spain". The letter went on to say that the payment was:

To be deducted from the proceeds received from the deposits held in your company trust account on my behalf. Such deposits are from the confirmed sale and purchase agreement, on the property at 44 New North Road, Eden Terrace, Auckland, as per our discussion today 20/11.

Mr Fletcher was told that, due to the urgency of the matter, he was to contact the hotel address given in the letter and to arrange for payment using his credit card, with the amount to be deducted from the trust account funds.

[26] On 21 November 2002, Mr Fletcher wrote to the manager of the hotel in Madrid and advised that he acted for Mr Hohepa. He informed the hotelier that:

We act for Mr Hohepa who is a long term guest ... Mr Hohepa advises that he has hotel expenses currently due to you of Euro 6,415.39. Our client is shortly due some funds and he will be able to meet his financial obligations with you.

In the meantime we have been authorised to pay you Euro 5,000.00 on account of our client's account and you may charge this to the following credit card:

Mr Fletcher then gave his name and American Express credit card details. The charge was made to his credit card.

[27] The November 2002 payment was not to be the only time that Mr Fletcher used his American Express card to pay for Mr Hohepa's hotel bills. As part of the arrangement they agreed on for payment of Mr Hohepa's accommodation in Spain, Mr Fletcher prepared a deed of acknowledgement of debt (the deed of debt) dated 21 November 2002. From the time the deed of debt was executed, Mr Fletcher received a number of requests from Mr Hohepa to assist him to pay his accommodation costs in Spain.

[28] The deed of debt provided for an unsecured specified term loan of NZ \$10,500, plus advances, to be made from the lender, Charles Hohepa of Madrid, Spain, company director, as trustee of the PWFm trust, a charitable trust in New Zealand, to the borrower, Charles Hohepa of Madrid, Spain, company director.

[29] The background to the deed provided that:

1. The Lender has agreed to assist the Borrower with an advance of the Principal Sum to enable the borrower to complete his work in Spain, which will long term have considerable benefit for the lender and its Charitable purposes.
2. The advance is to be made on the Interest Commencement Date on the terms recorded in this deed.

[30] The terms of the loan were a principal sum of NZ \$10,500, plus "advances". Repayment of the principal sum was upon demand. The ordinary interest rate was 10 per cent per annum for the period to 31 March 2003, and thereafter the ordinary market interest rate. The penalty interest rate was 14 per cent. The interest commencement date was 30 November 2002. Payments of interest were to commence on 31 March 2003. The lender's address was given as care of the offices of Fletcher Law, solicitors, and that was also to be the place where payments were to be made. Under the terms, it was recorded at clause 1.3 that the principal sum included provision for "advances", and the parties acknowledged that the lender might make further advances to the borrower from time to time by or at the request of the borrower.

[31] The executed version of the deed of debt that was produced in the common bundle of documents was missing one page. During the hearing, an unsigned version of the deed of debt, which contained the missing page, was placed before the

Court. The missing page contained clauses 4 and 5. Clause 4 provided that the borrower was to pay the lender's legal costs in respect of the deed of debt. Clause 5 purported to provide a means for the lender to obtain a mortgage over property to secure the loan. However, nowhere in the deed of debt is the property actually identified. Clause 5.1 provided that:

The borrower [Mr Hohepa in his personal capacity] as the registered proprietor of the Property, agrees to sign a mortgage over the Property in favour of the Lender to secure the monies advanced in terms of this Deed.

[32] Under clause 5.2, the lender was to prepare the mortgage and submit it to the borrower for signature if and when the lender required the borrower to provide the lender with a mortgage in terms of clause 5.1. Under clause 5.3, the borrower acknowledged that the lender would have the right to caveat the title to the property. It is not clear from the evidence whether the additional page in the unsigned version of the deed of debt was omitted from the executed deed of debt, or was simply omitted when the bundle of documents was prepared. In any event, either with or without the missing page, the deed of debt failed to provide any identifiable security for the loan to Mr Hohepa.

[33] A file note of Mr Fletcher's, dated 5 December 2002, records a request from Mr Hohepa for Mr Fletcher to provide financial assistance pending settlement of the New North Road property. The file note goes on to say that the sum of Euro 4,964.80 had been charged to Mr Fletcher's American Express card as NZ \$10,252.76. This may be a reference to the same payment that Mr Fletcher approved on 20 November 2002. The file note refers to the use of the credit card to pay for the hotel accommodation and states:

This is on the basis that I am authorised to deduct the amount charged from the funds held on deposit, once the Kiwi Dollar amount is known.

This afternoon American Express has confirmed that a charge of 4,964.80 Euro has been charged to my American Express account as NZ\$10,252.76. I will invoice and collect this sum from Charles Hohepa.

[34] In a file note dated 9 December 2002, Mr Fletcher recorded the understanding he had reached with Mr Hohepa about the use of his credit card. The file note shows that there had been a telephone discussion between Mr Fletcher and Mr Hohepa where they had talked about Mr Fletcher using his American Express

card to pay future hotel bills on Mr Hohepa's behalf, as and when they became due. The file note recorded that the payment of those costs would be covered by advances under the deed of debt, which Mr Hohepa was to repay at a later unspecified date.

[35] Documents from Fletcher Law's files show that Mr Hohepa made further requests on 14 December 2002, 16 December 2002, 13 January 2003, and 5 February 2003 for Mr Fletcher to pay his hotel bills using his American Express card, and then reimbursing himself from either loans secured against the New North Road property, or from the sale proceeds once they were received.

[36] The Fletcher Law trust account records for the PWFm trust show four occasions when Mr Fletcher charged payments he had made on his American Express card for Mr Hohepa's hotel accommodation costs to the PWFm trust. They were:

- i) 11 December 2002, \$10,500.00;
- ii) 10 February 2003, \$7,122.07;
- iii) 6 March 2003, \$20,264.73; and
- iv) 14 March 2003, \$14,604.98.

Mr Fletcher accepted under cross-examination that there were five occasions when he used his credit card to pay for Mr Hohepa's accommodation bills in Spain, and then subsequently reimbursed the payment using trust funds.

[37] In addition to payment of hotel accommodation, Mr Hohepa sought and obtained from Mr Fletcher other advances that were ultimately charged against the funds of the PWFm trust. Mr Hohepa wanted bridging finance in anticipation of the sale of the New North Road property. In a letter of authority dated 21 November 2002, Mr Hohepa said the loan was needed for the purpose of financing:

... the costs for the immediate release and processing of assets and valuable items, which have recently arrived in Customs at Madrid Airport. The proceeds from the sale of the above assets and valuables are primarily to fund Humanitarian Projects.

Nothing is said about the nature of the assets and valuables, nor are the humanitarian projects identified.

[38] On 10 December 2002, the necessary legal documents for a loan of \$150,000 from the ASB, secured by a registered mortgage on the title of the New North Road property, were sent to Mr Hohepa for execution. The power of attorney dated 11 December 2002 describes Mr Hohepa as being the owner of the New North Road property, without mentioning that he holds it on trust for the PWFm trust. The power of attorney contains nothing which might suggest that the mortgage security is in fact trust property, that Mr Hohepa owns the property as a trustee, and that he has delegated his power as a trustee to raise mortgage finance using the trust property as security to Mr Fletcher. The common law does not allow a trustee to delegate discretionary powers such as selling or leasing the trust property: see *Oliver v Court* (1820) 8 Price 127 at 166-167. Section 31 of the Trustee Act 1956 permits the delegation of an absent trustee's powers but this should be made clear in the power of attorney.

[39] The repayment of the loan was secured against the New North Road property. Until the sale of the New North Road property settled, any repayments to the ASB were to be made from trust property as a loan to Mr Hohepa under the deed of debt. Once settlement had occurred, the loan was to be repaid from the proceeds of the sale.

[40] The use of trust property to secure the loan meant that funds advanced under the loan were either trust funds, or they were personal to Mr Hohepa and he had used trust property to secure a personal loan. If the funds were trust funds, they had to be applied for trust purposes. Mr Hohepa's claim that he was using the funds for humanitarian projects is not consistent with the purposes in the PWFm trust deed. Since the sale of the New North Road property was due to settle in February 2003, the ASB mortgage had to be cleared from the title. The loan would either have to be repaid and the mortgage discharged from the sale proceeds, in which case trust property was being used to repay the loan, or payment would have to come from an alternative source. No such source was suggested and the general impression to be gained from the evidence is that from the outset, the plan was for the sale proceeds to be used to discharge the mortgage debt.

[41] The evidence shows that the ASB loan became a means whereby Mr Hohepa was able to gain for himself premature enjoyment of the sale proceeds from the New North Road property. At Mr Hohepa's request, Mr Fletcher took steps to ensure the ASB mortgage was registered before Christmas 2002. That did not occur, and it was not until 31 January 2003 that the mortgage was registered. Consequently, no funds were available from the ASB loan until registration was achieved. This outcome prompted a letter from Mr Fletcher to the Registrar-General of Land Information New Zealand advising that the delay in registration had caused Mr Hohepa loss, and that compensation under s 172 of the Land Transfer Act would be sought. Seemingly, Mr Hohepa was in need of funds in early January 2003. He took further steps to borrow money which was to be repaid on his receipt of the proceeds from the sale of the New North Road property.

[42] On 14 January 2003, Mr Hohepa negotiated directly with Ian and Margaret Iria of Mt Maunganui to raise the sum of \$40,000 to be secured against the proceeds from the sale of the New North Road property. The funds were transferred to Fletcher Law's trust account on 16 January 2003. On the same date, Mr Fletcher arranged for the funds to be used to purchase Euro, to be transferred by SWIFT to Mr Hohepa's bank account in Spain.

[43] On 17 January 2003, Mr Hohepa wrote to Mr Fletcher seeking to raise Euro 10,000 to enable him to retrieve an "asset". This was the first of a number of requests for money that Mr Hohepa made in relation to something which was only ever referred to as the "asset".

[44] On 3 February 2003, Mr Hohepa entered into an agreement with Adrian Meys and Dave Barton whereby to those persons he assigned and charged his interest as vendor in the sale and purchase agreement for the New North Road property. The agreement records that the assignment and charging of the sale proceeds was in consideration of sums of money Mr Hohepa had already received from Mr Meys and Mr Barton. These advances came to a total of NZ \$40,000. The agreement also authorised IBG to secure by first mortgage over the title to the New North Road property a loan for \$185,000 from which they were to be entitled to deduct \$40,000.

[45] The ASB funds did not become available until 10 February 2003. Once the bank had deducted its expenses, the net sum was \$149,250. On 7 February 2003, Mr Fletcher emailed Mr Hohepa advising him that the ASB funds would be available on 10 February 2003, and requesting instructions on what to do with the balance of the funds once Mr Fletcher had applied them to clearing Mr Hohepa's hotel expenses in Spain. On the same day, Mr Fletcher authorised a charge of Euro 9,945.65 to his American Express card to cover payment of Mr Hohepa's hotel expenses. On 12 February 2003, Mr Fletcher applied the ASB funds to send Euro 50,000 to Mr Hohepa.

[46] On 13 February 2003, Mr Barton wrote to Mr Fletcher, advising him that IBG had received various instructions from Mr Hohepa, including providing an advance against the settlement proceeds from the sale of the New North Road property. This was followed up by a letter on 18 February 2003 that Mr Barton wrote to Mr Fletcher, requiring repayment of a total sum of \$40,000, which had been remitted to Mr Hohepa, or other persons at Mr Hohepa's direction, between 3 and 4 February 2003. The letter also requested an additional \$21,500 for legal fees, loan application fees and specialist consultancy fees. The total amount sought was \$61,850. This debt was the foundation for the caveat that Mr Meys had lodged on 5 February 2003. In correspondence with Mr Fletcher, Mr Barton made it clear that the caveat Mr Meys had registered would not be withdrawn until all monies owed to Mr Barton, IBG and/or Mr Meys were repaid by Mr Hohepa. There followed a series of correspondence between Messrs Fletcher, Hohepa and Barton. In the course of this correspondence, Mr Fletcher wrote to Mr Hohepa on 25 February 2003 advising him that the deed of assignment he had entered into for the purpose of assigning his vendor's interest in the sale of the New North Road property was probably invalid for being in breach of trust. Mr Hohepa was advised that he may have a personal liability for using trust assets for his own financial benefit. On 28 February 2003, Mr Hohepa responded to Mr Fletcher. He explained that he had used Mr Barton to provide bridging finance, when there were delays with receiving the funds from the ASB. He said the money had been needed to secure the release of an "asset", and that this had been achieved.

[47] The outcome of the correspondence on the topic of the Meys' caveat was that in order to secure its removal from the title of the New North Road property (which

was necessary to enable settlement with the purchaser), acting on instructions from Mr Hohepa on 12 March 2003, Mr Fletcher paid the sum of \$55,518 to solicitors acting for Messrs Meys, Barton and IBG. The money was paid from the sale proceeds of the New North Road property. Although Mr Fletcher had earlier raised with Mr Hohepa and with Mr Barton's solicitors the prospect of paying Mr Barton's demand on a without prejudice basis to leave open the ability to challenge the propriety of the caveat and the loan on which the demand for payment was based, no reservations of that nature were actually attached to the payment.

[48] In late February 2003, Mr Barton was not the only person making enquiries as to what was to happen with the proceeds from the sale of the New North Road property. On 28 February 2003, Monty Smith, on behalf of Mr and Mrs Iria, wrote to Mr Fletcher enquiring about the settlement of the New North Road property, and seeking information as to when Mr and Mrs Iria were likely to be repaid the loan they had advanced to Mr Hohepa. The terms of the loan were that the principle was to be repaid on settlement of the New North Road property. Their interest in the sale proceeds did not, however, have the protection of a caveat. They received nothing from the sale proceeds.

[49] The plaintiffs produced in evidence a consolidated summary of all matters for the PWF trust and Mr Hohepa as handled through Fletcher Law's trust account. Neither defendant challenged the accuracy of this consolidated summary. It shows that after a final reconciliation of all the advances that were made to Mr Hohepa, as well as costs associated with his activities, both in relation to the sale of the property and the requests for funds, much of the sale proceeds were already accounted for by the time the sale proceeds were deposited into Fletcher Law's trust account. As at 17 April 2003, the balance of the sale proceeds remaining in Fletcher Law's trust account came to the sum of \$95,297.54.

PWF Mission Trust

Consolidation summary of all matters for PWF Mission (Charles Hohepa) through Fletcher Law Trust Account to 17 April 2003

Financial Transaction	Breakdown	Debits	Credits
Sale of 44 New North Road			
- Deposit received		\$ 17,500.00	
- balance sale price		\$ 332,500.00	

- apportionments on settlement	\$ 43.09	
- interest for late settlement	\$ 1,530.41	\$ 351,573.50
ASB Bank loan		
- loan advance	\$ 150,000.00	
- bank fee for loan	\$ 750.00	
- interest to bank on repayment	\$ 1,162.95	
- repayment of loan advance	- \$ 150,000.00	
leaving net cost of loan as		\$ 1,912.95
Morrison Kent costs		\$ 3,744.62
Fletcher Law costs 5-12-02 for 2227	\$ 4,166.25	
Fletcher Law costs 28-3-03 for 2227	\$ 778.75	\$ 4,945.00
Fletcher Law costs 28-3-03 for 2369		\$ 2,232.15
Fletcher Law costs 5-12-02 for 2348		\$ 277.00
Fletcher Law costs 5-12-02 for 2309	\$ 1,755.75	
Fletcher Law costs 31-3-03 for 2309	\$ 5,028.10	\$ 6,783.85
Fletcher Law costs 17-4-03 for 2453		\$ 3,418.56
Payments to C Hohepa (or at his request)		
11/12/2002	\$ 10,500.00	
10/02/2003	\$ 7,122.07	
12/02/2003	\$ 98,353.42	
06/03/2003	\$ 20,264.73	
12/03/2003	\$ 55,518.00	
14/03/2003	\$ 14,604.98	
27/03/2003	\$ 4,303.00	
27/03/2003	\$ 15,816.53	
28/03.2003	\$ 4,000.00	
31/03/2003	\$ 835.00	
31/03/2003	\$ 1,748.50	
31/03/2003	- \$ 2,009.74	
31/03/2003	\$ 4,293.59	
31/03/2003	\$ 2,267.83	\$ 237,617.91
ASB Bank – interest (net of RWT)		\$ 639.75
C Hohepa – interest credit to PWF Mission	\$ 2,267.83	
C Hohepa – interest credit to PWF Mission	\$ 1,748.50	\$ 4,016.33
Totals		\$ 260,932.04 \$ 356,229.58
Balance held at ASB Bank and on deposit as at 17 April 2003 for PWF Mission	\$ 94,109.25	\$ 95,297.54
C Hohepa – ASB costs	\$ 1,912.95	
C Hohepa – advances incl costs	\$ 237,617.91	\$ 239,530.86
Total PWF Mission assets (excl interest)		\$ 334,828.40

[50] The consolidated summary does not fit with the way in which the various payments have been presented in the statement of claim. The hearing of this proceeding has been protracted as a result of staggered hearings. Evidence has become available as a result of discovery part way through the hearings. Often this

evidence has altered the picture presented by earlier evidence. There is no doubt that substantial sums of trust money were misapplied. To avoid making findings of actual quantum based on inaccurate figures or calculations, I propose to give the parties leave to file additional evidence or to deal with the existing evidence by memoranda in order to make clear the actual amounts in issue. The parties should be able to agree on what the amounts are. If they cannot reach a common position, they can each set out their assessments of the amounts.

Claims made against Mr Hohepa

[51] As against Mr Hohepa, the plaintiffs' claims are for breach of trust, corrupt and improper practices, fraudulent receipt of monies, breach of fiduciary duty, equitable fraud, and conversion. There is a considerable degree of overlap with some of these causes of action. The conduct on which the allegations are founded is Mr Hohepa's misuse of trust property, and his use of trust funds for his own benefit. The instances in which he is alleged to have misused trust property, or applied trust funds for his own benefit include inter alia:

- i) Selling the New North Road property without complying with the procedure set out in the PWFm trust deed;
- ii) By failing to account to the first and second plaintiffs for the sale proceeds from the New North Road property;
- iii) Mortgaging the New North Road property to first the ASB, and secondly, Mr Meys, without complying with the procedure set out in the PWFm trust deed;
- iv) Applying the proceeds of the loans secured by the aforementioned mortgages to his own benefit;
- v) Entering into the deed of debt whereby he, as trustee, lent trust funds to himself in his personal capacity; and

- vi) Otherwise dealing with the trust property/funds for his own benefit.

[52] The relief the plaintiffs seek against Mr Hohepa includes: his removal as a trustee (this has already occurred); an award of damages equal to the value of the New North Road property as at the date of hearing; an accounting of all profits made by Mr Hohepa from his misuse of the trust funds or money unlawfully raised against the security of trust property; and \$50,000 exemplary damages in each cause of action. The plaintiffs also seek interest on any sums awarded, as well as costs on an indemnity basis. I deal with each incident in turn below.

Claims made against Mr Fletcher

[53] As against Mr Fletcher, the plaintiffs' claims are:

- i) Breach of a duty of care to the plaintiffs, the beneficiaries of the PWF trust, and to the "trust itself";
- ii) Breach of a fiduciary duty to the plaintiffs and the charitable purposes expressed in the PWF trust deed;
- iii) Breach of the Fair Trading Act 1986;
- iv) Breach of contract (through s 4 of the Contracts (Privity) Act 1982);
- v) Equitable fraud;
- vi) Knowing receipt of trust funds; and
- vii) Dishonest assistance.

[54] The relief the plaintiffs seek against Mr Fletcher includes: an award of damages in the sum of \$850,000, being the estimated value of the property as at the date of hearing; a permanent injunction restraining Mr Fletcher from disbursing the remaining trust funds to Mr Hohepa; an accounting of all profits made by

Mr Fletcher, if any; reimbursement of all legal fees charged by Mr Fletcher to Mr Hohepa; an order requiring Mr Fletcher to pay to the plaintiffs all funds held in his trust account to the credit of the first and second plaintiffs, Mr Hohepa, or the PWF trust. The plaintiffs also seek interest on any sums awarded, as well as costs on an indemnity basis.

[55] The striking out of Mr Hohepa's statement of defence, and the entry of judgment against him by default on liability removes any need for considering proof of liability in relation to him. However, in case any doubts arise as to the process that was adopted, I propose to make findings on Mr Hohepa's liability in the alternative. Furthermore, Mr Hohepa's conduct needs to be addressed in the context of considering proof of liability against Mr Fletcher.

Standard of proof

[56] As this is a civil case, the burden of proof requires the plaintiffs to prove the allegations they make against the defendants on the balance of probabilities. Nonetheless, when allegations of fraud in the civil context are made, the law recognises that (see *Re Dellow's Will Trusts, Lloyds Bank Ltd v Institute of Cancer Research* [1964] 1 All ER 771 at 773):

The more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it ...

The more serious the allegation the higher the degree of probability that is required: but it need not, in a civil case, reach that very high standard required by the criminal law.

Because some of the allegations in this case are in substance akin to suggesting that the defendants have committed fraud, I have approached the facts for determination on the basis that before reaching an adverse view of the defendants' conduct, I should assess the evidence using a standard of proof that takes the highest degree of probability as its measure.

The nature of the PWF trust

[57] The New North Road property was purchased from funds provided by the congregation of the PWF Mission.

[58] The first, second and third plaintiffs contend that the trustees hold the property on a bare trust for the benefit of the congregation. However, the first, second and third plaintiffs have not challenged the view that the PWF trust deed has some of the elements of a charitable trust. The Attorney-General has become involved in this proceeding on the basis that it concerns dealings with the property of a charitable trust. The first defendant's decision to play no part in the proceeding means he has taken no position on this issue. The second defendant has approached the PWF trust as if it is a charitable trust.

[59] There are four charitable purposes that a charitable trust can have: the relief of poverty; the advancement of religion; the advancement of education; and such other purposes beneficial to the community: see *Centrepoin Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673 (HC) at 677. Apart from trusts for the relief of poverty, which may benefit identified persons or groups of persons, all other charitable purposes must have a public benefit, if a trust is to qualify as a charitable trust: see *McGovern v Attorney-General* [1982] Ch 321. The advancement of religion is recognised to be a public benefit.

[60] The difficulty with characterising the nature of the PWF trust deed is that it does not readily meet the legal requirements for a charitable trust. Some terms of the PWF trust deed accord with the requirements for a charitable trust, but other terms do not. On the other hand, if characterised as a private trust, its terms fail to meet the legal requirements for a private trust. It is necessary to consider each term and determine its intent before standing back to consider the overall effect of the terms.

[61] The recital to the PWF trust deed records that the New North Road property was purchased with funds provided by the PWF Mission, and the property was to be held on trust for the members of the congregation. When a congregation of religious persons acquire a property to be held on trust, this act is consistent with the trust having a religious purpose. Hence, the recital is consistent with the trust having a charitable intent.

[62] Clause 1 of the PWF trust deed requires the trustees to deal with the New North Road property as directed by the congregation acting through its executive committee. However, when it comes to any disposition of this property by

sale, mortgage or lease, the executive committee's decision to effect such disposition must be confirmed by a simple majority resolution of a meeting of the congregation, of which the quorum for any such meeting is at least 10 persons.

[63] The requirement in clause 1 for the trustees to deal with the property at the direction of the congregation's executive committee could suggest the property was to be available for a religious purpose. But the requirement for the trustees to take direction from the congregation, and to obtain the confirmation of a majority of the congregation before the property is disposed of is inconsistent with a charitable trust. In terms of trust law, generally trustees must not permit others, including beneficiaries, to dictate to them the manner in which they should exercise their discretionary power: see *Re Brockbank* [1948] Ch 206. The only circumstances where beneficiaries or other persons can dictate how trustees are to exercise their powers are where that is expressly provided for in the trust deed. However, such provision would be inconsistent with the general law of charitable trusts for religious purposes. Trustees must exercise their power in accordance with achieving the religious purposes and objects of the trust. Trusts with express provisions that require trustees to act in accordance with the dictates of other specified persons are more likely to be classified as private and bare trusts.

[64] Under clause 2, any funds from the New North Road property, or its disposition, are to be paid and accounted for to the executive committee of the congregation, or applied in the manner provided for in clause 4. Clause 4 provides for the distribution of the trust assets on the occurrence of certain events. First, if the PWF Mission ceased to be a practising religion, so that there was no congregation to direct disposal of the trust assets, then the trustees, or their survivors, or the personal representatives of their survivors are empowered to transfer the trust assets to Oral Roberts NZ for the general purposes of promoting religion as expounded by that entity. Failing the existence of this entity, the trustees are empowered to apply the trust assets to such religious purposes as may be determined pursuant to the Charitable Trusts Act, or any Act in substitution thereof.

[65] The first part of clause 2, which permits the sale of the New North Road property and return of the sale proceeds to the congregation, is inconsistent with what the law requires of charitable trusts. No settlor can retain for himself or herself

a power to control trust property: see *Laws of New Zealand Charities* (online ed) at [169]. Nor is it possible to gift property to a charitable trust on the basis that when the property is sold, the proceeds are to be returned to the settlor: see *Laws of New Zealand Charities* (online ed) at [179]. But the last part of clause 2, which provides for the default provisions in clause 4 to take effect, (once the PWF Mission ceases to be a practising religion), undoubtedly provides for religious purposes that would qualify as charitable under the Charitable Trusts Act.

[66] Clause 3 is a machinery clause that deals with appointment of trustees. It gives no indication of the character of this trust.

[67] Clause 4, which is described in [64], is clearly consistent with the PWF trust being a charitable trust having the purpose of the advancement of religion.

[68] The PWF trust deed does not express the charitable purpose of the advancement of religion. Nonetheless, that is not the end of the matter. A benevolent construction is taken of charitable bequests. The court must look at the whole context to see whether a particular gift is intended to be charitable: see *Re Campbell* [1930] NZLR 713 (SC). Furthermore, the existence of some clear charitable purpose in a trust deed, which otherwise contains terms that are inconsistent with a charitable trust, can enable the trust to be saved by using the powers under s 61B of the Charitable Trusts Act. This allows the parts that are inconsistent with the trust being charitable to be removed.

[69] There is law to the effect that “a gift for the benefit of a charitable institution simpliciter is prima facie to be construed as a gift for that institution’s charitable purposes”: see *Laws of New Zealand Charities* (online ed) at [77], citing *Re Quinn* (1900) 18 NZLR 50 (SC). In that case, a testamentary gift to the religious order of the Little Sisters of the Poor was held to be charitable, even though no purpose or object was attached to the gift. The Court found that the act of gifting to a charitable institution was enough of itself to support the inference that the gift was intended for a charitable purpose.

[70] In *Re Twigger* [1989] 3 NZLR 329 (HC) at 338, Tipping J found that whether an institution was charitable or not was to be determined by its primary or main purpose. The evidence shows that the PWF Mission is a Christian religious faith, which carries out Christian missionary work. Therefore, the activities of the PWF Mission can be seen as advancing religion, and the primary purpose of the PWF Mission must be recognisable as a charitable purpose. It follows that, like the recipient in *R Quinn*, the PWF Mission is a charitable institution.

[71] The gift of funds from the PWF Mission for the purpose of acquiring the New North Road property can be seen as the means by which this religious congregation acquired property for the pursuit of its religious purpose. When seen in this way, the omission to mention the religious purpose in the PWF trust deed is of no effect since, in accordance with the principle expressed in *Re Quinn*, the law treats such gifts as being for the pursuit of the charitable institution's purpose. Construing the PWF trust deed in this way enables it to be seen as creating a charitable trust, despite the absence of an expressed charitable purpose and object.

[72] But there are still the provisions in clauses 1 and 2 restricting how the trustees can deal with the trust assets whilst the congregation remains in existence. Those provisions cannot be reconciled with the PWF trust being a charitable trust.

[73] Before considering further if there is sufficient indication of charitable purpose in the PWF trust deed to enable it to be construed as being a charitable trust, or saved as such by s 61B of the Charitable Trusts Act, I propose to consider the plaintiffs' argument that the PWF trust deed creates a bare trust in favour of the PWF Mission. It is also necessary to consider the impact this would have on the PWF trust's status as a charitable trust.

[74] A comprehensive discussion of the principles relating to bare trusts and bare trustees is found in *Burns v Steel* [2006] 1 NZLR 559 (HC). The case was about whether or not trustees appointed under a trust created by a will held shares in a company upon a bare trust. At [41] Randerson J referred to the definition of "bare trustee" in *Halsbury's Laws of England* (4th ed 2000 reissue) vol 48 at 650:

650. Meaning of 'bare trustee'. A bare trustee is a person who holds property in trust for the absolute benefit and at the absolute disposal of other persons who are of

full age and sui juris in respect of it, and who has himself no present beneficial interest in it and no duties to perform in respect of it except to convey or transfer it to persons entitled to hold it, and he is bound to convey or transfer the property accordingly when required to do so.

[75] At [42] Randerson J noted that the same definition was repeated in *The Laws of New Zealand Charities* (online ed) at [120] and in John Mowbray and others *Lewin on Trusts* (17th ed, Sweet & Maxwell 2000) at [1]-[21]). Randerson J then went on to consider a number of authorities from other jurisdictions where the concept of a bare trust was discussed. After a thorough review of those authorities, Randerson J concluded at [62] that, in general, the task of determining if a trust was a bare trust required an assessment of the nature of the trustees' obligations, which were to be ascertained from the terms of the trust deed, as well as the factual and legal matrix of the trust's creation:

Although consideration of whether the trustees are "bare trustees" may be helpful in some contexts, there is a risk of becoming overly concerned with nomenclature to the point where the nature of the duties and discretions of the trustees may be obscured. Where the expression "bare trustee" is used in statute, the Courts are of course obliged to give some meaning to it. But in the absence of a statutory reference of this kind, the real task is to ascertain the nature and extent of the trustees' obligations and discretions by reference to the terms of the instrument establishing the trust, assessed in the context of all the relevant surrounding circumstances and the obligations imposed on trustees by the general law or by statute.

[76] In the context of the facts in *Burns v Steel*, this required consideration to be given to the deceased's presumed intentions by reference to the terms of the will, assessed in the context of the company's constitution, and the obligations at law of trustees and executors. This led to Randerson J finding at [64] that he was satisfied that the trustees had active rather than merely passive duties, which distinguished them from bare trustees:

... the trustees are not mere ciphers ... they have active duties and discretions both as executors and trustees. As executors, the defendants are obliged to get in the assets of the deceased, pay the expenses and distribute the residue in accordance with the terms of the will. And, as trustees, they have the fundamental obligation to adhere to the terms of the trust and to act in the best interests of the beneficiaries.

[77] The testator in *Burns v Steel* had not enumerated any specific duty, other than the basic obligation at law to give effect to the will by implementing the gift of shares. Nonetheless, Randerson J concluded that this involved duties that went beyond simply transferring the shares to the plaintiff and guarding the property in the

interim. This was because of certain pre-emption provisions in the company's constitution which required the trustees to exercise judgment and skill before acting. Randerson J considered that the testator must be taken to have known of the pre-emption provisions of the company's constitution, and their effect on the trustees' duties. At [66] and [67] he concluded:

In ordinary circumstances, it would have been a straightforward matter to have taken a transfer of the shares and then distributed them to the plaintiff in accordance with cl 3 of the will. But the existence of the preemption provisions of the company's constitution make it impossible to follow that simple course, a fact of which the deceased must be taken to have been aware in making the gift of shares to the plaintiff. The trustees will be obliged to take at least some, and possibly all, of the steps outlined in Mr Wylie's submissions These are not merely mechanical matters but require the careful exercise of judgment and discretion. The trustees must hold the shares and, in order to fulfil their duty, undertake the preemption process in the best interests of the plaintiff as beneficiary.

In the absence of any absolute entitlement by the plaintiff to the shares in specie, the trustees must exercise their own discretion in a conscientious manner. It is for them to decide when it is appropriate to issue a transfer notice and the amount which should be nominated for the value of the shares. It is also a matter for them to proceed with any other steps inherent in the preemption process, including participation in any arbitration as to the fair value of the shares and deciding whether to revoke the transfer notice if the price fixed as the fair value is less than the figure nominated in the notice.

[78] In the PWF trust deed, clause 4 imposes active duties on the trustees. These actions require the exercise of discretion; they are not merely mechanical matters. Accordingly, the terms of the PWF trust deed are not consistent with a bare trust. The first, second and third plaintiffs' arguments that the PWF trust deed creates a bare trust in favour of the PWF Mission is untenable.

[79] This still leaves open the possible view that the PWF trust deed creates an express private trust for a designated group of persons with a conditional charitable gift, should the designated group of beneficiaries cease to exist. But if this view of the PWF trust deed was accepted, problems with the rule against perpetuities would then arise. The private trust aspect of the PWF trust deed would still have to comply with the rule against perpetuities: see *The Laws of New Zealand Charities* (online ed) at [72]-[73]. Non-compliance with the rule against perpetuities invalidates a trust and the disposition of property to it: see *The Laws of New Zealand Perpetuities and Accumulations* (online ed) at [7].

[80] The rule applies where there is a conditional gift to charity and the condition is not satisfied within the perpetuity period: see *Laws of New Zealand Charities* (online ed) at [76]. The PWFm trust deed pre-dates the Perpetuities Act 1964 and so that Act has no application: see s 4. The common law rule on perpetuities is set out in *Laws of New Zealand Perpetuities and Accumulations* (online ed) at [7]:

... to be valid, an executory devise or other future limitation *must* vest, if at all, within a life or lives in being and 21 years and a possible period of gestation. It is not sufficient that it *may* vest within that period. It must be valid in its creation, and, unless it is created in such terms that it *cannot* vest after the expiration of a life or lives in being and 21 years and the period allowed for gestation, it is not valid, and subsequent events cannot make it valid.

[81] With the PWFm trust deed, the property is to be held on trust for the benefit of the congregation until such time as the congregation ceases to exist. Since membership of a congregation can change over time, the precise duration of the lifetime of a congregation cannot be known. Whilst the application of the wait and see rule under the Perpetuities Act would have allowed a trust created on these terms to be treated as valid until such time as the 80 year period had expired, such an approach is not possible under the common law. It requires the ascertainment of the vesting to be visible at the time the gifting under the trust deed takes place.

[82] To comply with the rule against perpetuities, the PWFm trust deed would have to specify a finite duration for the private trust created within the deed. However, there is nothing in the PWFm trust deed that can be interpreted as doing this.

[83] The result of my analysis of the PWFm trust deed is that it is either a badly drafted charitable trust deed which contains some provisions that are inconsistent with charitable trust law, or it is a badly drafted private trust, (with a conditional charitable adjunct to it), which fails to comply with the rule against perpetuities, and so is invalid for that reason.

[84] Since clause 4 of the PWFm trust deed clearly has a religious charitable purpose, this is not a trust that would ever fail absolutely. The court would always be able to act using powers under the Charitable Trusts Act to prevent the trust from failing. In such circumstances, I consider that the better view to adopt of the

PWFM trust deed is that it is a poorly drafted charitable trust deed. This view is consistent with the general principle that, once a court is satisfied there has been an intention to dispose of property for a charitable purpose, a liberal approach is taken to the construction of instruments which purport to create a charitable gift or bequest either absolutely or upon trust: see discussion in *The Laws of New Zealand Charities* (online ed) at [61]. Parliament has given further effect to this principle in s 61B(2) of the Charitable Trusts Act by providing that no trust shall be invalid by reason that the trust property is to be held or applied in accordance with an imperfect trust provision.

[85] This still leaves the problem of the terms that are inconsistent with the PWFM trust deed being a charitable trust. However, they can be excised through exercise of the powers under s 61B of the Charitable Trusts Act. Since they can be removed in this way, I do not see their presence as being fatal to the PWFM trust being characterised as a charitable trust. It is not necessary for these proceedings that the s 61B powers be exercised. The present uncertainty surrounding whether or not Eden Refuge is one and the same as the PWF Mission congregation referred to in the PWFM trust deed does not require resolution in these proceedings. This is a step that can be taken once Mr MacDonald has formed a view on the steps to be taken following the conclusion of these proceedings. It is open to Mr MacDonald to apply to the court to approve a new scheme under clause 4 of the PWFM trust deed.

[86] There is another issue that was touched on, but was not fully and properly addressed during the hearing. This is the impact of the PWF Mission registering as a charitable trust board under s 11 of the Charitable Trusts Act. Such registration was achieved on 23 November 1978.

[87] The PWFM trust deed named three trustees: William Anateus Bloomfield, William Wilson and Hapi Murray Tauhui Pihema. By the time the PWF Mission registered as a trust board, Mr Bloomfield had died. The remaining trustees, Messrs Wilson and Hapi, are also named in the constitution of the PWF Mission trust board as being among the original board members and trustees.

[88] Section 14(1) of the Charitable Trusts Act provides that on incorporation of a trust as a charitable trust board, all property held by the trustees vests without

conveyance, or assignment in the charitable trust board, which under the Act is given its own legal personality. At the time the PWF Mission was registered as a charitable trust board, the two remaining trustees under the PWF trust deed were also board members and trustees of the PWF Mission trust board. It may well be, therefore, that in accordance with s 14(1), the New North Road property vested in the PWF Mission trust board. Once vesting of property under s 14(1) had occurred, such property would be vested in the PWF Mission trust board until disposed of by the board, or the board was liquidated or dissolved. On 26 May 1999, the PWF Mission trust board changed its name to the “Eden Refuge trust board”, which is the first plaintiff in these proceedings.

[89] However, s 10 of the Charitable Trusts Act, which provides for applications for incorporation as a registered charitable trust board, requires such applications to be accompanied by certain documents showing the general purposes of the trustees or society making the application for incorporation. One of the named documents is any declaration of trust. Another is any trusts on which the trustees hold property vested in them as trustees, but not held for the general purposes of the applicant. The PWF trust deed vests property in the trustees for the general purpose of advancing the PWF Mission faith. It is not, therefore, one of the types of trust expressly required to be provided when registration is sought. In terms of the general requirement to provide copies of declarations of trust, the effect of any omission to do so is unclear. In this case, the records of the documents the PWF Mission lodged with the New Zealand Companies Office, which was then responsible for processing and holding applications for registration as a charitable trust board, do not include a copy of the PWF trust deed of 1962. Either the persons applying for registration in 1978 were one and the same as the congregation referred to in the PWF trust deed and they have just omitted to include a copy of the PWF trust deed with the documents submitted for registration, or the charitable trust created by the trust deed is separate and different from the charitable trust board registered as the PWF Mission trust board and now known as the “Eden Refuge trust board”.

[90] What effect ss 10 and 14(1) may have had on the ownership of the New North Road property is an issue which will require resolution when decisions are made as to how the PWF trust is to proceed in the future. This is something in which the Attorney-General may engage. Since all persons having an interest in the

New North Road property through it being trust property are represented in these proceedings as plaintiffs, I do not consider it necessary for the purpose of determining the liability of the defendants to reach a firm conclusion on which of the first, second and third plaintiffs is the true owner of the trust property.

Findings on Mr Hohepa's liability

[91] The circumstances of this case cause me to conclude that at the time Mr Hohepa's associates approached Mr Fletcher in August 2002 for legal assistance in effecting the sale of the New North Road property, Mr Hohepa was working towards achieving the sale of that property, and to obtain the proceeds of the sale for his own personal use. By August 2002, if not earlier, he had no intention of using the sale proceeds for the benefit of the PWF trust.

[92] The advice Mr Hohepa received from Mr Fletcher in September 2002 made it clear that the New North Road property was trust property and, as such, neither it nor the sale proceeds could be used for Mr Hohepa's personal benefit. The advice also made it clear that if the religious congregation of the PWF Mission no longer existed, the PWF trust deed required the trust property to be dealt with in accordance with the default provision in clause 4.

[93] Mr Fletcher's advice was erroneous when he advised Mr Hohepa that, as the sole surviving trustee, once he was satisfied that neither the PWF Mission congregation nor Oral Roberts NZ remained in existence, he could determine an alternative appropriate religious purpose for the PWF trust. This was beyond Mr Hohepa's power as a trustee. All he could do in this regard was to prepare a scheme for the court to approve; in the context of this scheme he could ask the court:

- a) to determine if the Eden Refuge congregation was entitled to be recognised as adherents of the PWF Mission faith and if not;
- b) to determine if Oral Roberts NZ still existed and if not;
- c) to approve an alternative religious purpose.

[94] Jean Warburton *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) at 6-023 cites *Newsome v Flowers* (1861) 10 WR 26 as authority for the proposition that where there are competing claims between religious congregations, who each profess to be the only true believers of a religious faith provided for in a charitable trust, it is for the court and not the trustees to determine the congregation which qualifies under the trust deed:

... it is not for the trustees to determine whether the existing congregation hold the doctrines required to entitle them to the benefit of the charity or not, or to take steps to eject them on the ground that they do not hold the appropriate doctrines: that is a question for the courts.

[95] But, despite this error, there is nothing in the advice that could suggest it was open to Mr Hohepa to apply trust property for his own personal use. The purposes of the PWF trust deed related to the advancement of religion either by the PWF Mission, or the substitute religious purposes in clause 4: namely, Oral Roberts NZ, or such other religious purpose as approved by a court following an application under the Charitable Trusts Act.

[96] The facts show that once a sale of the New North Road property was achieved, Mr Hohepa set about raising finance for his own purpose against the security of the property and receipt of the sale price on settlement. Funds were advanced to Mr Hohepa through Mr Fletcher paying for Mr Hohepa's hotel accommodation in Spain, on the strength of Mr Fletcher being able to reimburse himself from the sale proceeds once they were received. Mr Hohepa's correspondence with Mr Fletcher refers to planned uses for the sale proceeds, none of which are consistent with the funds being used for religious purposes in New Zealand. There is nothing in the evidence that reveals Mr Hohepa's actions as being for the purpose of implementing an alternative religious purpose. The loans he obtained from the ASB, Adrian Meys and Mr and Mrs Iria, which were to be repaid on receipt of the sale price for the New North Road property, were intended to be applied towards some money-making project which Mr Hohepa had in mind. Once the loan funds were remitted to Mr Hohepa in Spain, they disappeared without trace. The benefit he obtained from Mr Fletcher paying his hotel accommodation was a personal benefit. The deed of debt Mr Hohepa executed shows that in his role as a trustee of the PWF trust, he was lending money to himself in his personal capacity.

There is nothing in the evidence to show that Mr Hohepa had any genuine intentions of applying the sale proceeds in accordance with his obligations under the PWF trust deed.

[97] The way in which he went about selling the property, without any notice to the religious congregation then using the property as its church, is also indicative of an intention to apply the trust property for his own use. As the sole surviving trustee of the PWF trust deed, if Mr Hohepa had genuine concerns about whether the congregation using the property was the congregation intended to have use of the property under the PWF trust deed, the appropriate action to take was to communicate with those persons, notify the Attorney-General, and, if doubts remained as to their eligibility under the PWF trust deed, apply to the court under the Charitable Trusts Act for directions.

[98] There was evidence that the New North Road property was in want of repair, but there was no evidence of any pressing need to sell the building. The communications between Mr Hohepa and Mr Fletcher show that Mr Hohepa did not recognise the congregation using the New North Road property as being entitled to do so, but, if that were the case, the proper step was to ask the court to determine the issue. The plan of action that was followed included entering into a sale and purchase agreement, taking steps to obtain the easy removal of the caveats on the title of the property, and gaining advance enjoyment of the sale proceeds by borrowing against the title using the sale proceeds as security. None of these steps are consistent with the actions of a genuine trustee. A proper enquiry into whether or not the PWF Mission was still in existence is not conducted though using the provisions of the Land Transfer Act to challenge a registered caveat on the title of the trust property, and then leaving it to the recipient/caveator (in this case Eden Refuge) to take steps in the High Court to oppose the caveat not lapsing.

[99] Mr Hohepa's actions have resulted in the PWF trust losing a property which it had owned since 1962 and which formed the bulk, if not all, of the trust's assets. All that remains for the PWF trust is the balance of the sale proceeds that were held in Mr Fletcher's trust account at the time this Court issued an interim injunction preventing any further payment of the sale proceeds to Mr Hohepa. Mr Hohepa has depleted the PWF trust of its assets.

[100] The only probable inference to be drawn from the evidence is that Mr Hohepa arranged for the sale of the New North Road property to realise a trust asset, the proceeds of which he could then apply for his own personal use. The raising of the loans from the ASB and Adrian Meys, and the uses to which those loans were put, were entirely divorced from the PWF trust. Mr Hohepa applied the loans to pay off debts and secure a mysterious “asset”. By appropriating the money from the sale of the New North Road property for his own personal use, Mr Hohepa has approved trust property being used in a way which resulted in him borrowing from the PWF trust.

[101] The law imposes a range of duties on trustees which, if breached, will result in a breach of trust. The duties that are relevant to these proceedings are:

- a) The duty to execute the trust in accordance with its terms and in accordance with the general law;
- b) The duty of loyalty; and
- c) The duty to preserve trust property (both in terms of property vested in the trustees at the time the trust was created, and any moneys or other property derived from the sale of the original trust property).

[102] The actions of Mr Hohepa patently result in a breach of trust and a breach of fiduciary duty. I have already dealt with the removal of Mr Hohepa as a trustee in the interim judgment I delivered on 7 March 2008. Of the remaining causes of action against Mr Hohepa, I find the following has been established:

- a) The second cause of action in relation to the breaches of duty pleaded in paragraphs 46(b), (d), (e), (f), (g), (h) and (j);
- b) The third cause of action in relation to the breaches of duty as a fiduciary;
- c) The fourth cause of action in relation to the breaches of duty pleaded in paragraph 55(a), (c), (d), (e) and (f);

- d) The fifth cause of action; and
- e) The sixth cause of action in that by unlawfully depriving the PWF trust of its property, Mr Hohepa has converted trust property.

[103] I do not propose to deal with the allegations relating to Mr Hohepa's failure to comply with the procedure set out in clause 1 of the PWF trust deed before dealing with trust property, as I am not satisfied that this aspect of clause 1 is enforceable. I have already commented that the clause is inconsistent with what the law requires of a charitable trust.

Status of the first and second plaintiffs

[104] I do not propose to deal with the allegations that Mr Hohepa has failed to account to the first and second plaintiffs for the proceeds of the trust property. The question of the entitlement of those persons to benefit under the PWF trust deed is a question that does not require resolution in this proceeding. I propose to leave to one side their standing to bring claims in this proceeding against Mr Hohepa and Mr Fletcher. As a matter of general principle, a congregation has no standing to enforce a charitable trust under which they may derive some benefit. However, in *Newsome* the Court found at 972 that a congregation did have standing to resist an ejection action by the trustees and get new trustees appointed. This can be seen as an exceptional case, because the congregation had no other option available to them. The two pre-existing trustees had been persuaded to appoint new trustees and to vest the church's property in them. The new trustees were members of a breakaway congregation who wanted to secure the property for their own worship. Because the pre-existing trustees had no way to stop the new trustees from evicting the congregation, the Court considered that it was appropriate for the congregation to take action. It may well be that the commencement of this proceeding and the application for an interim injunction to stop the remainder of the trust funds being sent to Mr Hohepa was an urgent circumstance which would come within the *Newsome* exception. Whether it does so does not require determination at the present time. Leave is reserved to the parties to come back to this Court on this point, should there be a need to do so.

[105] For the purposes of finding liability established against Mr Hohepa and Mr Fletcher it is enough if the two remaining plaintiffs have standing to bring the claims. Mr MacDonald as the current and court appointed trustee of the PWF trust clearly has standing to sue a former trustee for the misapplication of trust funds, as well as the trust's then solicitor for any actionable wrong doing on his part. The Attorney-General, who occupies a special role as protector of charitable trusts (see *Laws of New Zealand Charities* (online ed) at [273]) has standing to enforce the proper execution of a trust, and to recover misapplied trust funds. The findings of liability that I reach in this judgment are based on the claims as made by the third and fourth plaintiffs. All references henceforth to the plaintiffs having established liability are to be read as references to Mr MacDonald and the Attorney-General.

Findings on Mr Fletcher's liability

[106] By the time Mr Fletcher wrote the legal opinion dated 26 September 2002 to Mr Hohepa, Mr Fletcher knew the facts set out in [9] herein. In addition, Mr Fletcher thought that the PWF trust was a charitable trust. At paragraph 22 of the legal opinion, in the context of an assessment on whether the PWF trust was connected with the former PWF Mission trust board (Mr Fletcher concluded there was no connection), Mr Fletcher drew a distinction between registered charitable trust boards and unregistered charitable trusts with these words: "Generally the law makes a distinction between a charitable trust board (incorporated), *an unincorporated charitable trust (which the PWF Mission Trust is)* and a Church congregation (unincorporated society)" (emphasis added). Later, at paragraph 32 of the opinion, Mr Fletcher wrote that:

... the PWF Mission trust is clearly established for the advancement of religion, one of the four heads of charity defined by Lord McNaughton in *Income Tax Purposes Commissioners v Pemsel* [1891] AC 531. Currently the *Pemsel* heads of charity are recognised by New Zealand law as the only form of charitable purposes which qualify for the relevant charitable recognition and tax exemptions.

These comments reveal that Mr Fletcher saw the PWF trust as being a charitable trust.

[107] The opinion reveals that Mr Fletcher had a reasonable knowledge of charitable trust law. In his evidence, Mr Fletcher said he had been in practice either

in partnership or on his own account for 28 years, of which for the last 15 years his primary focus was specialising in the law of trusts and tax. He also admitted to acting for “quite a few charitable institutions”. The only probable inference from Mr Fletcher having the knowledge disclosed in the opinion, as well as his general knowledge of the law of trusts and in particular charitable trusts, is that he knew that trust property could not be applied by Mr Hohepa for his own personal use.

[108] The opinion shows that by September 2002, Mr Fletcher was well aware of the claims of Eden Refuge to the New North Road property, including the fact it had occupation of the property and had registered a caveat against the title of that property. He was also aware of the uncertainty as regards whether that entity was connected with the PWF trust, and the possibility that the default provisions of the PWF trust deed may have become applicable.

[109] Instead of advising Mr Hohepa to make direct and open enquiries of Eden Refuge and Oral Roberts NZ as to their eligibility to enjoy benefits under the PWF trust, and of the need to apply to the court to resolve this issue, Mr Fletcher provided general advice on trustees’ powers, opined on and queried matters relating to Eden Refuge’s occupation of the New North Road property. He then recommended challenging the caveats registered on the property’s title.

[110] The opportunity to challenge the caveats had arisen because, as the sole surviving trustee, Mr Hohepa was able to perfect the title to the New North Road property by registering a transmission by survivorship. Mr Fletcher advised Mr Hohepa that at the same time as lodging the transmission for registration, he should issue a s 145 notice under the Land Transfer Act. Having set out in the legal opinion various ways of ascertaining if the primary purpose of the PWF trust was still extant, or whether the default provisions of the PWF trust deed should now be applied, Mr Fletcher then proceeded to advise Mr Hohepa that a notice under s 145 provided a “prompt solution”. He described how the procedure under s 145 placed the burden of being an “active litigant” on the party opposing the lapsing of a caveat, and that if the party took no steps, the caveat would automatically lapse with “no litigation involvement” and “minimal cost” on the part of Mr Hohepa. Mr Fletcher continued with the comment that: “If the Caveators (including Eden Refuge) do not

have the financial resources to initiate the High Court proceedings, then the Caveat will effectively lapse by default". This is what occurred.

[111] Legal proceedings opposing the lapsing of a caveat must be brought within 14 days of receipt of the s 145 notice. Unless the recipient of such a notice is astute, understands the implications of a s 145 notice, and has the financial resources to resist the lapsing of its caveat, the protection the caveat provides will be lost. Had Eden Refuge taken steps to oppose the lapsing of its caveat, the competing arguments over the PWF trust and the existence of the PWF Mission congregation would have come before the court, and Mr Hohepa would have been prevented from using the trust's property for his own benefit. It seems, however, that Eden Refuge did not realise that the lapsing of its caveat was but a prelude to the loss of occupation of the property from which its congregation practised their faith.

[112] This is understandable, as at no time was Eden Refuge clearly put on notice that Mr Hohepa had formed the view that Eden Refuge represented a separate congregation of persons from the congregation referred to in the PWF trust deed. Eden Refuge was the same entity as the charitable trust board which had been incorporated in 1978, and registered under the name PWF Mission trust board. Some members of the congregation had either been part of the PWF Mission congregation in the 1960s, or were the descendants of the members of that congregation. From the perspective of Eden Refuge, it was the same as the PWF Mission trust board and, in addition, it saw itself as the registered body that was representative of the PWF Mission congregation referred to in the PWF trust deed. It had no reason to believe that others would see it differently. Until it was clearly informed of a challenge to its eligibility to benefit under the PWF trust deed, I consider that Eden Refuge would not have realised that losing possession of the New North Road property was one of the possible implications of not challenging the removal of its caveat. This is understandable. Eden Refuge was not legally advised at that time, it did not have the resources to obtain legal advice readily, and its trustees impressed me as well meaning religious persons who were not astute to the full implications of the threat to Eden Refuge which the s 145 notice conveyed.

[113] In the opinion of 26 September 2002, Mr Fletcher opines that there is no “direct link” between the PWF trust and Eden Refuge. He comments that the continued existence of the original congregation is unclear, and that there is no clear transition from it to the congregation associated with Eden Refuge. But he goes on to note information already received from Mr Hohepa that there had been issues between Mr Hohepa and Eden Refuge in 1984 which had resulted in the police being called to the New North Road property. Mr Fletcher goes on to query who has been responsible for paying the usual outgoings of the New North Road property, and to refer to the fact that Eden Refuge had been occupying the building since, to Mr Fletcher’s knowledge, at least 1984. He then requests Mr Hohepa to provide confirmation that the congregation associated with the Eden Refuge Trust is a separate congregation from that associated with the PWF trust. Mr Hohepa never provided any reliable evidence to Mr Fletcher which confirmed the divide between the original PWF Mission congregation and Eden Refuge.

[114] Given the uncertainty about the continued existence of the original PWF Mission congregation, its connections, if any, with Eden Refuge, and the long time occupation of Eden Refuge of the New North Road property, I consider that Mr Fletcher should have recommended that Mr Hohepa involve the Attorney-General, who has a statutory responsibility for charitable trusts. Directions from the court on ascertaining if there was still a congregation that qualified under the PWF trust deed, and, if not, how the default provisions should be applied, should also have been sought. This approach would have been consistent with the law as stated in *Newsome*. Mr Fletcher has acknowledged this as much, with the statement in the legal opinion:

The primary issue that you [Mr Hohepa] will have to address, in the event of a challenge by the [Eden Refuge Trust] ... congregation is why ... [that] congregation would not qualify as an appropriate beneficiary of the Trust under this provision [clause 4] given their association with the property since (at least) 1984.

Whilst this advice was given, nothing was done to implement the suggestions contained therein. Instead, the use of the s 145 notice to challenge Eden Refuge’s caveat was the chosen method of handling any possible contest between Eden Refuge and Mr Hohepa over the New North Road property.

[115] The advice Mr Fletcher gave on the use of the s 145 procedure, and the adoption of this advice, began the first stage in the process that ultimately resulted in the New North Road property being sold, and a large part of its proceeds being applied for purposes inconsistent with the PWFM trust deed and for the personal benefit of Mr Hohepa. In the circumstances, using the s 145 notice as a means to handle any possible contest between Mr Hohepa and Eden Refuge over the New North Road property was wrong. It was an indirect and underhand attempt at removing Eden Refuge as a potential participant and recipient under the PWFM trust, in respect of both clauses 1 and 4 of the PWFM trust deed. Once the potential qualification of Eden Refuge under the PWFM trust deed was recognised, the proper course of action was for Mr Fletcher to have advised Mr Hohepa that he, as trustee of the PWFM trust, needed to take active and transparent steps to ascertain how the PWFM trust's property should be applied.

[116] Following the lapse of the caveats on the title of the New North Road property, Mr Fletcher acted to assist Mr Hohepa in the following ways:

- a) The sale and conveyance of the New North Road property;
- b) Preparing the deed of debt, dated 20 November 2002. Then in reliance on this deed arranging various money transfers to Mr Hohepa personally from the proceeds of the ASB loan, and indirectly making personal loans to Mr Hohepa using his credit card and money transfers to pay debts Mr Hohepa owed to third parties;
- c) The mortgaging of the New North Road property to the ASB as security for an ASB loan made to Mr Hohepa personally; and
- d) Arranging for the repayment and discharge of the ASB mortgage and loan from Messrs Meys and Barton, which Mr Hohepa had arranged for himself, and was secured against the title of the New North Road property.

I will consider each of these events in relation to the allegations made against Mr Fletcher.

Sale of the New North Road property

[117] Mr Hohepa was the lawfully appointed trustee of the PWF trust. In this role he had authority to sell the New North Road property. I have found the requirements in the PWF trust deed, for the trustees to obtain the approval of the PWF Mission congregation before the New North Road property could be sold, to be inconsistent with the legal requirements for a charitable trust. It follows, therefore, that there can be no legal complaint regarding Mr Hohepa's failure to obtain the approval of the PWF Mission congregation (if it still existed in 2002) before he sold the property.

[118] Nonetheless, Mr Hohepa could not sell the property for the purpose of benefiting himself personally. I have found that this is what he did. However, at the time his associates approached Mr Fletcher, I do not consider it would have been apparent then to Mr Fletcher that the property was being sold for an unlawful purpose. But the sale of the property did not go smoothly at first. Up until 3 December 2002 there was room to get out of the sale and purchase agreement.

[119] Mr Hohepa was unhappy with the price Mr Haley had negotiated. In early November 2002, Mr Hohepa had asked Mr Fletcher if he could avoid being bound by the sale and purchase agreement. The agreement had been purportedly signed by Mr Haley, an associate of Mr Hohepa, but Mr Haley denied he had done so and said it was the real estate agent who had in effect forged Mr Haley's signature. Mr Haley was not the registered owner of 44 New North Road. He held a power of attorney from Mr Hohepa for the purpose of selling the New North Road property. However, the power of attorney did not conform with the requirements of s 31 of the Trustee Act. There was nothing in the agreement to show it was for the sale of trust property. Except for the power of attorney, the PWF trust and Mr Hohepa had never held Mr Haley out as someone who had authority to bind the trust. The purchaser's solicitor was doubtful about the strength of the agreement. She recognised that the agreement was not signed by the registered proprietor of New North Road, and by letter dated 31 October 2002 enquired of Mr Fletcher if the sale was authorised. Mr Fletcher's file note of 7 November 2002 shows that he believed then that the agreement could be voided if that was what Mr Hohepa wanted. The sale proceeded because Mr Hohepa decided he wanted to sell on the

terms in the agreement, and because Mr Fletcher was willing to accept and act on Mr Hohepa's instructions. Until 3 December 2002 when Mr Fletcher wrote to the purchaser's solicitor advising that Mr Hohepa confirmed the agreement, there were opportunities to avoid being bound by it.

[120] By 7 November 2002, Mr Fletcher knew that Mr Hohepa wanted access to funds, and had recorded this in the file note of that date. Mr Hohepa's need for accessing funds is very clearly stated in the file note. Later in November 2002, the first advance was made to Mr Hohepa under the deed of debt through Mr Fletcher charging his American Express credit card to pay for Mr Hohepa's hotel accommodation in Madrid.

[121] Then on 22 November 2002, in response to Mr Fletcher's request for information, Mr Hohepa sent a memorandum which set out the projects Mr Hohepa saw himself being involved in. This is a curious document. I consider that any sensible person who read the document would have had serious concerns about the intentions, honesty and reliability of Mr Hohepa. Nothing in the document refers to the advancement of the PWF Mission faith, or the work of the PWF Mission. Indeed, nothing in the document refers in any way to the advancement of religion. The focus of the document is on grandiose plans for what Mr Hohepa describes as "humanitarian projects". Whilst such projects may have similar aims to religious projects, the two are legally distinct from each other. The memorandum begins in this way:

Further to recent requests for information, I decided that I would brief you all and our many associates, as to the overall business I have set up, the Humanitarian Projects, which are an integral part of the business in the placement of bulk funds for hypothecation. These projects firstly, ensure the successful placement of the funds into the system and secondly the utilisation of the funds in the long term.

[122] In the preamble, Mr Hohepa describes himself as: "... an indigenous, native New Zealand Māori, who works for and on behalf of Māori people who are and have been, seriously disadvantaged by successive governments in our country".

[123] Mr Hohepa describes himself as having "worked for and championed Māori issues for 32 years". He says:

After realising 15 years ago that the rationale of the NZ Government and NZ's big business fraternity was far too entrenched into the so-called, "Great White Hunter" syndrome. To the extent, the only viable way ahead for Māori to achieve a more equitable and sustainable economic place, in the NZ economy, was to go offshore to set up a better, more robust financial base.

[124] Mr Hohepa then refers to Māori sovereignty and to the recognition of sovereignty for other persons. The memorandum then refers to the plight of third world peoples at the hands of the United Nations, European Union and United States of America, and the totalitarian policies first world powers inflict on third world countries. The memorandum describes a New Zealand based humanitarian organisation called *Te Matua Karango O Te Huihuinga Putanoa Soc. Inc.*. It says the aim of the society is to promote peace and harmony to all peoples, and is committed to the betterment and wellbeing of all mankind. The memorandum makes reference to: "The global economy, political power bases of the world, totalitarian policies, the war on terrorism since September 11".

[125] Mr Hohepa sets out his involvement in what he describes as "Debt purchasing and Debt Refactoring companies" in Africa, as well as his involvement in "Trust Management regimes with a number of West African Business Leaders and Monarchs". He then describes his business involvements in Hong Kong and Mainland China, including him having been asked:

On behalf of New Zealand Māori to broker a tripartite accord between the Chinese and Americans for the re-purchasing and repatriation of a huge amount of historical currencies back to the US.

[126] He refers to his "hypothecation" programmes, without defining what these might be. In another part of the memorandum, Mr Hohepa describes his business approach:

The writer has established the main source of business on the African continent, which would normally realize a lot of Western resistance. Nevertheless, the writer has a philosophy of creating a win/win situation, in this case, by brokering a number of strategic political accords between Europe, the US and the Pacific Rim.

[127] Mr Hohepa also refers to placing trust funds for 40 weeks with the resultant ability to "leverage up to 100% plus per week which compounds out ensuring huge payouts". He also mentions an investment sum of "approx \$USD1.8B" and refers to this sum leading to pay outs of "1/3 to the IMF, 1/3 to Humanitarian projects, and

1/3 can be shared amongst the principals”. Towards the end of the memorandum, under a heading “current status”, Mr Hohepa states:

I need now to ensure delivery of the consignments or a successful Bank Transfer in Madrid, Spain, without any further problems from the Security Company, the Diplomats or the Banks. Invariably from my side, I will fulfil my obligations and everyone else needs to reciprocate. Once the consignments leaves Africa the Diplomatic Corp, Bank or the Security Company in Africa must be made accountable to enforce the delivery without any delay or impediment. When the delivery is affected and we have possession a Deed of Assignment will be forwarded for the principals in Africa to sign and have witnessed or notarized. This document will precipitate the SAFE placement of funds into the system.

[128] Mr Hohepa’s memorandum is no more than an incomprehensible rambling. It is little different from the Spam that can clog email accounts, enjoining the recipient to part with his or her money on the strength of futile promises of future wealth. I also consider that this is the interpretation any sensible and honest solicitor would have made of it.

[129] By 3 December 2002, when Mr Fletcher wrote to the purchasers’ solicitors confirming the sale and purchase agreement, he knew enough then from his dealings with Mr Hohepa to be aware that Mr Hohepa was neither a trustworthy nor reliable person. By then there was sufficient information to put Mr Fletcher on his guard, and to indicate to him that the sale of the New North Road property was not being undertaken for the purposes of the PWF trust. The information would also have informed Mr Fletcher that proceeding with the sale of this property, and transferring the sale proceeds offshore to Mr Hohepa would result in their misuse. It is hard to see how anyone would have placed a different interpretation on what was happening. Nonetheless, Mr Fletcher continued to act for Mr Hohepa. The confirmation of the sale and purchase agreement turned what was an agreement that may have been readily avoided on the ground of forgery into an unconditional and binding agreement that led to the PWF trust losing the New North Road property.

[130] Furthermore, since the New North Road property did not settle until 5 March 2003, there was ample time between 3 December 2002 and March 2003 for Mr Fletcher to reconsider what was happening, and to withdraw at any time, but he never did. Instead, he continued to assist Mr Hohepa to complete the

New North Road sale, even though Mr Hohepa's conduct became increasingly dubious and suggestive of someone who was dishonest and in need of money.

The deed of debt and loans to Mr Hohepa

[131] Apart from being prepared to accept instructions for the sale and conveyance of trust property from someone as dubious as Mr Hohepa, Mr Fletcher assisted Mr Hohepa to obtain money from the PWF trust. This assistance was carried out through the deed of debt by which Mr Hohepa as trustee purported to lend money to himself in his personal capacity.

[132] Details of advances Mr Fletcher made to Mr Hohepa by using his American Express card to pay for Mr Hohepa's accommodation in Spain, and then reimbursing the cost of those charges from money held in the Fletcher Law trust account on account of the PWF trust are set out in [33]-[36] herein. File notes Mr Fletcher made at the time show that he was well aware that trust money was being used indirectly to benefit Mr Hohepa personally. The file notes also show that Mr Fletcher must have known that Mr Hohepa was in financially strained circumstances in Spain and was, therefore, not the type of borrower to whom large sums of money, as part of unsecured off shore loans, should be sent. It is hard to see how any other inference could be drawn from those notes. In a file note dated 9 December 2002, Mr Fletcher recorded the consequences of the first use of his credit card in this way:

I received a phone call early this afternoon from Charlie Hohepa in Madrid.

I confirmed to him that we had received a further fax from his hotel this morning with a further invoice for payment.

He confirmed that he has had a meeting with the hotel manager and that our action in paying his last hotel bill has helped his credibility considerably, not only with the hotel but also his business dealings in Madrid. For this reason, he would like us to attend to the payment of the invoice faxed through today ...

He will authorise any future payments and his signature will appear on the invoices we get faxed through by the hotel.

He would like me to attend to the payment of these as they come through.

It is appropriate that the money required to cover these costs are advanced from the PWF Mission Trust to Mr Hohepa under the Deed of

Acknowledgement of Debt as a further advance which he will repay at some later date.

This overcomes any “fiduciary” issues.

Once the money comes through from the loan advance from ASB Bank (and made of the settlement of the property sale) we are to retain sufficient funds to cover these sorts of expenses which are to continue to be paid my AMEX card. (emphasis added)

Charles

[133] Mr Hohepa’s financial plight was also made known to Mr Fletcher by direct requests from the Spanish hotelier for payment of Mr Hohepa’s hotel accommodation. On 21 December 2002, the Spanish hotelier wrote to Mr Fletcher regarding payment of the hotel bills and in the letter he informed Mr Fletcher that: “Mr Hohepa has invoices to be paid since 16 November – 36 days today without any guarantee”.

[134] Again, on 9 January 2002, the hotelier sent an invoice on behalf of the Apartamentos Plaza Basilica to Mr Fletcher:

Mr HOHEPA has hotel expenses to be paid for an amount of 4,500 Euros approx.

PLEASE INFORM US URGENTLY IF YOU ARE GOING TO SEND FURTHER AUTHORISATION TO CHARGE YOUR CREDIT CARD.

We need your answer URGENTLY.

[135] Nonetheless, Mr Fletcher continued to advance trust money to Mr Hohepa through the indirect route of paying Mr Hohepa’s hotel bills, in reliance on authority from Mr Hohepa to deduct the charges from the PWFm trust money, when either the ASB loan came through, or the sale proceeds were received. Mr Fletcher also transferred funds using SWIFT transfer. Nothing seemed to deter Mr Fletcher from continuing to make his credit card available to Mr Hohepa.

Arranging ASB loan and mortgage

[136] There was also the raising of a loan of \$150,000 from the ASB secured by mortgage against the title of the New North Road property. Mr Fletcher knew that those funds were to be sent to Mr Hohepa, and that the eventual payment of the loan

would be from the New North Road sale proceeds. This is exactly what happened when the New North Road property settled.

[137] At the time the loan was arranged, there was nothing to show that it was being used for the purposes of the PWF trust. The purpose of the loan as shown in the documents was to secure unidentified assets which were later to be sold in order to fund humanitarian projects. This does not fit with the terms of the PWF trust. If the loan funds were trust funds, they could not legitimately be used in this way. If they were personal loans to Mr Hohepa secured against trust property, they constituted part of an arrangement that was an unlawful use of trust property. Mr Hohepa would then be using trust property for his personal benefit. The circumstances reveal nothing to suggest that the funds actually were applied for purposes that fit with the terms of the PWF trust deed. Mr Fletcher had full knowledge of the details of the transaction; he was the solicitor who prepared the transaction, he arranged for the funds to be sent to Spain, and he applied the sale proceeds to discharge the mortgage. Whether Mr Fletcher saw the ASB funds as trust property or a personal loan to Mr Hohepa, the only probable inference from the circumstances is that Mr Fletcher knew these dealings were in breach of the PWF trust deed. There is no way to view them as being legitimate transactions under the law of trusts.

Arranging for the discharge of the Meys/Barton mortgage

[138] Then there was the repayment of the Meys/Barton loan. This was necessary as there was a mortgage for this loan registered against the title of the New North Road property. If the loan had not been repaid, the property sale could not have proceeded. However, by then (March 2003) Mr Fletcher knew enough to inform him that this was just another ploy by Mr Hohepa to raise funds for himself on the strength of the New North Road property.

[139] It is clear to me that Mr Hohepa's need for funds (due to the delay in registering the ASB mortgage) had caused him to raise money from elsewhere and, therefore, he had entered into the Meys/Barton loan and mortgage. Mr Fletcher did not know this had occurred, but, once he did know, he allowed trust funds to be used to repay the loan. This was so even though he recognised that, by raising the loan

from Mr Meys, Mr Hohepa was in breach of trust. Mr Fletcher's letter of 25 February 2003 to Mr Hohepa says this. In such circumstances Mr Fletcher could have refused to act any further. Whilst that would have resulted in the sale of the New North Road property not settling by March 2003, enough had occurred by then to make Mr Fletcher realise that Mr Hohepa had no intention of applying the sale proceeds for the purposes of the PWF trust. Indeed, by March 2003, a substantial portion of the sale proceeds had already been accounted for by the advances that had already been made to Mr Hohepa. Had the sale not settled, Mr Fletcher and the registered mortgagees would have been out of pocket. There would have been contractual issues between the PWF trust and the purchaser. The resulting legal tangle would have been unpleasant for Mr Fletcher, but the PWF trust's assets would have been better preserved than they were after settlement occurred. By the time the final accounting was completed, approximately \$94,000 of the sale proceeds remained.

Characterisation of funds made available to Mr Hohepa

[140] In various ways, money was sent by Mr Fletcher to Mr Hohepa which has in turn reduced the wealth of the PWF trust. At the time the transfers were done, Mr Fletcher knew they would have this result. In his evidence he said that the transfers of funds was a means of advancing funds to Mr Hohepa for trust purposes before the sale proceeds became available. I consider, therefore, that in such circumstances any handling of funds that has resulted in the value of the PWF trust's assets being reduced will have the effect of imbuing those funds with the character of being trust funds. In this regard, money that was wrongly obtained from personal loans secured against the New North Road property, and which was later repaid from the proceeds of the sale of that property, should be characterised as trust funds. Credit card payments that were made on the strength of reimbursement from trust funds, and which were in fact reimbursed in that way, as well as being made under the guise of the deed of debt, should also be characterised as trust funds.

Mr Fletcher's explanation for his actions

[141] Mr Fletcher has attempted to explain his actions. At times in the course of his evidence Mr Fletcher said he was acting for the PWF trust, then he said that he

was acting for Mr Hohepa in his role as trustee of the PWFm trust. In saying this, Mr Fletcher seemed to be seeking to differentiate Mr Hohepa from the PWFm trust. At another time in the course of his evidence, Mr Fletcher said that Mr Hohepa and the PWFm trust were one and the same, as the trust was not an incorporated entity under the Charitable Trusts Act. He contends that he was doing no more than acting on instructions from Mr Hohepa, who as trustee of the PWFm trust had the necessary authority to instruct Mr Fletcher. In this regard, Mr Fletcher said that Mr Hohepa “was the trust man so if he had instructed us to pay out all the funds then that would have been our obligation to do”. He went on to say that if Mr Hohepa had “not confided in us at all as to what his plans were and simply instructed us to pay the funds ... we would have had difficulty in resisting that”.

[142] Since he had accepted instructions from Mr Hohepa to act in the conveyancing of the PWFm trust’s New North Road property, I consider that Mr Fletcher was acting for the PWFm trust. Since the trust has no legal personality, it was required to operate through its trustee, which was Mr Hohepa. It follows that the duties Mr Fletcher owed in his role as a solicitor were owed to the PWFm trust. Therefore, Mr Fletcher could only act on instructions from Mr Hohepa that were congruent with Mr Hohepa’s role as trustee and the duties he owed to the trust. Furthermore, from the time Mr Fletcher provided a legal opinion to Mr Hohepa in September 2002, Mr Fletcher had full knowledge of the provisions of the PWFm trust deed, and he had formed the view the PWFm trust was a charitable trust. I have already referred at [107] to Mr Fletcher’s extensive knowledge and experience in the area of trust law and the law of charities, as revealed by the opinion and his own evidence on this topic. I conclude, therefore, that he would have had knowledge of the trust’s purposes and objects, and he would have been able to recognise when the instructions he received from Mr Hohepa were not congruent with the trust’s purposes and objects. On any occasion when Mr Hohepa’s instructions were incongruent with the duties Mr Fletcher owed to the trust, they should not have been performed. I do not accept that Mr Fletcher can explain the actions he took, which have been harmful to the trust, as being no more than him doing what Mr Hohepa had instructed. As the trust’s solicitor, it was incumbent on Mr Fletcher to ensure that nothing he did harmed the trust’s financial interests.

[143] Mr Fletcher also said that neither Eden Refuge nor the group of persons Ms Maletino represents have a legitimate claim to the PWF trust's property. I have already decided that the standing of those persons to bring the claims in this proceeding can be left to one side. Their potential lack of standing has no impact on the question of how Mr Fletcher has conducted himself vis-à-vis the PWF trust. Nor does the question of their entitlement to qualify as one of the specified religious groups in the PWF trust deed have any impact on Mr Fletcher's liability. Since the PWF trust is a charitable trust, and Mr Fletcher always saw it as a charitable trust, he would have been aware that, through its trustee, Mr Hohepa, the trust had to operate in accordance with its charitable purposes and objects. The existence or otherwise of a PWF Mission congregation did not alter the duty Mr Fletcher owed to the PWF trust to ensure that the legal services he provided did not result in outcomes that were contrary to the PWF trust's purposes and objects.

[144] The thrust of Mr Fletcher's explanation for his willingness to assist Mr Hohepa by sending money from the PWF trust's realised assets to Spain was that there was a belief the original PWF Mission congregation referred to in the PWF trust deed was "obviously defunct", and the substitute religious group (Oral Roberts NZ) was also "defunct in New Zealand". This belief was said to justify Mr Fletcher thinking that an alternative religious purpose could be determined by Mr Hohepa. There was reference to the possibility of creating a new charitable trust and transferring the PWF trust funds to the new trust. When it was pointed out to Mr Fletcher that the determination of a new religious purpose would require the court's sanction under the Charitable Trusts Act, Mr Fletcher did not dispute that. He said that this was something that was intended to occur in the future, and that in the meantime the sale proceeds from the New North Road property were to be transferred offshore to Mr Hohepa for him to invest on behalf of the PWF trust.

[145] Mr Fletcher accepted that it would have been obvious to him that with the PWF Mission congregation and Oral Roberts NZ considered to be defunct, and with no alternative charitable trust scheme in place, once the proceeds of the sale of the New North Road property were sent to Mr Hohepa in Spain, there was nothing to restrain Mr Hohepa from applying the funds for his own purposes. Nonetheless, Mr Fletcher saw no reason not to act on Mr Hohepa's instructions. He took steps

which essentially resulted, either directly or indirectly, in Mr Hohepa having access to funds which were impressed with the character of being trust funds.

[146] Mr Fletcher considered that putting Mr Hohepa in possession of realised trust funds made no difference to Mr Hohepa's legal position vis-à-vis the PWF trust. This was because he saw it as being no different from the previous circumstance where Mr Hohepa was the registered owner of the New North Road property. Hence it was proper for Mr Fletcher to have followed Mr Hohepa's instructions.

[147] What Mr Fletcher says is legally correct, to the extent that the law does not distinguish between trust property in the form of cash funds and in the form of realty. In both circumstances, the trustee has legal power to use the property subject only to the requirements that the use be in accordance with the terms of the trust deed, and whatever else the law may require of trustees. However, Mr Fletcher's explanation does not deal with the fact that by the time trust funds were being sent offshore to Mr Hohepa, Mr Fletcher had knowledge, through his dealings with Mr Hohepa between October 2002 and March 2003, of Mr Hohepa's conduct during this period of time. In addition to this, other than some general understanding that Mr Hohepa intended to invest the funds outside New Zealand, Mr Fletcher had no knowledge of the investments Mr Hohepa intended to make. From time to time Mr Hohepa referred to an asset, and his need to collect the asset from a lawyer's office. The asset was said to be in the realm of US \$3m. Mr Fletcher was never informed as to what this asset was, or indeed whether the many references Mr Hohepa made to an "asset" were to the same asset. All the information Mr Fletcher had about Mr Hohepa pointed increasingly to Mr Hohepa being dubious, dishonest and unreliable. In such circumstances, and given that Mr Fletcher was the solicitor acting for the PWF trust, his explanation about Mr Hohepa's authority to give instructions avoids the real issue: namely, how to explain the ongoing acceptance of instructions from a trustee like Mr Hohepa.

[148] Another reason Mr Fletcher gave for proceeding with the conveyance of the New North Road property was that it was subject to an unconditional sale and purchase agreement, and that it was in a bad condition. In essence, his evidence was that at the time, he saw the sale of the property as being in the PWF trust's best interests.

[149] Whilst Mr Fletcher may have initially formed the view that the sale of the New North Road property was in the PWF trust's best interests, as matters progressed, between November 2002 (which pre-dates the confirmation of the sale and purchase agreement on 3 December 2002) and the settlement date (in March 2003), there were a number of incidents which could only suggest that Mr Hohepa's intentions for the trust's property were dishonest. I refer to those incidents in detail later in this judgment (at [156]-[188]). Nonetheless, Mr Fletcher took no steps to extricate himself from his participation in Mr Hohepa's illegal conduct. Nor did he inform the other persons who had an interest in the trust's property, or the Attorney-General, about Mr Hohepa's questionable conduct. If these steps were taken, this may have brought the sale process to a halt. It certainly would have meant that Mr Fletcher ceased to have any further role in Mr Hohepa's breaches of trust.

[150] The sale and purchase agreement was confirmed on 3 December 2002. Settlement did not eventuate until March 2003. Mr Fletcher had to issue a settlement notice, because the purchaser could not settle on the due date as it had difficulty arranging insurance. Mr Fletcher assisted the purchaser to obtain insurance. This was a conveyance where opportunities arose over time for the PWF trust to attempt to extricate itself from the sale of its New North Road property. From beginning to end, Mr Fletcher acted to progress the transfer of ownership of the property from the PWF trust to the purchaser.

[151] Mr Fletcher has refuted having any knowledge, at the time, of Mr Hohepa's dishonest intentions. Mr Fletcher has described Mr Hohepa as being committed to carrying on the vision of the original founders of the PWF trust. Mr Fletcher has sought to explain the conduct of Mr Hohepa, and his performance of Mr Hohepa's instructions, as being founded in a recognition on both their parts that Mr Hohepa would be investing the PWF trust's funds to start a new trust that would be approved by a court under the Charitable Trusts Act at some later date.

[152] I have great difficulty believing Mr Fletcher's explanations. The events which occurred between November 2002 and March 2003 speak for themselves. The simple, obvious and most probable explanation for what happened is that Mr Hohepa had formed a plan to remove trust funds from a trust of which he was the sole trustee, and for which he possibly believed there was no one able to oppose his

actions. Mr Fletcher willingly and knowingly participated in this process. To find that Mr Fletcher did not realise what was occurring would be to conclude that he was credulous and so easily duped by Mr Hohepa's wiles that he failed to recognise the character of the man he was dealing with. The latter view strains credulity and flies in the face of reason. The overall impression I formed of Mr Fletcher when he gave his evidence was that he was not someone who would be easily duped. The logical and most probable inference to be drawn from the relevant events is that no solicitor, including Mr Fletcher, could fail to realise Mr Hohepa's intentions and their result. Furthermore, in this case there was sufficient time to come to this realisation. It is not as if events unfolded so quickly that no person would have had time to realise the true import of what was happening. The relevant events from which such inferences can be drawn were spread over a period of four to five months.

Incidents which reveal the state of Mr Fletcher's knowledge

[153] During this period there were a series of incidents which gave Mr Fletcher enough knowledge to make it clear to him that Mr Hohepa was acting to advance his own interests, and was not acting in the interests of the PWF trust. I consider that Mr Fletcher must have realised at the time what those incidents revealed. When the totality of these incidents is considered, it is impossible to infer anything but that Mr Fletcher would have been aware of Mr Hohepa's dishonest intentions. If I am wrong in this regard and he was not aware of what was happening, that could only be because he chose to close his eyes to the obvious. There is nothing in the evidence that Mr Fletcher relied upon in his defence which would cause me to shift from the views I have reached, or from the reasons which caused me to reach those views.

[154] The first incident is the circumstances surrounding the sale of the New North Road property, and the manner in which the certificate of title was cleared of caveats that otherwise would have been an obstacle to the sale. The second incident involves the deed of debt, and the advances under that deed to Mr Hohepa, including Mr Fletcher paying Mr Hohepa's personal accommodation expenses in Spain. The third incident is the raising of the ASB finance, and the use that was made of those funds. The fourth incident is the presence of the Meyes/Barton mortgage on the title to the New North Road property, and the steps Mr Fletcher took to remove it. The fifth incident is the way in which Mr Hohepa

presented himself, and the nature of the instructions Mr Hohepa was issuing to Mr Fletcher for trust money to be paid into the accounts of third parties, unknown to Mr Fletcher, who were based offshore. The sixth incident is the working relationship that seemed to have developed between Mr Hohepa and Mr Fletcher.

[155] These incidents reveal that Mr Hohepa was someone who wanted to obtain access to trust funds for his own use, and that Mr Fletcher knew this at the time. Whilst there is no direct evidence to prove Mr Fletcher had this knowledge, this is the only reasonable, logical and probable inference to be drawn from the circumstances. I deal with each of these incidents below.

The first incident

[156] When the sale and purchase agreement was first brought to Mr Fletcher, there were issues about whether the agreement was properly executed and, therefore, binding on the PWF trust. Mr Hohepa was unhappy about the sale price and there were discussions about avoiding the agreement. Once Mr Fletcher learned the New North Road property was trust property, and that there was a sole trustee living overseas who was a stranger to him, Mr Fletcher should have been cautious about any dealings with the property that would result in the trust property being realised and the funds being sent offshore. As he was dealing with a charitable trust, Mr Fletcher would have known that there were no legal beneficiaries who could act to protect the trust from a trustee intent on benefiting himself. Furthermore, Mr Fletcher was of the view that both the original congregation associated with the charitable trust, and the substitute religious body were defunct. On this view, it would mean that there were no persons with an interest in ensuring Mr Hohepa acted in the interests of the PWF trust. In such circumstances, the need for the solicitor acting for the trust to ensure that trust funds were not used for an unlawful purpose was obvious.

[157] In September 2002, Mr Fletcher had advised Mr Hohepa of the need to determine a new religious purpose if the PWF Mission and Oral Roberts NZ were defunct. Mr Fletcher had outlined how an application could be made to the court to approve a new scheme. Mr Hohepa's failure to adopt this course of action would have indicated a lack of good faith on his part.

[158] Then there is the manner in which the caveats on the title to the New North Road property were dealt with. One of those caveats is not relevant to this proceeding and it was properly removed. But the caveat of Eden Refuge was recognised at the time to have been filed by a group of persons whom Mr Fletcher saw as potential contestants who had no entitlement to the PWFm trust's property. I am not going to set out the details of the correspondence flow between Mr Fletcher and solicitors acting for either Eden Refuge or Oral Roberts NZ. The steps Mr Fletcher took in late November and December of 20021 show that he was writing to solicitors whom he understood had once acted for Eden Refuge and for Oral Roberts NZ. The content of those letters, and how Mr Fletcher responded to any replies supports the inference that they were designed to flush out the strength of any opposition to the sale of the New North Road property. The letters Mr Fletcher wrote contain comments which refute the entitlement of Eden Refuge to claim any rightful use of the New North Road property. My view of the letters is that, insofar as they able, they attempt to close down any opposition to Mr Hohepa. They are not letters which are consistent with the conduct of a trustee acting in good faith, and who is genuinely seeking to find out whether either of the two religious groups named in the PWFm trust deed are still in operation.

[159] The September opinion shows that Mr Fletcher knew of Eden Refuge's use of the New North Road property, and that this had been happening for a considerable period of time. In this opinion he suggested that an application to the court to approve a new scheme could also sort out whether or not Eden Refuge had any entitlement to recognition as a religious congregation covered by the PWFm trust deed. However, having identified the direct and transparent court process under the Charitable Trusts Act for resolving the operation of the PWFm trust, Mr Fletcher was then prepared to act on Mr Hohepa's instructions to resolve this issue using another approach. This was the method of using s 145 of the Land Transfer Act to challenge Eden Refuge and Oral Roberts NZ's caveats. Whilst this process puts a caveator on notice of his or her caveat being challenged, I have already concluded at [115] that this an underhand way of informing both groups that their rights under the PWFm trust deed were being challenged.

[160] The steps Mr Hohepa took regarding the caveats were not consistent with the actions of a trustee acting in good faith, who wanted to clarify if the caveators had

any claim to being religious bodies covered by the PWF trust deed. At the very least, they would put any solicitor acting for the trust on notice that he/she should be cautious about the trustee's intentions. In this case, the communications between Mr Fletcher and Mr Hohepa show that they were both happy to use the s 145 process to remove the caveats. That Mr Fletcher willingly participated in this underhanded process is another indication to me that he was prepared to help Mr Hohepa exclude any opposition to the sale of the property, even if it came from persons who may have validly had a claim to recognition under the PWF trust deed.

The second incident

[161] It is a well established principle of trust law that trustees do not obtain personal borrowings from trusts of which they are a trustee: see *Re Waterman's Will Trust* [1952] 2 All ER 1054 at 1055. Nonetheless, Mr Fletcher prepared the deed of debt under which advances were made to Mr Hohepa. Furthermore, Mr Hohepa only received any money under the deed because of the actions of Mr Fletcher in sending the money to Spain. Mr Fletcher now accepts that the preparation of the document was an "error" on his part.

[162] Mr Fletcher sought to explain his involvement with the deed of debt as being motivated by his desire to:

Underscore to Mr Hohepa his fiduciary obligations to the charitable object of the PWF Mission and to make it very clear to him that he had a personal liability to account for his obligations.

[163] In this regard, Mr Fletcher described the deed of debt as a "crude attempt on his part to ensure Mr Hohepa understood the distinction between the funds he had an accountability for as trustee and any other money he might have". Mr Fletcher also said that the deed did not record the full extent of the arrangement and that, as he saw it, the advances made to Mr Hohepa were to be used for the purposes of the PWF trust. Mr Fletcher accepted that in hindsight he should have refused to have any part in the transferring of funds derived from trust property to Mr Hohepa. Mr Fletcher said that he participated in the funds transfer because Mr Hohepa was "quite passionate" about wanting to advance a particular investment. Nonetheless, Mr Fletcher accepted that apart from a very general idea about an investment, he had

no specific knowledge of what the investment was. Mr Fletcher also accepted that at the time he understood there was a likelihood that Mr Hohepa would be intermingling trust funds with his own personal funds.

[164] I have difficulty understanding Mr Fletcher's explanations, let alone accepting them as justifying his involvement in the preparation of the deed, and the making of advances under it. The explanations do not accord with either the language of the deed, Fletcher Law's trust account records, or with what any legal practitioner would understand from the documentation that was executed.

[165] The language of the deed makes it clear that it is for the purpose of Mr Hohepa, as trustee, lending trust funds to himself in his personal capacity. The deed expressly imposes a personal liability on Mr Hohepa to repay the advances. If the arrangement was that the loan advances made under the deed were being given to Mr Hohepa as trustee, to use to advance the objects and purposes of the PWF trust, it is hard to see why a personal liability to repay those advances would be imposed on Mr Hohepa. Either the money was coming to him in his personal capacity, in which case he would be obliged to repay the trust (although no trustee should ever borrow money from a trust for his personal use), or he was obtaining the money for the trust's purposes, in which case no obligation to repay could ever arise. Furthermore, the deed of debt provided for Mr Hohepa as borrower to pay interest to the lender. If, as Mr Fletcher later tried to explain, the deed of debt was to bring home to Mr Hohepa his fiduciary obligations as a trustee, and if the funds advanced were always intended to be used for trust purposes, why was interest provided for in the deed? Mr Fletcher's explanation to this question was that the inclusion of interest was part of the standard form acknowledgements of debt took, and that someone in his office had included the provision in the deed of debt Mr Hohepa executed.

[166] Mr Fletcher described the creation of the deed as being an error of form rather than substance. As regards the use of a deed debt, he said: "My error which I readily acknowledge was the basis on which I recorded how those funds were appropriated to Mr Hohepa". But if Mr Fletcher wanted to inform Mr Hohepa that, as a trustee, he would be personally liable to the PWF trust for any trust funds that were not properly applied, the obvious and simple way to do this was in a written

communication which simply spelt out the duties and potential liabilities the law of trust imposes on trustees. The deed was a convoluted and obscure way of communicating this advice. There is nothing in the contemporaneous material to suggest the substance of the deed was different from its form. The explanations that the deed was something different from what it appeared to be are recent in that they have only been advanced as part of Mr Fletcher's evidence in the proceeding. The explanations are so far-fetched as to be unbelievable. I do not believe Mr Fletcher's evidence on why or how the deed of debt came to be.

[167] The contemporaneously made trust account records of Fletcher Law show the advances as personal loans from the PWF trust to Mr Hohepa. Mr Fletcher tried to explain this inconsistency by claiming that it was a mistaken attempt by an employee of his law firm to reconcile the money flow at the time. I do not accept that the accounting treatment of the advances as personal loans to Mr Hohepa was simply an employee's mistake. No evidence was called from this employee to confirm that she acted in error. I consider the more reliable evidence is to be found in the language of the deed and the trust account records, rather than in Mr Fletcher's attempts at a much later date to claim documents, which were contemporaneous with the relevant events, are incorrect and inaccurate.

[168] Mr Fletcher explained the way in which some advances were made under the deed of debt as resulting from a request from Mr Hohepa for funds, so that he could participate in an investment which would benefit the charitable objects of the PWF Trust. He said that once the deed was signed, Mr Hohepa wanted an immediate transfer of funds and, as Mr Fletcher could not immediately do that, another way of transferring money to Mr Hohepa was required. Mr Fletcher said that Mr Hohepa was "most insistent that I make the transfer, otherwise the opportunity would be lost". Mr Fletcher accepted that at no time did he find out what the specific asset was that Mr Hohepa wished to invest in. The plan Mr Hohepa suggested was for Mr Fletcher to use his credit card as a method of quickly transferring funds offshore by paying Mr Hohepa's hotel bill. In this way, Mr Hohepa, once relieved of the burden of paying his personal debts, could apply his freed-up personal funds to investments for the PWF trust. Mr Fletcher's file note describes the purpose of this method as being: "... a payment to his [Mr Hohepa's]

hotel (he had a long-term apartment lease) would free up his funds (for the apartment cost) to run with the opportunity”.

[169] Although the explanation was given more than once in evidence, a good example of this explanation can be seen from Mr Fletcher’s answer when under cross-examination by counsel for the first, second and third plaintiffs:

Q. Did you discuss the appropriateness of money belonging to the 1962 trust (PWFm trust) being applied to pay Mr Hohepa’s personal hotel bills?

A. The payment was not for his personal hotel bills; the payment was to allow the funds to transfer from one side of the world to the other and that was a mechanism that was identified by him at short notice but I indicated to him that I was unhappy about paying these funds to him but I acknowledged that he was the legal owner of those funds and that if in the normal course of events this transaction had for example settled in full and he had asked us to transfer those funds to a particular bank account then we would be obliged to make that payment. I indicated to him that I wanted him to understand that these funds were not his, that they belonged to the charitable purpose and at that stage I was referring to clause 4 in the deed of 1962 and that I wanted him to sign something that made it quite clear that he was going to be personally responsible for ensuring that those funds were applied to that purpose. He agreed and again at very short notice in reality we cobbled together that document which appears in the bundle at 336, 337, 338 and 339 (the deed of debt) which was really a very crude and inappropriate way of trying to have Mr Hohepa acknowledge that these funds in whatever way they were paid to him had to be accounted for by him in his capacity as the trustee.

[170] What was described as a method to achieve a ready transfer of trust funds for investment was nothing more than Mr Fletcher personally paying Mr Hohepa’s personal debts, and later reimbursing those payments from the Fletcher Law trust account for the PWFm trust. Mr Fletcher accepts that this method was highly irregular; he said he agreed to adopt it because it was the most efficient and cost effective means of transferring funds overseas on short notice. Mr Fletcher now accepts this may have been an error of judgment. Once again, the best way of evaluating what Mr Fletcher must have known at the time he was receiving instructions is to look at the contemporary documents.

[171] Mr Fletcher’s file note of 9 December 2002 describes the money transactions he was to embark on using his credit card to pay Mr Hohepa’s Spanish hotel debts,

and the reimbursement of those payments from trust funds. The description is not consistent with the explanation he gave in evidence for the transactions. The file note is set out in full in [132].

[172] Mr Fletcher's file has an email from Mr Hohepa dated 16 December 2002. It is headed "current stress factors", and in it Mr Hohepa thanks Mr Fletcher for paying a hotel bill. In the email Mr Hohepa states:

Received your email, thanks heaps for doing something about the hotel. Talk about stress, not so much about the hotel but more related to the fact that I could lose US\$2.5m. I have it in my possession, it has had six independent specialists check it and my financial advisors who are attached to the European Security have the serials and confirmed it is a live asset.

The thought that it could go down the gurgler is just totally inconceivable. I need to get liquid ASAP, because I have been given an appointment by the head of the US T Redemption Group, to be in Hong Kong at 3.00 pm on Tuesday for immediately settlement. I have been formally appointed by the T as the Principal Accord Negotiator, between both groups as such I will receive a 4 per cent immediate payment from the paymaster on Thursday morning HK time. Everything started to slip away because I have to make sure my family are secure while I am away.

I would appreciate the tracking number so I can adequately cover my obligations re ASB loan req's/LINZ.

I will send my bank co-ordinates in the event the funds come on stream and I can draw down enough to finalise things here.

[173] There is nothing in the file note of 9 December 2002 or the email of 16 December 2002 that could suggest that this most unusual method of transferring trust funds is consistent with the conduct of a trustee who is acting in good faith. Indeed, since on the view of both Mr Fletcher and Mr Hohepa the two religious groups covered by the PWF trust were no longer operational, it is difficult to understand why they saw a need for trust funds to be transferred out of New Zealand at such short notice, and to be invested so urgently. Until a new scheme was put in place, it is also difficult to see how there could be any valid basis for making any such investment.

[174] The email communications Mr Fletcher was receiving in relation to payment of Mr Hohepa's hotel accounts (some of which are referred to earlier in the judgment) all reveal that Mr Hohepa was under a degree of financial distress, and needed someone to help him pay his hotel accommodation. There is nothing in any

of the emails that would cause the reader to think that Mr Hohepa had funds available from which he could readily meet his accommodation costs, and that the method of funds transfer he had suggested was simply to avoid the usual costs of transferring funds overseas. The logical and probable inference to be drawn from the method of funds transfer was that it provided a means for Mr Hohepa to pay personal debts that he otherwise would have difficulty paying. This would have been apparent to Mr Fletcher at the time. The evidence does not support any other inference.

[175] When the circumstances of the advances under the deed of debt are looked at overall, I find Mr Fletcher's attempts to explain his conduct to be unbelievable. Perhaps a credulous and inept solicitor might see what occurred in the way in which Mr Fletcher now describes, though this is hard to imagine. In any event, the impression I gained of Mr Fletcher during the course of the hearing was that he was neither credulous nor inept.

The third incident

[176] Using the New North Road property as security for a loan from the ASB after the property was under a sale and purchase agreement was, in the circumstances of the PWF trust, an odd thing to do. Since, from the point of view of Mr Fletcher, the sale proceeds were trust funds of a charitable trust which had lost its primary purpose, and required a new court approved purpose, it is hard to see why there was any urgent need for funds to be advanced to Mr Hohepa. The steps that were taken suggest that Mr Hohepa needed bridging finance, and so he was acting to obtain funds in advance of the settlement date. The use of the property to secure a loan from the ASB is consistent with Mr Hohepa using the funds for his own purpose, and is inconsistent with the PWF trust's circumstances as Mr Fletcher knew them to be at the time.

The fourth incident

[177] The circumstances of the registration of the Meys/Barton caveat on the title to the New North Road property, to protect their unregistered mortgage, show that, unknown to Mr Fletcher at the time, Mr Hohepa was working on his own to secure

further bridging finance before the sale proceeds were available. This provides further confirmation that he was in need of funds. However, once Mr Fletcher became aware of this mortgage, rather than acting to protect the PWF trust's interests, he did all he could to have the caveat removed so that the settlement of the New North Road property would proceed. This included paying Meys/Barton, even though at the time Mr Fletcher had recorded in a letter to Mr Hohepa that he was in breach of trust in relation to these dealings. Mr Fletcher has no satisfactory explanation for his actions here. The presence of the caveat on the title would have prevented the sale from settling. It is difficult to see why the PWF trust did not resist being liable for the actions of its dishonest trustee. Mr Fletcher said in his evidence that he had not learnt of the existence of the Meys/Barton caveat until two days before settlement, and that there was no time available to dispute or challenge the caveat if Mr Hohepa was to settle on the due date. But even so, nothing was done to protect the PWF trust. Even though thought was given to settling with Meys/Barton on a without prejudice basis (see [47]), when it came to the actual settlement it was made without any such reservation. Mr Fletcher failed to take even this small step to protect the PWF trust.

[178] On 25 February 2003, Mr Fletcher wrote to Mr Hohepa advising him of the arrangements made for discharging the caveat, and that the arrangements Mr Hohepa had made with Mr Meys using the PWF trust property were invalid as being in breach of trust. The letter of 25 February 2003 also sets out concerns Mr Fletcher had regarding the registration of the Meys/Barton caveat. These were:

- a) The deed of assignment Mr Hohepa had entered into with Mr Meys did not disclose that Mr Hohepa was trustee of the PWF trust;
- b) Mr Fletcher said the deed of assignment was probably invalid as being in breach of trust, therefore, Mr Hohepa had a personal liability for using trust assets for his own personal financial benefit;
- c) The deed of assignment was said to purport to include an instruction from Mr Hohepa to secure a first mortgage loan advance. Mr Hohepa had the deed of assignment signed to the extent of the loan moneys he obtained from Mr Meys, his interest from the sale of the

New North Road property. Mr Fletcher expressed the view that this did not constitute a proper agreement to mortgage and, therefore, did not support the caveat registered by Mr Meys;

- d) There had been no compliance with the requirements of the Credit Contracts Act 1981;
- e) He went on to record his extreme disappointment that the situation had developed, but then said that he was: “Inclined to simply proceed on the basis that we complete settlement on the terms demanded by the solicitor acting for Mr Barton and Mr Meys”.

[179] The concerns recorded in this letter show that Mr Fletcher thought the arrangements Mr Hohepa had entered into with Mr Meys did not comply with all the legal requirements. This would have provided a ground for challenging their legality. Given that Mr Fletcher could see so much was legally wrong with the form of arrangements Mr Hohepa had entered into with Mr Meys, he would have known there was a legitimate reason for refusing to pay Mr Meys. This was a circumstance where Mr Fletcher, as solicitor for the PWF trust, could see a proper basis for challenging the legality of and, therefore, the requirement to pay under the financial arrangements which he saw as being in breach of trust. Yet Mr Fletcher knowingly allowed trust funds to be used to discharge these arrangements. His actions allowed trust funds to be misapplied, and the settlement of the New North Road property to proceed. He would have known all this at the time.

The fifth incident

[180] This incident involves the way in which Mr Hohepa presented himself to Mr Fletcher. Mr Hohepa’s memorandum of 22 November 2002 is not a document that would engender a reader to have confidence in him. His continual references to a valuable unspecified “asset” he wants to obtain, his references to extraordinarily large sums of money which he has unspecified plans to obtain for his unspecified investment projects, and the continual failure (at the relevant times) of any of these large aims to eventuate, all suggest he is a liar, or fantasist, or perhaps both.

The sixth incident

[181] This involves the working relationship which developed between Mr Hohepa and Mr Fletcher. Mr Fletcher contends that he believed that the trust funds he was sending offshore on Mr Hohepa's instructions were to be invested so that there would be additional money for the new charitable trust Mr Hohepa had in mind. A file note Mr Fletcher made on 22 November 2002 records his views. I consider it worthwhile to set out the file note in full:

As a result of various discussions I have had with Charlie Hohepa it is clear that he has a deep seated conviction in understanding the purposes for which the PWF Mission Trust was formed and was appointed as a trustee to Act as a guardian to protect the trust assets for future generations, particularly against interlopers.

It is also clear that he wants to re-establish the Mission's goals and objectives of the original group of people that established the Church in New North Road Auckland, and he is quite certain that the present occupiers of the Church premises are not legally the correct successors entitled to the original vision.

The Oral Roberts Society and its evangelistic activities in the United States has come into serious disrepute and is substantially defunct. Certainly the Oral Roberts Society is defunct in New Zealand.

I have discussed with Charlie the options available to him and have recommended that he give serious consideration to incorporating a Charitable Trust, redefining the original visions and goals based on what was contained in the trust deed and completing incorporation under the Charitable Trusts Act 1957 to lawfully allow for the transfer of the property with the proceeds of sale into an incorporated entity which will provide limitation of liability and allow a proper structure to develop in terms of the future development of the trust and the additional funds that Charlie Hohepa introduces to advance the visions and objectives based on his work in Spain.

We will address this issue further in the New Year.

[182] The declaratory statement in this note regarding Mr Hohepa's deep-seated conviction to promote the original vision of the PWF trust is one of the few times this is referred to in the contemporary documents. At no time do the contemporary documents reveal that Mr Fletcher had any knowledge as to how Mr Hohepa would carry out these convictions. None of the communications he received from Mr Hohepa were consistent with a trustee wanting to promote the purposes and objects of the PWF trust. Nor did Mr Fletcher suggest anything different in his evidence.

[183] At no time were any instructions given that would have seen the creation of an alternative charitable scheme. I consider the thrust of the instructions Mr Fletcher received was patently aimed at excluding anything that stood in the way of Mr Hohepa gaining control of the PWF trust's property, and this would have been apparent to Mr Fletcher at the time. Why in such circumstances he continued to act on Mr Hohepa's instructions can only have been from choice. The clear impression I have gained from the evidence is that Mr Fletcher chose to work with Mr Hohepa and to accept directions from him, even though he was aware that Mr Hohepa was acting to advance his own interests and not those of the PWF trust. This is clear from their interactions as early as late November 2002.

[184] The recommended option Mr Fletcher described in the penultimate paragraph of the file note for dealing with the PWF trust property is a curious one. As trustee of the PWF trust, it was always open to Mr Hohepa to take steps to pursue the purposes and objects of that trust. He did not need to create a new trust in order to do that. The idea that a new charitable trust would be created, and incorporated under the Charitable Trusts Act was unnecessary for the promotion of the PWF trust's purposes. The statement that incorporating a new charitable trust under the Charitable trusts Act would "lawfully allow for the transfer of the property with the proceeds of sale into an incorporated entity" omits any reference to the fact that any transfer of the property of the PWF trust to a new trust could only occur through a court-sanctioned scheme.

[185] I take the reference in the file note to incorporation under the Charitable Trusts Act to be a reference to the procedure provided for in s 14(1) of that Act. Under this procedure, on incorporation of a charitable trust as a charitable trust board, all property held by the trustees vests without conveyance or assignment in the trust board. But this procedure can only properly apply to circumstances where such property is lawfully held by trustees. In the present case, Mr Hohepa lawfully held property as trustee of the PWF trust. Had he incorporated that trust as a charitable trust board (this leaves to the side the arguments of Eden Refuge that they are the incorporated body of the PWF trust), the New North Road property would have been transferred to the new charitable trust board. But since, in his view and the view of Mr Fletcher, the two religious groups which were covered by the PWF trust's purposes and objects were no longer in existence, and a new

alternative purpose needed to be determined under the Charitable Trusts Act, there was no basis for Mr Hohepa to seek to incorporate the PWFMT trust as a charitable trust board under the Charitable Trusts Act. What was required was an application to the court to approve a new charitable scheme for this trust. Furthermore, there may have been practical difficulties in achieving incorporation, given that Eden Refuge obtained incorporation under its former name as the PWF Mission trust board.

[186] There was nothing to stop Mr Hohepa creating a new charitable trust and, as a trustee of that trust, seeking to have it incorporated under s 14. If he had done so, any property he held as trustee of this second trust would have been automatically transferred to the newly incorporated trust board. But that would have been entirely separate from the property he held as trustee of the PWFMT trust. Unless it was actually the PWFMT trust that was incorporated, the procedure provided for in s 14 could not cause PWFMT trust property to be transferred to any newly incorporated charitable trust board. There was no legal way in which the PWFMT trust property could be transferred under the Charitable Trusts Act to an incorporated charitable trust board without there first being a new court approved scheme for the PWFMT trust. The procedure outlined in the file note could not on its own legitimately achieve transfer of the PWFMT trust's property into any incorporated charitable trust board.

[187] The file note strikes me as the expression of a cynical attempt at using charitable trust law to achieve an outcome that bedded in Mr Hohepa's ownership of the PWFMT trust's property, in circumstances where he had placed at a legal distance any claims others might make to having an interest in the PWFMT trust, as well as allowing Mr Hohepa to enjoy the benefit of limitation of liability when it came to the use to which he put the trust funds. Whilst Mr Fletcher accepted in evidence that the circumstances of the PWFMT trust made a court approved scheme necessary, apart from his opinion of September 2002, his records of suggested options for approaching the matter say nothing about using the court process set out in the Charitable Trusts Act. If he genuinely believed the religious groups referred to in the PWFMT trust deed were defunct, he should have been strongly advising Mr Hohepa of his legal duty to apply to the court to approve a new scheme. His

failure to do anything like this shows that none of his actions were consistent with a solicitor acting for a charitable trust.

[188] On 12 December 2002, Mr Fletcher wrote to Mr Hohepa advising him that he had received a letter from the solicitor who had earlier acted for Eden Refuge, and that the letter contained a “most disturbing element”, namely an “indication that an Auckland law firm has indicated that they act for the Oral Roberts Evangelistic Association”. Such partisan language is unusual in a letter from a solicitor acting for a trust to a trustee. It indicates that they both saw the possible continued existence of Oral Roberts NZ in New Zealand as an obstacle to the plans of Mr Hohepa. Mr Fletcher goes on in the letter to note that there may be some interesting developments in the New Year, and possibly court proceedings “depending on the funds that the backers of the Oral Roberts Evangelistic Association may have”. He advises Mr Hohepa that he proposes no action be taken in respect of the solicitor’s letter until settlement of the sale of the New North Road property has been completed, or until communications are received from the Auckland law firm acting for Oral Roberts NZ. The suggested advice of essentially lying low until the New North Road property was sold is not consistent with the reactions to be expected of a solicitor and a trustee who have learned of the possible existence of one of the religious groups that are a specified substitute purpose of the PWF trust deed. Once there was a suggestion that Oral Roberts NZ was still in existence in New Zealand, he should have been advising Mr Hohepa to seek them out with a view to seeing if they qualified for recognition as the second religious group referred to in the PWF trust deed.

Legal analysis

[189] Although there are a number of causes of action pleaded against Mr Fletcher, there is a considerable degree of overlap and reliance on the same facts to establish liability. I do not propose to make findings on all causes of action. The claims in equity for breach of fiduciary duty, dishonest assistance and knowing receipt amply cover what has occurred here. Should my approach present difficulties for the plaintiffs that I have not foreseen, leave is reserved to them to seek findings on the remaining causes of action.

[190] One of the differences between claims of breach of fiduciary duty, on the one hand, and dishonest assistance and knowing receipt, on the other, is that the first claim requires the defendant to owe a fiduciary duty to the wronged party. With the other claims, the defendant can be a stranger to the wronged party; here the obligations equity imposes arise from the circumstances of the wrong, and not from a breach of an existing duty. The claims made against Mr Fletcher approach the question of his liability from both angles.

Breach of fiduciary duty

[191] Equity requires solicitors to act with loyalty and fidelity to their clients and to exercise the utmost good faith in their dealings with clients: see *Sims v Craig Bell & Bond* [1991] 3 NZLR 535 (CA) at 543. In *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83 (CA) at 89, the Court of Appeal referred to solicitors' fiduciary duties to clients as carrying the obligation to act with absolute fairness and openness towards clients.

[192] If solicitors breach these duties in circumstances where their clients suffer loss, equity gives a remedy for the loss suffered: see *Farrington* at 99. Furthermore, innocent breaches, or those lacking in any fraudulent intent are enough to found such a remedy in equity; in *Farrington*, the Court of Appeal referred to earlier English authority and said at 99:

It is of no moment that the respondents (the solicitors) have acted innocently or completely without any fraudulent intent... A fiduciary relationship is "one respect of which if a wrong arise, the same remedy exists against the wrong-doer on behalf of the principle as would exist against a trustee on behalf of the cestuit qui trust".

[193] *Nocton v Ashburton* [1914] AC 932 is the seminal case from which these principles come. At 954, Viscount Haldane LC said:

... when fraud is referred to in the wider sense ... used in Chancery in describing cases which were within its exclusive jurisdiction, it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power. It was thus that the expression "constructive fraud" came into existence. The trustee

who purchases the trust estate, the solicitor who makes a bargain with his client that cannot stand, have all for several centuries run the risk of the word fraudulent being applied to them. What it really means in this connection is, not moral fraud in the ordinary sense, but breach of that sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience.

[194] Mr Fletcher received a series of instructions from Mr Hohepa. First, the sale of the New North Road property; secondly, the advances of funds under the deed of debt; thirdly, the raising of the ASB mortgage secured against trust property; and fourthly, the payment and discharge of the ASB mortgage and the Meys' mortgage. Here there are two possibilities: the first is that at all relevant times Mr Fletcher was acting for only the PWFm trust; the second is that Mr Fletcher provided services to both the PWFm trust and to Mr Hohepa (in his personal capacity). In either case, at all material times, Mr Fletcher was a solicitor for the PWFm trust. As such, he undoubtedly owed fiduciary duties of loyalty, fidelity and to act in the utmost good faith towards the trust, which since the trust had no separate legal personality, took the form of duties owed to whomever was the trust's trustee or trustees. The real area of concern, therefore, is the scope of his duties and whether he breached them.

[195] Other than through receiving payment for his legal services, there is no evidence that Mr Fletcher has personally profited from the alleged breaches of fiduciary duty. However, the fiduciary duties which equity imposes on solicitors extend beyond the occasions when solicitors enrich themselves at the expense of their clients. When it comes to determining the scope of fiduciary duties, there is helpful guidance to be found in *Cook v Evatt (No 2)* [1992] 1 NZLR 676. At 685 Fisher J observed that:

The existence and scope of fiduciary obligations are not to be determined by placing the instant case into a preconceived category and then invoking the duties thought to attach to that category; they must be tailored to the particular case after a meticulous examination of its own facts.

[196] The present case involves a solicitor acting for a charitable trust in the sale of its major, if not only asset, when there was only one trustee. Obviously, since a charitable trust has no beneficiaries in the way a private trust does, there are fewer, if any, persons who can act to protect the trust should the trustee act to advance his own interests at the expense of the trust. This will be especially so when the charitable purpose of a charitable trust may be spent, and what is then called for is an

alternative scheme. In this case, the natural persons (Eden Refuge and the group Ms Maletino represents) who had an interest in protecting the PWF trust, and who would have been within their rights to bring the matter to the attention of the Attorney-General, were not directly informed in any clear way about Mr Hohepa's handling of the trust property.

[197] In the absence of natural persons who have an interest in ensuring the trust continues under a new scheme, the opportunity is there for a dishonest sole trustee to misapply trust funds. The Attorney-General has statutory responsibilities to charities, but unless someone informs the Attorney-General of a trustee's wrongdoing, there is little that he can do. In such circumstances, the scope of the general fiduciary duties of solicitors to act loyally and in the utmost good faith in their dealings with clients would require them:

- a) To refuse to act on instructions from the trustee which they could foresee would be likely to result in harm to the trust;
- b) To ensure that the trust's property is dealt with in accordance with the law; and
- c) To require the trustee to satisfy them that the instructions, if acted upon, would not result in something that was contrary to the terms of the trust deed. This would protect the trust's interests from any harm arising from a trustee's wrongdoing.

[198] A solicitor who continues to act on instructions that are inconsistent with the terms of the trust deed places himself or herself in a position where he or she cannot discharge the fiduciary duties of loyalty and good faith owed to the trust. This is analogous to a conflict of interest arising from acting for two clients. The same solicitor will exacerbate his or her situation if he or she also engages in personal dealings with such a trustee.

[199] In the present case, Mr Fletcher placed himself in a direct conflict of interest by becoming a creditor of Mr Hohepa. This was through using his credit card to pay the hotel expenses in Madrid. The way he was to be repaid was at the expense of the

PWFM trust, as it was from the sale proceeds of New North Road, or from borrowed money raised against the security of the ASB mortgage on the New North Road property. If at any relevant time he had second thoughts about using the trust's funds in this way, it would have been at his own expense.

[200] Similarly, since Mr Fletcher had prepared the ASB mortgage and certified it for the bank, he was in a conflict of interest when it came any potential challenge to repayment of the mortgage on the ground it was part of a transaction that was a breach of trust. *Nathan v Dollars & Sense Ltd* [2008] NZSC 20, [2008] 2 NZLR 557 is an example of an agent's dishonesty precluding his principal (the mortgagee) from relying on the indefeasibility protections of the Land Transfer Act 1952 when it came to the principal attempting (unsuccessfully as it turned out) to enforce a registered mortgage. Throughout the period between the signing of the sale and purchase agreement for New North Road and the eventual settlement of the sale, including discharge of mortgages, any potential opportunity for Mr Fletcher to revisit the propriety of his actions and to adopt an approach that was protective of the PWFM trust placed Mr Fletcher in conflict with acting to protect his own interests. Any actions he took to expose Mr Hohepa's improper dealings with the PWFM trust's property, and the various legal inadequacies and insufficiencies of the legal transactions associated with the improper dealings, would have been at Mr Fletcher's own expense.

[201] Mr Fletcher was required to ensure that the steps he took in relation to the sale of the trust's property at New North Road, and the management of the sale proceeds were in keeping with the terms of the PWFM trust deed and not dealt with in a way that was harmful to the PWFM trust. He was also bound to disregard instructions that required him to act in a way that was contrary to the terms of the PWFM trust deed. Instead, at every material step towards the sale of the New North Road property and the associated dealing with trust property, Mr Fletcher acted to the benefit of Mr Hohepa and not of the PWFM trust.

[202] I heard evidence from expert witnesses on the accepted standards of practice for a law practitioner acting for a trust. This evidence was relevant to the claim in negligence. I have not relied on this evidence when determining the equitable claims, because I consider that the evidence is unnecessary. It is difficult to imagine

a clearer case of breach of fiduciary duties. The duties I have identified as having been breached are also to be found in the Code of Conduct which then applied to solicitors. *The Rules of Professional Conduct for Barristers and Solicitors* (6th ed. 2000) reflect the same principles found in cases such as *Sims* and *Farrington*. Similar standards of avoiding conflicts of interests and ensuring the lawyer/client relationship is one of trust and confidence are the ethical equivalents of the fiduciary duties that lawyers owe to their clients.

[203] If I am wrong in finding that Mr Fletcher actually knew that the instructions he received from Mr Hohepa were contrary to the PWFm trust deed and what the law of trusts permits when it comes to dealing with trust property, I consider that what has occurred here can only otherwise be described as Mr Fletcher wilfully shutting his eyes to the obvious. A solicitor's fiduciary duties to act loyally and in the utmost good faith in dealings with the client will be breached in this circumstance as well.

[204] There is also room for finding that the scope of the fiduciary duties of a solicitor faced with the circumstances facing Mr Fletcher extends beyond refusing to act, and includes a positive obligation to report the trustee's conduct to the Attorney-General in his special role as protector of trusts. As was recognised in *Farrington* at 89, solicitors are officers of the court and as such they are bound to a higher degree than others to observe the utmost good faith towards a client. When the client is a charitable trust whose purpose appears to be spent, and there is a sole trustee who lives overseas and is seeking to have trust funds sent to him without having given any solid assurance that the trust's purposes and objects can be performed overseas, discharging obligations of good faith and loyalty can include taking active steps to protect the trust from having its funds misapplied.

[205] Mr Fletcher has denied owing a fiduciary duty to Eden Refuge, Ms Maletino and Mr MacDonald. I accept that he did not owe a fiduciary duty to the first two persons. But in relation to Mr MacDonald, he is now the trustee of the PWFm trust. It is only through its trustee that the trust can enforce the fiduciary duties that are owed to it. Accordingly, I find that Mr Fletcher does owe Mr MacDonald, in his role as the current PWFm trustee, the fiduciary duties which I have found Mr Fletcher has breached. I also consider the Attorney-General has standing to make these

claims. It follows that I find that as regards Mr MacDonald and the Attorney-General, the eighth cause of action for breach of fiduciary duty has been proved.

Dishonest assistance

[206] The claim of dishonest assistance is directed towards strangers to trusts who are accessories to a breach of trust. A recent statement of the requisite elements of dishonest assistance can be found in *Burmeister v O'Brien* HC Tauranga CIV 2005-470-3396, 1 December 2009. There has been some controversy since the House of Lords decision in *Twinsectra Ltd v Yardley* [2002] 2 AC 164 over whether this claim requires a subjective approach to the assessment of dishonesty. Dicta of the Court of Appeal in *US International Marketing Ltd v National Bank of New Zealand Ltd* [2004] 1 NZLR 589 (CA), as well as a recent finding in the judgment of this Court in *Burmeister* make it clear that in New Zealand the approach to be taken follows that of the Privy Council in *Royal Brunei Airlines v Tan* [1995] 2 AC 378; namely, an objective approach to assessing dishonesty is all that is required. Mr Fletcher invited me to adopt the approach taken in *Twinsectra*. Whilst I do not think the outcome for Mr Fletcher would have been any different if I did adopt the *Twinsectra* approach, I intend to follow the approach of Asher J in *Burmeister*.

[207] The three key elements of dishonest assistance are (*Burmeister* at [93]):

- a) Money is lost as a result of a breach of trust or a breach of fiduciary duty;
- b) The defendant has participated in the breach of duty by helping or assisting in some way with those breaches; and
- c) There is dishonesty (objectively assessed) on the part of the defendant.

[208] In *Burmeister*, Asher J referred to there being some doubt about whether a breach of fiduciary duty was sufficient and ultimately concluded (at [96]) that it was. In the present case, the breaches that have resulted in the loss of PWF trust property are clearly breaches of the trust. The property of a religious charitable trust

has been misapplied by the trustee for non-religious purposes, and to the personal benefit of the trustee. Hence the first element is established.

[209] Mr Fletcher's actions helped Mr Hohepa gain access to the trust funds and, therefore, to misapply them. Without the help of Mr Fletcher in New Zealand, Mr Hohepa would never have been able to achieve the sale of the New North Road property, the raising of the ASB mortgage finance against that property, the discharge of the Meys' mortgage, having his hotel expenses in Spain met, and having some of the trust funds sent to him in Spain. Mr Fletcher's help was essential, both as a person based in New Zealand and as a solicitor. Hence the second element is established.

[210] The last element is the state of Mr Fletcher's knowledge and intent at the time he helped Mr Hohepa in the way set out above. The clearest statement of how to determine dishonest intent is that of Lord Nicholls in *Royal Brunei* at 389:

Before considering this issue further it will be helpful to define the terms being used by looking more closely at what dishonesty means in this context. Whatever may be the position in some criminal or other contexts (see, for instance, *Reg v Ghosh* [1982] QB 1053), in the context of the accessory liability principle acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.

In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask

questions, lest he learn something he would rather not know, and then proceed regardless.

[211] Mr Fletcher knew that Mr Hohepa was appropriating trust property. There was nothing about the circumstances of the appropriation that could suggest the appropriation was for trust purposes. Mr Fletcher has accepted that it was obvious to him at the time that once trust property was sent to Mr Hohepa in Spain, there was nothing to stop Mr Hohepa applying it for his own purposes. Mr Fletcher has also accepted that at the time he understood that trust funds sent to Mr Hohepa would become intermingled with Mr Hohepa's personal funds. There is nothing in the communications Mr Hohepa was sending to Mr Fletcher that showed intent, on Mr Hohepa's part, to apply trust property he received for the purposes of the PWF trust. The evidence all points to Mr Hohepa being intent to obtain the trust funds to apply them for his own projects. Whilst Mr Fletcher may have believed the original purpose of the PWF trust was spent and that the substitute purpose (to assist Oral Roberts NZ) was also spent, these circumstances did not permit Mr Hohepa simply to take trust funds and apply them for purposes which he thought worthwhile. Until the court had approved a new scheme for the PWF trust, its property had to be applied in a manner that was consistent with the terms of the PWF trust deed. Given that the two religious purposes (PWF Mission and Oral Roberts NZ) were New Zealand based, it is hard to see how sending trust funds offshore for Mr Hohepa to use could ever be said to be consistent with the terms of the PWF trust deed. All of this would have been obvious to an honest man and to an honest solicitor. Such persons do not knowingly participate in the type of transactions which have occurred. But Mr Fletcher chose to do so. It follows that on an objective assessment of Mr Fletcher's conduct, the only available conclusion is that he acted dishonestly. It follows that liability for dishonest assistance is proven.

Knowing receipt

[212] When a stranger to a trust beneficially receives trust property as a consequence of the trustee's breach of trust, there can be liability in equity for knowing receipt. Before liability is established, the stranger must also be shown to have had knowledge of the fact that the property he or she has received is traceable to a breach of trust or breach of fiduciary duty.

[213] The requisite elements to establish liability for a claim based on knowing receipt can be found in *Westpac Banking v Savin* [1985] 2 NZLR 41 (CA) at 53. It will be enough if it can be shown that Mr Fletcher is someone who has beneficially received PWFm trust property, as a consequence of Mr Hohepa's breach of trust in circumstances where Mr Fletcher:

- a) Had notice the property was subject to a trust; and
- b) Had notice that his receipt and use of the property constitutes a misapplication of the trust's property.

[214] Notice that trust property is being misapplied can take the form of actual knowledge or constructive knowledge. In *Savin* at 52, the Court of Appeal identified five categories of knowledge:

- a) Actual knowledge;
- b) Knowledge which is obtainable but for shutting one's eyes to the obvious;
- c) Knowledge which is obtainable but for wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make;
- d) Knowledge of circumstances which would indicate the facts to an honest and reasonable person; and
- e) Knowledge obtainable from inquiries which an honest and reasonable person would feel obliged to make, being put on inquiry as a result of his or her knowledge of suspicious circumstances.

[215] In the present case, Mr Fletcher knew the terms of the PWFm trust deed. He knew that money he received into his trust account either from mortgages raised against the New North Road property, or from the sale proceeds of the New North Road property was trust property. There were at least five occasions on

which he used his credit card to pay Mr Hohepa's hotel bills. He reimbursed himself from trust funds. The use of trust funds to pay a trustee's personal expenses is a breach of trust. Mr Fletcher knew he was paying Mr Hohepa's personal expenses when he used his credit card, and he did so knowing he had Mr Hohepa's approval to reimburse the cost from trust funds. Mr Fletcher has sought to explain his actions by saying it was a cheap and efficient way of transferring trust funds overseas to Mr Hohepa, the rationale for this being if Mr Fletcher paid Mr Hohepa's hotel bills on the promise of reimbursement from trust funds, personal money that Mr Hohepa would otherwise have applied to pay his hotel bills would then become available for Mr Hohepa to use in Spain for trust purposes.

[216] Having seen and heard Mr Fletcher's evidence, my view is that this explanation is not credible. I think it is an attempt to explain away conduct in which he and Mr Hohepa participated in the mishandling of trust money. More detailed reasons for my rejection of this explanation are set out at [168]-[175]. Even if such cross-crediting arrangements were a permissible use of trust funds, in this case all the available information indicated that Mr Hohepa was having financial difficulties. Hence, the likelihood of him having funds that he would become free to apply to trust purposes in Spain was improbable. Furthermore, Mr Fletcher never had any clear indication of how the PWF trust's purposes might be executed in Spain so that the purpose of freeing Mr Hohepa's Spanish funds was not secured.

[217] Therefore, the highly probable inference is that Mr Fletcher actually knew that the reimbursement of the credit card debts from trust funds was a breach of trust. If the finding of actual knowledge is wrong, I consider in these circumstances that Mr Fletcher must have been shutting his eyes to the obvious. I am also of the view that knowledge of the circumstances as I have found them to be would be sufficient indication to an honest and reasonable solicitor that the trustee he or she was dealing with was acting in breach of trust.

[218] There has been some controversy within the case law as to whether or not the scope of constructive knowledge extends as far as the fifth category I have identified. Since I have found Mr Fletcher to have had actual knowledge, or to be within the earlier categories of constructive knowledge, there is no need for me to form a view on where the scope of constructive notice should end. Accordingly, I find that in

relation to the use of trust funds to reimburse credit card payments, liability for knowing receipt has been proven.

[219] There are also legal fees that Mr Fletcher was paid from trust funds. Apart from the legal fees for the provision of the written opinion of September 2002, I consider that the bulk of the legal fees Mr Fletcher received, all of which came from trust property, were incurred through wrongful conduct on the part of Mr Fletcher, or by employees of his firm Fletcher Law at his direction. By November 2002, the actions of Mr Fletcher and Fletcher Law for which he charged legal fees were part and parcel of the conduct that has resulted in him being found liable for breaches of fiduciary duty and dishonest assistance. He knew he was being paid from trust funds. Given the level of knowledge I have found he had regarding the breaches of trust, he must also have known the legal fees were not legitimate expenses of the PWF trust. I find, therefore, that apart from the legal services provided up to the end of October 2002, the remainder of the legal fees were paid from trust property in circumstances where there was a knowing receipt by Mr Fletcher that the payments were in breach of trust. It follows that liability for knowing receipt of those payments is proven.

[220] The factual findings I have reached on the knowing receipt claim disposes of Mr Fletcher's affirmative defence. The circumstances he pleads in paragraph 76(a) to (e) of his statement of defence do not reflect the factual circumstances as I have found them to be. The trust money came into Fletcher Law's trust account as a result of Mr Hohepa's breach of trust. Mr Fletcher then applied this money for his own personal benefit when it came to reimbursing himself for the money he had lent to Mr Hohepa. The money was also applied for Mr Fletcher's personal benefit when it was used to pay for the legal fees, which had assisted Mr Hohepa to wrongfully gain access to trust property. For reasons already stated, I have found that Mr Fletcher had the requisite knowledge of these circumstances to establish liability for knowing receipt at the time he received the payments.

Relief

[221] I have found liability for breaches of trust, breaches of fiduciary duty and conversion proven against Mr Hohepa. I have found liability for breaches of

fiduciary duty, knowing receipt and dishonest assistance proven against Mr Fletcher. The remedies for breach of trust, breach of fiduciary duty and knowing receipt are restitutionary based, whereas the remedies for conversion and dishonest assistance are fault based: see *Equiticorp Industries Group v The Crown* [1998] 2 NZLR 481 (HC) at 540. When it comes to remedying the loss to the PWFm trust, the plaintiffs cannot recover under both heads of remedies. I propose to deal with the restitutionary based remedies and reserve leave to the plaintiffs to return to this Court for a determination on the fault based remedies, should the need arise.

[222] The decision to deal with the restitutionary remedies does not affect the separate issue of whether this is a case where an award of exemplary damages would also be appropriate. Such damages are punitive in character, and so any award will not have the effect of double recovery for the loss which the PWFm trust has suffered.

[223] When a trustee's breach of trust or breach of fiduciary duty results in the trust suffering loss, equity gives a remedy. Similarly, with those who breach fiduciary duties they owe to others, equity will remedy any resulting loss: see *Farrington* at 99. Those who are found liable for knowing receipt of trust property are impressed with the same obligations under the trust as its trustees. When it comes to remedying the loss to the trust, equity acts to restore to the wronged trust/beneficiary what was wrongly taken from it. In this regard, the fundamental question lying at the heart of equity asks (see *Equiticorp* at 653): "What is required to restore the parties to their former positions, and in the process do practical justice between them?"

Measuring loss

[224] The PFWM trust has lost the New North Road property, which was its major asset. It has also accumulated debts in the form of the legal bills Mr Fletcher tendered for his services, as well as disbursements and any other miscellaneous costs arising from the wrongful dealings with the trust's property. In principle, to restore the PWFm trust to its former position in a way that would do justice between the trust and the defendants would involve return of the New North Road property, and a refund of the legal fees and miscellaneous costs.

[225] The circumstances of the sale and the length of time since the sale mean that restitution in specie of the New North Road property is no longer possible. Nor is it possible to retrieve the part of the sale proceeds that have been misapplied. The remaining portion of the sale proceeds that were protected by the interim injunction issued in this Court have already been paid to Mr MacDonald. However, where trust property has been irretrievably lost through breaches of trust and breaches of fiduciary duty, equity provides a remedy in the form of equitable compensation: see *Target Holdings Ltd v Redferns* [1996] AC 421 at 434. The losses to be made good are those which on a commonsense view of causation were caused by the breaches. There is no doubt here that the PWF trust's loss of its property was the direct result of both defendants' breaches of duty. Moreover, in this case if the loss is seen as the mishandling of the sale proceeds, rather than the sale of New North Road, an order requiring the payment of money can be seen as effecting restitution in specie rather than as an award of equitable compensation. This is a case where the substance of the order will be the same, however it is described.

[226] The plaintiffs produced expert opinion evidence that attempted to place a recent value on the New North Road property. I do not consider that attempting to place a recent value on the property is the best way to measure its loss. The approach taken in *Equiticorp* (at 653-654) when restitution in specie was not possible was to take the value of the lost property (in that case shares) at the time the property was sold inequitably. I consider that approach is preferable in this case to adopting a recent value for the property. The PWF trust has lost its real property and the sale price it would otherwise have received in return. This is not a case where, in reaching a view on the restitutionary amount, there is a need, as there was in *Equiticorp*, to offset the sale price with deductions to avoid the trust being unjustly enriched. In this regard, the circumstances are more analogous to those in *Farrington* and in *Nocton* where the plaintiffs had lost their money through the solicitor's breach of fiduciary duty.

[227] Although the evidence is that Mr Hohepa was not initially happy with the sale price for the New North Road property, there is no evidence to suggest the transaction was not a bona fide arms' length sale. I propose, therefore, to take the sale price of the New North Road property as the starting point for ascertaining the restitutionary based relief. There are also the various expenses charged to the

PWFM trust, including legal expenses. In this regard, the legal services given in providing the legal opinion of September 2002 should not be taken into account, as there can be no complaint about a trustee seeking and a solicitor providing advice of that nature. However, by November 2002 onwards, at the latest, the legal costs and associated expenses then incurred are so much a part of the wrongful conduct of Mr Fletcher that the PWFM trust is entitled to be refunded what it has paid. These expenses were paid out of the sale proceeds, so I expect they will not be additional to the sale price. The PWFM trust should not receive any more than it has actually lost. The figure arrived at will then need to be adjusted to take account of the funds in the Fletcher Law trust account that were preserved from dissipation by the interim injunction issued in this Court.

[228] The plaintiffs will also be entitled to interest under the Judicature Act 1908. Since the relief is to remedy equitable wrongs, compound interest is also available. The funds that were protected by the interim injunction were earning interest before their release to Mr MacDonald. Some thought will need to be given to how that interest fits with interest under the Judicature Act and the possibility of an award of compound interest.

[229] I do not propose to attempt to quantify the restitutionary amounts now. Nor do I propose to make findings on awarding compound interest or exemplary damages. Findings of that nature may be influenced by the actual amounts to be awarded. I reserve leave to the parties to file further submissions on the topic of relief. The Registry is to arrange a telephone conference at the earliest opportunity for the purpose of setting timetable orders and giving further directions on the presentation of the quantification of the relief to be awarded.

[230] The question of costs for this proceeding also remains outstanding.

Result

[231] The third and fourth plaintiffs have proven their claims of breach of trust, breach of fiduciary duty and conversion against the first defendant.

[232] The third and fourth plaintiffs have proven their claims of breach of fiduciary duty, knowing assistance and dishonest assistance against the second defendant.

Duffy J

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