IN THE COURT OF APPEAL OF NEW ZEALAND

CA212/2010
[2012] NZCA 124

BETWEEN	CHARLES FLETCHER Appellant
AND	EDEN REFUGE TRUST First Respondent
AND	JOANNE LYDIA MALETINO Second Respondent
AND	CALLUM MACDONALD Third Respondent
AND	THE ATTORNEY-GENERAL Fourth Respondent
AND	CHARLES HOHEPA Fifth Respondent

Hearing: 7 March 2012

Court: Harrison, Wild and White JJ

Counsel: D A Wood for Appellant
G Bogiatto for Third Respondent
C R W Linkhorn and R I Berkeley for Fourth Respondent

Judgment: 30 March 2012 at 2 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is ordered to pay reasonable indemnity costs and usual disbursements to both the third and fourth respondents.

REASONS

(Given by White J)

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Introduction

[1] In the High Court Callum MacDonald, the current trustee of the Peoples Worship in Freedom Mission trust (the PWFM trust), and the Attorney-General, in his role as protector of charitable trusts, were successful in proving claims of:

(a) breach of trust, breach of fiduciary duty and conversion against Charles Hohepa, the previous trustee of the PWFM trust; and

(b) breach of fiduciary duty, knowing receipt and dishonest assistance against Charles Fletcher, a lawyer practising as Fletcher Law in Hamilton, who acted for Mr Hohepa and the PWFM trust.[1]

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1 *Eden Refuge Trust v Hohepa* [2011] 1 NZLR 197 (HC) [High Court judgment].

On the basis of these findings Mr Hohepa and Mr Fletcher were also held jointly and severally liable for the principal sum of $253,445.21, interest (simple and compound) and scale costs.[2]

[2] This appeal by Mr Fletcher is solely against the findings of Duffy J in the High Court of breach of fiduciary duty, knowing receipt and dishonest assistance. There is no appeal by Mr Hohepa and no appeal by Mr Fletcher against quantum. Nor is there a cross-appeal by Mr MacDonald or the Attorney-General against the order for scale costs.

[3] In the absence of any appeal by Mr Hohepa, there is no dispute that, in his capacity as trustee of the PWFM trust, he misappropriated to his personal use funds belonging to the trust. The overarching issue on the appeal by Mr Fletcher therefore is whether, in his capacity as the lawyer acting for the trust and Mr Hohepa, he should also be held liable for the loss suffered by the trust.

[4] Mr Fletcher did not dispute that he was aware that Mr Hohepa was misappropriating the funds of the PWFM trust, but argued that this knowledge did not give rise to liability on his part.

[5] At the hearing of the appeal before us, this issue was further narrowed because Mr Wood, counsel for Mr Fletcher, acknowledged that, if the Judge's finding that Mr Fletcher dishonestly assisted Mr Hohepa to misappropriate the funds of the PWFM trust was upheld, Mr Fletcher would be liable to meet the judgment against him. This acknowledgment meant that the appeal focused on the grounds raised by Mr Fletcher for challenging that finding, namely:

(a) the Judge failed to apply the correct legal test for dishonest assistance and failed to ask and answer the question why Mr Fletcher had assisted Mr Hohepa to misappropriate the funds belonging to the PWFM trust; and

(b) the Judge had failed to accept that Mr Fletcher, in his capacity as Mr

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2 *Eden Refuge Trust v Hohepa [Remedies]* [2011] 3 NZLR 273 (HC) [the quantum judgment].

> Hohepa's lawyer, was obliged to accept his client's instructions in respect of the funds of the PWFM trust and, as required by s 89(1) of the Law Practitioners Act 1982, disburse them in accordance with those instructions.

[6] We consider these grounds for challenging the Judge's finding of dishonest assistance after setting out the relevant factual background and the relevant findings made by the Judge.

Factual background

[7] The factual background is essentially undisputed and the following summary is based largely on the narrative provided to the Court by counsel for Mr Fletcher.

[8] The PWFM trust was created in 1962 with a religious charitable purpose. Its original trustees purchased a property at 44 New North Road, Auckland, in trust for its members.

[9] It appears that the members of the trust subsequently became factionalised with one group of members (called the Smith group) incorporating themselves under both the Incorporated Societies Act 1908 and the Charitable Trusts Act 1957 with the name PWF Mission Trust Board, a process completed in 1978. This group changed the name of the trust board to the Eden Refuge Trust in 1999. It also lodged caveats against the title to the property at 44 New North Road in 1986 and 2000. A further caveat was lodged against title to the property in 2002 by a Mr and Mrs Hicks who claimed an interest under an agreement to mortgage.

[10] Mr Hohepa was appointed a trustee of the PWFM trust in 1984 and his name was entered on the title to the property. With the death of the other trustees in 1986 and 2001, Mr Hohepa became the sole trustee and ultimately the sole registered proprietor of the property.

[11] In the meantime disputes within the PWFM trust had led to the exclusion of the Smith group from the premises on the property in 1984 and an extensive

correspondence between the lawyers for the parties as to the ownership of the property.

[12] The 1986 caveat lapsed after it was challenged by the trustees under s 145 of the Land Transfer Act 1952.

[13] In September 2001 Mr Hohepa sought advice from Mr Fletcher as to his position. Mr Fletcher had been in practice as a barrister and solicitor either in partnership or on his own account for 28 years. For the last 15 years his primary focus had been as a specialist in the law of trusts and tax and he had acted for quite a few charitable trusts.[3]

[14] After discussions with Mr Hohepa and after obtaining copies of the relevant documents and correspondence, including Land Transfer Office and Ministry of Economic Development records, Mr Fletcher provided Mr Hohepa, who by then was residing in Madrid, Spain, with a comprehensive letter of advice dated 26 September 2002. The letter set out in detail the background facts relating to the trust and the property, the terms of the trust, the distinction between property ownership and the church congregation, the charitable religious nature of the trust and Mr Hohepa's "rights and obligations" as a result of the existence of the Smith group, which he described as the Smith congregation.

[15] The specific advice which Mr Fletcher gave to Mr Hohepa in the letter of 26 September 2002 as to his "rights and obligations" was as follows:

> 36. As the sole surviving Trustee it is now your responsibility to determine an appropriate religious purpose that the property, or the proceeds of sale of the property, can be used for in terms of Charitable Trust Act 1957. The primary issue that you will have to address, in the event of a challenge by the Smith congregation, is why the Smith congregation would not qualify as an appropriate beneficiary of the Trust under this provision particularly given their association with the property since (at least) 1984.
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> 37. Section 3 of the Charitable Trust Act 1957 deals with property acquired and held on behalf any religious group. Section 4 deals with evidence of appointment of Trustees and Section 5 deals with

[3] High Court judgment at [107].

issues to do with the Transfer of Properties. We enclose a copy of these three sections for your information.

38. We believe that you have the following legal rights:-

    (a) To appoint any additional person/s to act as Trustee/s with you to hold ownership of the property,

    (b) To sell the property to any third party and hold the proceeds of sale for the charitable purposes referred to in the Declaration of Trust,

    (c) To transfer ownership of the property to a new group of persons acting as Trustees of a religious congregation (unincorporated or to an incorporated Trust Board) on such terms and conditions as you think fit, for example by way [of] sale to the Smith congregation or the Eden Refugee Trust.

    (d) Gift the sale proceeds of the property to any other religious body.

    (e) Retain ownership of the property for the benefit of a revived Peoples Worship in Freedom Mission Religious congregation.

39. You also have the right to make an application to the High Court seeking directions as to what should be done with the property or the proceeds of sale of the property. This is the most recommended course of action where there is a dispute.

40. As a Trustee you have obligations to hold the property for the purposes that are set out in the Declaration of Trust. This creates a fiduciary duty and obligation on you to exercise your legal rights and duties in good faith for the benefit of those entitled under the Trust.

41. The extent of your fiduciary obligations and duties require you to:-

    (a) Act in good faith and in the interest of the Trust and its charitable purposes,

    (b) Exercise powers under the Declaration of Trust (or as provided by law) for a proper purpose,

    (c) Exercise reasonable care and skill in performance of your duties, and

    (d) Avoid any conflict of interest.

[16] Mr Fletcher then dealt with the fact that Mr Hohepa was the sole surviving trustee and enclosed a transmission for execution so that the property at 44 New North Road could be registered in Mr Hohepa's sole name.

[17] Mr Fletcher also gave Mr Hohepa advice about the caveats over the property and the steps which might be taken to have them removed, including reference to ss 143 and 145 of the Land Transfer Act.

[18] Acting on further instructions from Mr Hohepa, Mr Fletcher registered the executed transmission and gave notice to the caveators, Eden Refuge Trust and Mr and Mrs Hicks, of lapse of their caveats under s 145 of the Land Transfer Act. As the caveators took no steps, the caveats lapsed in November 2002.

[19] On 25 October 2002 Mr Hohepa's agent, a Mr Haley, sold the property at 44 New North Road unconditionally for $350,000. Mr Fletcher was instructed to act on the sale. The deposit of $17,500 was paid into the trust account of Fletcher Law.

[20] On 9 December 2002 a further caveat was lodged against the title to the property by the Oral Roberts Evangelistic Movement. Mr Fletcher conducted a brief correspondence with the solicitors for the caveator and was told by the Movement in the United States that it was not operative in New Zealand.

[21] On 20 November 2002 Mr Fletcher received an urgent request from Mr Hohepa, who was in Madrid, Spain, to provide him with funds of €5,000. As Mr Fletcher did not have facilities to advance such a sum to Mr Hohepa from Fletcher Law's trust account, Mr Fletcher decided that payment could best be made by way of his personal American Express card on the understanding that he would be reimbursed from trust funds. Having impressed on Mr Hohepa that any funds from the sale of the property were trust funds, Mr Fletcher arranged for Mr Hohepa to sign a Deed of Acknowledgment of Debt to the trust for any funds that he received. The deed recorded that the sum due was $10,500 plus advances. The deed was signed by Mr Hohepa in his capacity as a trustee and as a borrower.

[22] Before arranging the Deed of Acknowledgment of Debt, Mr Fletcher recorded in a file note dated 22 November 2002 that he had discussed the options with Mr Hohepa and had recommended forming a new charitable trust. The file note read:

> 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.

[23] Notwithstanding this advice Mr Fletcher also recorded in a file note dated 5 December 2002 that he was going to advance money from trust funds to Mr Hohepa by paying his hotel bill. Mr Fletcher followed this with another file note dated 9 December 2002 that said that since he held the Deed of Acknowledgment Debt, this "overcomes any 'fiduciary' issues".

[24] From that time until 14 March 2003 Mr Fletcher made a series of advances as directed by Mr Hohepa using his American Express card. The advances were as follows:

11 December 2002 -	$10,500
10 February 2003 -	$7,122.07
6 March 2003 -	$20,262.73
14 March 2003 -	$14,604.98

[25] Mr Hohepa also advised Mr Fletcher that he had an immediate opportunity to benefit the trust and required funds. On that basis Mr Fletcher made an application to the ASB Bank on Mr Hohepa's behalf for a short term mortgage advance to be secured against the property. On 7 December 2002 the bank provided instructions for a loan advance of $150,000. The mortgage securities were prepared and forwarded to Mr Hohepa for execution by Mr Fletcher.

[26] After the documents were returned on 20 December 2002 the mortgage was forwarded to Land Information New Zealand for registration along with a request to lapse the Oral Roberts Evangelistic Movement caveat. On 31 January 2003 the mortgage was registered and the caveat lapsed.

[27] On 3 February 2003 Mr Hohepa negotiated, without notice to Mr Fletcher, a loan advance of $40,000 to be secured against the New North Road property. The advance was from two individuals, Adrian Meys and David Barton. To protect the advance Mr Barton lodged a caveat against the title to the property.

[28] On 10 February 2003 the ASB funds were advanced to the trust account of Fletcher Law less a fee, the total sum being $149,250. Because the ASB funds were secured against the New North Road property, the ASB funds were trust property. Nonetheless, Mr Hohepa, through Mr Fletcher, subsequently drew on the trust account for his personal benefit.

[29] Mr Fletcher became aware of the advance to Barton and Meys on 13 February 2003 and wrote to Mr Hohepa advising him that he was "almost certainly" in breach of trust in securing an advance in that manner and giving security over the property. Mr Fletcher received from Mr Barton a statement to settle the account in the sum of $61,850.

[30] On 5 March 2003 the sale of the New North Road property was settled. This followed some difficulties with the purchaser who had defaulted. Fletcher Law received from the solicitors for the purchaser directly into its trust account the net sum to settle, namely $334,073.50. Once again, some of the trust funds deposited into the Fletcher Law trust account from the sale of the house were dissipated by payments to Mr Hohepa, who applied the funds for his personal benefit.

[31] On 12 March Fletcher Law paid the sum of $55,518 to secure withdrawal of the caveat lodged by Mr Barton on the basis that the debt was contested and Mr Hohepa was to have the right to challenge it.

[32] Also on 12 March 2003 the members of the Eden Refuge Trust who had continued to use the premises for the Smith group services became aware of the sale. Their solicitor wrote to Mr Fletcher on the following day.

[33] On 4 April 2003 the Eden Refuge Trust obtained an injunction in the High Court against any further payments by Mr Fletcher to Mr Hohepa. At that stage it

appeared that there was approximately $95,000 in the trust account of Fletcher Law, calculated as follows: [4]

Total amount received on sale of 44 New North Road, including deposit, apportionments on settlement and interest for late settlement		$351,573.50
Less repayment of ASB Bank loan, bank fee and interest	$ 1,912.95	
Morrison Kent costs	$ 3,744.62	
Fletcher Law costs	$ 17,656.56	
Payments to Mr Hohepa	$237,617.91	
	$260,932.04	
Plus Interest		$ 4,656.08
Balance		**$95,297.54**

[34] The figure of $237,671.91 shown as payments to Mr Hohepa included both the advances by way of Mr Fletcher's American Express card, the ASB loan and a portion of the proceeds from the sale of the New North Road property. As Duffy J recognised,[5] the figures in the preceding paragraph could not be reconciled with the statement of claim. Ultimately, for the purpose of Duffy J's quantum judgment, the parties were in agreement that the total amount of misapplied funds was 253,445.21.[6]

4 High Court judgment at [49].
5 The High Court judgment at [50].
6 The quantum judgment at [14] and [42].

High Court trial

[35] The trial in the High Court, which was spread over some 20 days in 2008 and a further three days in 2009, included an interim judgment on 7 March 2008 removing Mr Hohepa as a trustee of the PWFM trust and replacing him with Mr MacDonald.[7] The Attorney-General was also joined as a party to the proceeding by minutes of 2 and 16 December 2008.[8]

[36] In addition to receiving in evidence a substantial number of background documents relating to the claims against Mr Hohepa and Mr Fletcher, Duffy J heard a range of evidence from various witnesses, including representatives of the Smith group, Mr MacDonald, Mr Hohepa's mother and brother, Mr Fletcher, and two lawyers who gave expert evidence as to the responsibilities of a lawyer in the position of Mr Fletcher.

[37] Mr Fletcher gave evidence over six days in 2008. He was cross-examined extensively for some three days. Duffy J also questioned him during the time he gave evidence. There is no doubt that, as the trial Judge, she had ample opportunity to assess Mr Fletcher as a witness and to form views as to his credibility and the veracity of the explanations he gave for his actions as the lawyer acting for Mr Hohepa and the PWFM trust.

High Court judgment

[38] Duffy J delivered a comprehensive judgment on 17 March 2010 finding both Mr Hohepa and Mr Fletcher liable. She made findings against Mr Hohepa notwithstanding the fact that his statement of defence had been struck out and judgment had been entered against him by default. Although Duffy J found Mr Fletcher liable for breach of fiduciary duty, knowing receipt and dishonest

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7 *Eden Refuge Trust v Hohepa* HC Auckland CIV-2003-404-539, 7 March 2008.

8 *Eden Refuge Trust v Hohepa* HC Auckland CIV-2003-404-539, 2 December 2008 (Minute No 7); and *Eden Refuge Trust v Hohepa* HC Auckland CIV-2003-404-539, 16 December 2008 (Minute No 8).

assistance, it is, for the reasons we have already given, necessary for us to focus only on her reasons for the latter finding.

[39] After setting out the factual background, which we have already summarised, and the nature of the PWFM trust, and after adopting a standard of proof that took "the highest degree of probability as its measure",[9] Duffy J made her findings of liability in respect of both Mr Hohepa and Mr Fletcher. She found that by the time Mr Fletcher wrote his letter of advice to Mr Hohepa on 26 September 2002 he was aware of the terms of the PWFM trust and its status as a charitable trust, Mr Hohepa's position as sole surviving trustee, the registration of the caveats, the existence of the Eden Refuge Trust and its association with the property at 44 New North Road, and the background correspondence relating to the dispute between the parties over the property.[10]

[40] In view of Mr Fletcher's knowledge and understanding of the position relating to the PWFM trust, Duffy J considered that he should have recommended to Mr Hohepa that the Attorney-General "who has a statutory responsibility for charitable trusts" should have been involved and directions from the Court should also have been sought.[11] The Judge noted that, instead of taking these steps, Mr Fletcher gave advice about the caveats that ultimately led to the sale of the New North Road property and:[12]

> ... 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 Rd 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.

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9 At [56].
10 At [106].
11 At [114].
12 At [115].

[41] Duffy J then found that Mr Fletcher had acted to assist Mr Hohepa in the following ways:[13]

> a) The sale and conveyance of the New North Rd property;
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> 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;
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> c) The mortgaging of the New North Rd property to the ASB as security for an ASB loan made to Mr Hohepa personally; and
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> 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 Rd property.

[42] She considered each of these events in detail.

[43] In respect of the sale of the New North Road property, Duffy J found that at the time Mr Fletcher was asked to act on the sale for Mr Hohepa it would not have been apparent to him that it was being sold for an unlawful purpose.[14] But by 7 November 2002 Mr Fletcher knew that Mr Hohepa wanted access to the funds and made the first advance under the deed of debt through his American Express card to pay for Mr Hohepa's hotel accommodation in Madrid.[15] The Judge considered that a memorandum sent by Mr Hohepa to Mr Fletcher on 22 November 2010 about "the projects" that Mr Hohepa saw himself being involved in was a curious document which would have given any sensible person who read it serious concerns about "the intentions, honesty and reliability of Mr Hohepa".[16] After referring to Mr Hohepa's memorandum in detail, the Judge described it as "no more than an incomprehensible rambling" and little different from the spam that can clog email accounts. The Judge held that this was the interpretation any sensible and honest solicitor would have made of it.[17]

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13 At [116].
14 At [118].
15 At [120].
16 At [121].
17 At [128].

[44] The Judge considered that by 3 December 2010 when Mr Fletcher wrote to the purchasers' solicitors confirming the sale and purchase agreement for the New North Road property he knew enough from his dealings with Mr Hohepa to be aware that Mr Hohepa was "neither a trustworthy nor reliable person" and that 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 PWFM trust.[18] The information would also have informed Mr Fletcher that proceeding with the sale of the property and transferring the sale proceeds offshore to Mr Hohepa would result in their misuse. The Judge considered that it was hard to see that anyone would have placed a different interpretation on what was happening.

[45] In respect of the deed of debt and loans to Mr Hohepa, the Judge found 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 offshore loans, should be sent.[19] The Judge pointed out that Mr Fletcher nonetheless 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.[20]

[46] As far as arranging the ASB loan and mortgage was concerned, the Judge found that whether Mr Fletcher saw the ASB funds as trust property or a personal loan to Mr Hohepa, the only probable inference from the circumstances was that Mr Fletcher knew these dealings were in breach of the PWFM trust deed and there was no way to view them as being legitimate transactions under the law of trusts.[21]

[47] As far as arranging for the discharge of the Meys/Barton mortgage was concerned, the Judge found that once Mr Fletcher knew that Mr Hohepa had entered

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18 At [129].
19 At [132].
20 At [135].
21 At [137].

into the loan and mortgage, he allowed trust funds to be used to repay the loan even though he recognised that, by raising the loan, Mr Hohepa was in breach of trust.[22]

[48] The Judge then summarised the position under the heading "Characterisation of funds made available to Mr Hohepa" as follows:[23]

> In various ways, money was sent by Mr Fletcher to Mr Hohepa which has in turn reduced the wealth of the PWFM 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 PWFM 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 Rd 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.

[49] The Judge then turned to consider in detail Mr Fletcher's explanations for his actions. She rejected Mr Fletcher's attempt to differentiate between Mr Hohepa and the PWFM trust, finding that he was acting for them both. She held that 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.[24]

[50] In rejecting Mr Fletcher's explanations for his actions, Duffy J examined the explanations in detail and reached the following significant conclusions:

> [142] ... 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.
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> ...
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> [147] ... 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 PWFM trust, his explanation about Mr Hohepa's authority to give

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22 At [139].
23 At [140].
24 At [142].

> instructions avoids the real issue: namely, how to explain the ongoing acceptance of instructions from a trustee like Mr Hohepa.
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> ...
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> [149] ... 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.
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> ...
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> [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.
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> [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 PWFM 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.

[51] Duffy J then examined in further detail the series of incidents supporting these conclusions, namely: 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 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 raising of the ASB finance and the use that was made of those funds; the presence of the Meys/Barton mortgage on the title to the New North Road property and the steps Mr Fletcher took to remove it; 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; and the working relationship that seemed to have developed between Mr Hohepa and Mr Fletcher. Duffy J reiterated her conclusion that the clear impression she gained from the evidence was 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 PWFM trust.[25]

[52] After examining the relevant evidence in the case and making her factual findings, Duffy J turned to analyse the relevant legal principles relating to the causes of action based on breach of fiduciary duty, dishonest assistance and knowing receipt. In respect of the dishonest assistance cause of action, the Judge referred to the decisions in *Burmeister v O'Brien*,[26] *Twinsectra Ltd v Yardley,*[27] *US International Marketing Ltd v National Bank of New Zealand Ltd*,[28] and *Royal Brunei Airlines Sdm Bhd v Tan.*[29] She then identified the three key elements of dishonest assistance as:[30]

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

[53] Duffy J had no difficulty in finding that each of these elements had been established in the present case.

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25 At [183].
26 *Burmeister v O'Brien HC Tauranga CIV-2005-470-3396, 1 December 2009.*
27 *Twinsectra Ltd v Yardley [2002] UKHL 12, [2002] 2 AC 164.*
28 *US International Marketing Ltd v National Bank of New Zealand Ltd* [2004] 1 NZLR 589 (CA).
29 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC).
30 At [207].

[54] As to the first element, she found that the property of a religious charitable trust had been misapplied by the trustee for non-religious purposes and to the personal benefit of the trustee.[31]

[55] As to the second element, Duffy J said:

> [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 Rd 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.

[56] As to the third element, the Judge set out the well-known statement of law of Lord Nicholls in *Royal Brunei*[32] and found:

> [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 PWFM 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 PWFM 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 PWFM trust, its property had to be applied in a manner that was consistent with the terms of the PWFM 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 PWFM 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.

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31 At [208].

32 At 389.

The case for Mr Fletcher

[57] Mr Wood accepted that the Judge had correctly identified the three key elements of dishonest assistance and had correctly found that the first two elements were established on the evidence. Mr Wood also accepted that the Judge's finding of dishonesty on Mr Fletcher's part was open to her if that finding was made on the basis of an objective assessment, but challenged both the Judge's formulation of the third element and her application of it to the facts of his case.

[58] Mr Wood argued that, while the standard for the third element was objective, it also involved a subjective element, namely what the person actually knew and the reason why he or she acted in the way that he or she did. Mr Fletcher relied on the statement by Lord Nicholls in *Royal Brunei* that:[33]

> When called upon to decide whether a person was acting honestly, a court will look at the circumstances known to the third party at the time. The Court will also have regard to the personal attributes of the third party such as experience and intelligence and the reason why he acted as he did.

[59] In support of this submission reference was made to the decisions in *Twinsectra Ltd v Yardley, US International Marketing Ltd v National Bank of New Zealand Ltd, Barlow Clowes International Ltd (in liq) v Euro Trust International Ltd*[34] *and Abou-Rahmah v Abach.*[35]

[60] Mr Wood then submitted that whether a defendant's state of mind is honest or dishonest involves an assessment of his mental state. When the factual circumstances were examined in this case it was apparent that Mr Fletcher believed what he was told by Mr Hohepa and that a questioning of or reflection on his obligation to pay out the funds to the new trustee never arose. While some of his actions were conceded by him in evidence to have been "mistaken", they were not, "apparently", wrong. The test for dishonest assistance still appeared to leave room for Mr Fletcher, acting as a solicitor, to have been "in error" in the same sense, but not dishonest as found. The conscious and personal decisions that drove Mr Fletcher

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33 At 391.

34 *Barlow Clowes International Ltd (in liq) v Euro Trust International Ltd, [2005] UKPC at 37, [2006] 1 WLR 1476.*

35 *Abou-Rahmah v Abacha [2006] EWCA CIV 1492, [2007] 1 All ER 827 (Comm).*

to become engaged in these events had not been examined by the Judge and no findings of fact had been made to support any appreciation of why Mr Fletcher acted in the way he did. It was submitted in particular that Mr Fletcher's position was similar to that of the lawyer involved in *Twinsectra v Yardley* who was found not to have been dishonest.

[61] Mr Wood also submitted that Mr Fletcher was required to pay out the funds on Mr Hohepa's instructions by virtue of s 89(1) of the Law Practitioners Act. Reliance was placed on the decision of the Court of Appeal of New South Wales in *Adams v Bank of New South Wales*[36] where it was held that a solicitor was required by the equivalent provision of the New South Wales legislation to comply with the instructions of a client who was a trustee in respect of funds held in the solicitor's trust account. Mr Fletcher's defence based on s 89 of the Law Practitioners Act had not been considered by the Judge.

[62] In the course of the hearing before us, however, Mr Wood made it clear that Mr Fletcher did not challenge the findings made by the Judge in her judgment at [152], [209] and [211].[37] Instead, as already noted, the judgment was challenged on the grounds that:

(a) the Judge failed to apply the correct legal test for dishonest assistance and failed to ask and answer the question why Mr Fletcher had assisted Mr Hohepa to misappropriate the funds belonging to the PWFM trust; and

(b) the Judge had failed to accept that Mr Fletcher, in his capacity as Mr Hohepa's lawyer, was obliged to accept his client's instructions in respect of the funds of the PWFM trust and, as required by s 89 of the Law Practitioners Act, disburse them in accordance with those instructions.

[63] We now turn to address these two grounds separately.

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[36] *Adams v Bank of New South Wales* [1984] 1 NSWLR 285 (NSWCA).
[37] Quoted above at [48], [53] and [54].

A subjective element for dishonest assistance?

[64] We agree with Mr Woods that on the issue of the existence of a subjective element in the assessment of dishonesty for the purpose of the dishonest assistance cause of action it may not be a straightforward matter to reconcile all aspects of the decisions in *Royal Brunei*, *Twinsectra Ltd v Yardley* and *Barlow Clowes International Ltd (in liq) v Euro Trust International Ltd.* *The High Court of Australia has also followed a somewhat different approach in Farah Constructions Pty Ltd v Say-Dee Pty Ltd.*[38]

[65] But, for two reasons, it is unnecessary for us to address this issue in the present case: first, as Mr Woods accepted, the Supreme Court has already expressed a preference for the decision in *Barlow Clowes International Ltd (in liq) v Euro Trust International Ltd* over the decision in *Twinsectra Ltd v Yardley*; and, second, on the facts of this case any subjective element would in any event be met. We also do not accept the submission for Mr Fletcher that the Judge here failed to ask and answer the question why Mr Fletcher had assisted Mr Hohepa to misappropriate the funds belonging to the PWFM trust.

[66] In *Westpac New Zealand Ltd v MAP & Associates Ltd*[39] the Supreme Court addressed the issue of dishonest assistance in the context of whether it was necessary for a bank to establish all the ingredients of the cause of action in order to have a defence to a prima facie breach of mandate or whether some lesser standard sufficed, based on reasonable belief, suspicion or concern that it would be dishonestly assisting a breach of trust.[40] On this issue the Supreme Court in its judgment, delivered by Tipping J, said:

> [25] There is only one aspect of the cause of action for dishonest assistance that needs any present discussion. Westpac relied in its submissions on a number of references to suspicion made in the course of the judgment of the Privy Council in *Barlow Clowes International Ltd v Eurotrust International Ltd*. It is desirable to clarify how suspicion relates to the overriding need for proof of dishonesty.

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38 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22, (2007) 230 CLR 89.*

39 *Westpac New Zealand Ltd v MAP & Associates Ltd* [2011] NZSC 89, [2011] 3 NZLR 751.

40 At [10].

> [26] In *Barlow Clowes*, which represented a significant volte-face from the decision of the House of Lords in *Twinsectra Ltd v Yardley*, Lord Hoffmann summarised the state of the law on dishonest assistance. The major difference between *Twinsectra* and *Barlow Clowes* is that in the latter case their Lordships recognised, as had Lord Millett in his dissenting speech in *Twinsectra*, that although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be described as dishonest, it is irrelevant that the defendant has different standards and does not appreciate that his conduct, by ordinary standards, would be regarded as dishonest. We would adopt his Lordship's summary in *Barlow Clowes* but with some elaboration as regards when suspicion amounts to dishonesty. In that respect the Privy Council said that the necessary state of mind could consist in suspicion combined with a conscious decision not to make inquiries which might result in knowledge.
>
> [27] The key ingredient in the cause of action for dishonest assistance is the need for a dishonest state of mind on the part of the person who assists in the breach of trust. We agree with the statement in *Barlow Clowes* that such a state of mind may consist in actual knowledge that the transaction is one in which the assistor cannot honestly participate. But it may also consist in what we would describe as a sufficiently strong suspicion of a breach of trust, coupled with a deliberate decision not to make inquiry lest the inquiry result in actual knowledge. For the purpose of this alternative, it is necessary that the strength of the suspicion that a breach of trust is intended makes it dishonest to decide not to make inquiry. That state of mind, which equity equates with actual knowledge, is usually referred to as wilful blindness. It involves shutting one's eyes to the obvious and can thus fairly be equated with the dishonesty involved when there is actual knowledge.

[67] As Justice Robert Chambers, writing extrajudicially, foretold,[41] the approach taken in *Royal Brunei* (as clarified in *Barlow Clowes*) has been followed by the Supreme Court here. Notwithstanding the particular context in which the issue arose in *Westpac*, we consider that we are bound to follow the approach adopted by the Supreme Court. In New Zealand a dishonest state of mind is determined by the application of an objective standard. A dishonest state of mind consists of actual knowledge that the transaction is one in which the assistor cannot honestly participate or a sufficiently strong suspicion of a breach of trust that it is dishonest to decide not to inquire, coupled with a deliberate decision not to make inquiry lest the inquiry result in actual knowledge.

[68] Applying that approach to the facts of the present case, we are satisfied that Mr Fletcher had the requisite dishonest state of mind. The unchallenged findings by the Judge in her judgment at [211], which she found proved to "the highest degree of

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[41] Robert Chambers, "Dishonest Assistance" (2011) 17 NZBLQ 18 at 28.

probability" and which we agree were soundly based on the evidence, clearly established the required dishonest state of mind. Mr Fletcher had actual knowledge that the transactions involving the disbursement of the funds belonging to the PWFM trust from the sale of the New North Road property were transactions in which he could not honestly participate.

[69] We agree with Mr Linkhorn for the Attorney-General that Mr Fletcher's actual knowledge and relevant actions may be summarised as follows:

(a) he knew that the trust property was committed to the charitable purpose of the advancement of religion, for the provision of a place of worship in this case;

(b) he knew the trust had only one surviving trustee;

(c) he knew that charitable funds could not be applied for the benefit of the trustees and that a High Court approved scheme was necessary to adjust the charitable purposes (as Duffy J found based on his 28 years of experience);

(d) he knew there was a dispute of some years dividing the congregation and that the absent remaining trustee Mr Hohepa was not in a position to engage with the congregation;

(e) he took steps to bring the land title up to date to reflect Mr Hohepa's survivorship as a precursor to mortgaging the property;

(f) he took steps, both as solicitor and under power of attorney, to mortgage the trust property in return for a bank loan so that the resulting funds could be made available to Mr Hohepa personally;

(g) he took steps, as solicitor, to complete the sale of the church property; and

(h) he disbursed the majority of the cash proceeds from the loan and later

> the sale in a number of transactions that he knew were unconnected with the trust's charitable objects. These included hotel bills and payments to Mr Hohepa's creditors, including Mr Fletcher himself.

[70] We also consider that the evidence in this case met the alternative approach for the requisite dishonest state of mind endorsed by the Supreme Court in *Westpac*, namely a sufficiently strong suspicion of a breach of trust that it is dishonest to decide not to inquire, coupled with a deliberate decision not to make inquiry lest the inquiry result in actual knowledge. Our view is based on the same evidence that led to the Judge's findings in her judgment at [211] and her statement at [153] that if she was wrong in her conclusion that Mr Fletcher would have been aware of Mr Hohepa's dishonest intentions that could only be because "he chose to close his eyes to the obvious". We are satisfied that the evidence in this case established sufficiently strong suspicions of breaches of trust by Mr Hohepa which made it dishonest for Mr Fletcher not to inquire.

[71] For completeness, we note that even if a subjective element were required for the requisite dishonest state of mind we would have found that element satisfied in this case. Contrary to the submissions for Mr Fletcher, the Judge did ask and answer the question why Mr Fletcher had assisted Mr Hohepa to misappropriate the funds belonging to the PWFM trust. She expressly considered and rejected each and every one of Mr Fletcher's explanations for his actions.[42] In doing so, she implicitly found that he had no honest motive for his actions in assisting Mr Hohepa to misappropriate the PWFM trust's funds. In the words of Lord Nicholls in *Royal Brunei*, Duffy J had regard to Mr Fletcher's personal attributes, including his experience and intelligence as a practising lawyer, and the reasons why he acted as he did. She held that, given Mr Fletcher's long experience in practice (28 years) and specialisation in the law of trusts, the only inference that could be drawn was that Mr Fletcher must have known that trust property could not be applied for Mr Hohepa's personal use.[43] Indeed Mr Fletcher had given Mr Hohepa advice to that effect. There was therefore no basis on this ground for challenging the finding of dishonest assistance.

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42 At [141]–[188].
43 At [107].

[72] Our conclusion on this issue is also reinforced by the crucial factual differences between this case and the decision in *Twinsectra Ltd v Yardley* relied on by Mr Wood. In *Twinsectra* the trial Judge in the High Court found that the lawyer concerned had shut his eyes to the problems or the implications of what happened, but acquitted him of dishonesty. In the Court of Appeal it was concluded that by deliberately shutting his eyes in this way the lawyer had been dishonest. The House of Lords by a majority, however, decided that the Court of Appeal was not entitled to substitute their assessment for that of the trial Judge on this issue. In stark contrast in the present case there was a finding of dishonesty by the Judge which we have upheld.

A defence under s 89 of the Law Practitioners Act 1982?

[73] We turn now to Mr Wood's submission based on s 89 of the Law Practitioners Act 1982, which applied at the time of the events of this case and provided:[44]

> **89 Solicitor to pay client's money into trust account at bank**
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> (1) All money received for or on behalf of any person by a solicitor shall be held by him exclusively for that person, to be paid to that person or as he directs, and until so paid all such money shall be paid into a bank in New Zealand to a general or separate trust account of that solicitor.
>
> (2) No such money shall be available for the payment of the debts of any other creditor of the solicitor; nor shall any such money be liable to be attached or taken in execution under the order or process of any court at the instance of any such creditor.
>
> (3) Every solicitor who knowingly acts in contravention of this section commits an offence against this Act.
>
> (4) Nothing in this section shall be construed to take away or affect any just claim or lien that any solicitor may have against any money so received by him.

[74] There is no doubt that s 89(1) imposed two important obligations on solicitors: first, to hold money received "for or on behalf of any person" exclusively for that person in a trust bank account and, second, to pay the money to that person

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[44] See now ss 110–114 of the Lawyers and Conveyancers Act 2006.

or as that person directed.[45] The statutory obligations were strict and reinforced not only by the fact that by s 89(3) any contravention of them was a criminal offence, but also by the provisions of the Solicitors' Trust Account Regulations 1998[46] and the decisions of this Court, in a professional disciplinary context, which emphasised the inviolate nature of funds held in trust and the paramount need for solicitors to avoid overdrawing their trust accounts.[47]

[75] A striking illustration of the strict nature of the second obligation imposed on solicitors, namely to pay the money in the trust account to the person on whose behalf it was held or as that person directed, even when that person was a trustee, occurred in *Adams v Bank of New South Wales*, the authority relied on by Mr Wood.

[76] In that case a solicitor, Mr Beard, acted for the first mortgagee, Mr Adams, on a mortgagee sale of a property that was also subject to a second mortgage to the Bank of New South Wales. The net proceeds of sale were paid into Mr Beard's trust account and held by him on trust for Mr Adams in terms of s 41(1) of the New South Wales Legal Practitioners Act 1898, the equivalent of s 89(1) of the New Zealand Law Practitioners Act 1981. After deducting legal costs and other expenses, Mr Beard paid the balance of the proceeds to Mr Adams. Mr Beard was aware that at that time Mr Adams intended to apply the proceeds immediately for purposes that did not include paying the Bank the sum claimed by it as second mortgagee. Mr Beard advised Mr Adams that any surplus would belong to the Bank, but until there was a Court order requiring Mr Adams to pay the surplus to the Bank he was free to deal with the funds as he saw fit. Mr Adams advised Mr Beard that, in the event of a Court order, he would pay the sum due to the Bank as second mortgagee.

[77] At first instance the Bank succeeded in its claim against Mr Beard for a declaration that he had held the sum claimed by the bank in trust for it and orders for recovery of the sum. The Bank succeeded on the basis that, because Mr Beard knew the Bank was entitled to the surplus from the mortgage and that Mr Adams had no

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45 *Laws of New Zealand* Law Practitioners (as at 1995) at [71] (see now *Laws of New Zealand* Lawyers and Conveyancers at [113]) and GE Dal Pont *Lawyers' Professional Responsibility* (4th ed, Thomson Reuters, Sydney, 2010) at [9.70].

46 Now the Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

47 *Re McD* [1931] NZLR 414 (CA) at 416; *Re C and S* [1931] NZLR 398 (CA) at 399–400; *R v F* [1932] NZLR 315 (CA) at 316–317; and *Re S (a solicitor)* [1935] NZLR 908 (CA) at 908–909.

intention of using the trust funds to pay the bank, Mr Beard was a constructive trustee of the funds to which the Bank was entitled.[48] :

[78] Mr Beard's appeal to the Court of Appeal of New South Wales was successful on the grounds that the Bank had not established that Mr Beard had knowingly participated in Mr Adams' breach of trust. Hutley JA, with whom Moffitt P and Samuels JA agreed, pointed out that while the view of Mr Beard that Mr Adams was entitled to deal freely with the funds until there was a Court order against Mr Adams was erroneous, there was no evidence that Mr Beard knew the limits of valid claims by Mr Adams in his capacity as first mortgagee and Mr Beard had the assurance of Mr Adams that the whole of the proceeds of the sale could be properly dispensed in a way which left no surplus.[49] On this basis the Court of Appeal held that neither knowing receipt nor dishonest assistance was established. Hutley JA said:[50]

> Though the proceeds of sale went through the trust account of the firm of Beard and McDonald, that firm did not receive the money for themselves. They did not receive part of the trust property by simply holding it on trust in the ordinary course of business for a trustee. Furthermore, in my opinion, it cannot be said that Mr Beard assisted in a dishonest and fraudulent design on the part of Adams; the solicitor had the assurance of his client that when the rights of the respondent (the Bank) had been properly determined he would be in a position to pay whatever was due to it. It would seem to me, in the circumstances, that there is no basis whatsoever for the order against Mr Beard.

[79] Moffitt P, with whom Hutley and Samuels JA also agreed, however, went further in relying on the obligation imposed on Mr Beard by s 41(1) of the Legal Practitioners Act 1898. Moffitt P said:[51]

> Thus at the time the proceeds of sale were paid to the solicitor in the present case, on no view was he a trustee of the money or a constructive trustee of it. His obligation was as provided in the Legal Practitioners Act 1898, s 41(1), to hold it exclusively for his client who had entrusted him with the money and to disburse it as his client directed. The provision of the statute accords with the general law of agency. Depending on the terms of his retainer as solicitor for the trustee, he may have an obligation to give proper and skilful advice to the trustee as his client as to the proper administration of the trust.

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48 *Bank of New South Wales v Adams* [1982] 2 NSWLR 659 at 665–666 (NSWSC).
49 At 301.
50 At 301.
51 At 290–291.

> Whether he does so or not, the responsibility rests with the client, who is the trustee, to discharge the obligations of the trust. Holding the money, as he does, as agent for the trustee, he does not hold it on behalf of the beneficiaries or owe them an obligation. It may be different if while holding the money on behalf of his client trustee, he assumes or has imposed upon him some obligation to a beneficiary or beneficiaries. He could assume some such obligation by giving, with the consent of his client, some enforceable undertaking as to the money held by him. He could have some obligation imposed on him by his being made a party to proceedings in which an undertaking to the court is extracted from him or in which an order or declaration is made by the court in terms which bind him to apply the money in some way for the benefit of a beneficiary. Nothing like this occurred in the present case.
>
> If the client directs the solicitor to pay the money to another solicitor or to the trustee personally or to some other person, the solicitor is obliged to follow his client's directions. If the solicitor suspects that upon the money being paid to the client, he will apply some or all of it for purposes inconsistent with the client's duty as trustee or, in the case of a mixed fund to part of which the client is entitled, that he will not divide the fund properly or will not conduct a proper account, no ground arises for the solicitor to refuse to perform his obligation as solicitor and pay the money as directed by his client. He might refuse to act further for his client, but he could not refuse to pay the money as directed by his client. If he were to refuse what should he do? Should he conduct some inquiry concerning his suspicions, or commence some proceedings or go behind his client's back to the supposed beneficiaries? What is he to do with the money in the meantime? What defence would he have if he withheld the money and were sued by his client? Being bound by s 41(1) to pay the money according to the client's direction, his performance of that obligation cannot provide a basis for a finding that the solicitor acts improperly or in some way becomes a constructive trustee. He could not well become some kind of constructive trustee retrospectively, so s 41(1) no longer applies to him, as some of the reasoning of the learned judge appears to suggest. Of course the case would be quite different if aliunde [otherwise] it were proved that the solicitor was a party with his client to some type of conspiracy to defeat the interests of the beneficiaries or to manipulate the solicitor's trust account, for example to "wash money", for some improper purpose. Counsel for the respondent bank expressly stated to this Court that no allegation of any dishonest purpose was made against Mr Beard and that this had been similarly announced at first instance.

[80] We agree that the obligation imposed on a solicitor by a provision such as s 89(1) of the Law Practitioners Act is strict and that, in ordinary circumstances, the solicitor must comply with a client's instructions as to the disbursement of funds held in a trust bank account even when the client is a trustee. We also agree, as Moffitt P recognised, that the obligation is not absolute and may not apply in all circumstances. We agree with the examples of the exceptions given by Moffitt P, namely if it were proved that the solicitor was a party with his client to some type of conspiracy to defeat the interests of the beneficiaries or to manipulate the solicitor's

trust account, for example to "wash money", for some improper purpose. We also agree with Moffitt P and Hutley JA that proof of knowing receipt or dishonest assistance would be exceptions to the obligation.[52]

[81] At the same time, however, we have doubts about the apparent suggestion in the judgment of Moffitt P that suspicions by the solicitor of a trustee client's intended misapplication of trust funds would not amount to dishonest assistance. In our view the subsequent decisions in *Royal Brunei*, *Barlow Clowes* and *Westpac* mean that a lawyer whose suspicions of a client's intended breach of trust were sufficiently strong and who failed to make inquiry might well become liable for dishonest assistance notwithstanding the obligation under s 89(1). Today, in New Zealand, the answers to Moffitt P's rhetorical questions would be that the solicitor was required to make inquiry concerning his or her suspicions. The solicitor might pay the money into court and seek directions or retain the funds in the trust account and commence interpleader proceedings.[53] And the solicitor would have a defence to a claim based on an alleged breach of the obligation under s 89(1).

[82] Our doubts as to the judgment of Moffitt P are reinforced by two subsequent Australian decisions. The first is *Jalmoon Pty Ltd v Bow*.[54] In *Jalmoon* the Queensland Court of Appeal referred specifically to Moffitt P's judgment in *Adams* and noted that although the language was "rather broad", it was intended to convey simply that Mr Beard "held the money on trust for [his] client, but not on the trust on which the client had obtained the money".[55] The Court held that an instruction by the director and sole shareholder of a company, purportedly on behalf of the company, to pay to him money a solicitor held in his trust account on behalf of the company was not binding. The solicitor sought to justify his compliance with the instruction by arguing that, as the sole shareholder, the director was authorised to require payment of money to him by the doctrine of unanimous assent. The Court rejected this argument, holding that because the solicitor knew the money would not be used to benefit the company he should not have released the funds to the

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52 At 292 and 301.

53 Under r 4.58 of the High Court Rules. See, for example, *Smith v Collier* [2001] NSWSC 194 and *Walters v Icon Central Ltd* HC Auckland CIV-2010-484-4877, 7 March 2011.

54 *Jalmoon Pty Ltd v Bow* [1997] 2 Qd R 62 (QCA).

55 At 72.

director.[56] Paying out the money to the director in those circumstances was a breach of the fiduciary obligations owed to his client, the company.

[83] The second Australian authority is the decision of the New South Wales Supreme Court in *Smith v Collier*.[57] Under a settlement agreement, Ms Collier had agreed with Lloyd's of London that Lloyd's would pay a sum into the trust account of Ms Collier's solicitors, which would be held by the solicitors on behalf of Ms Collier subject to the rights of her creditors.[58] Acting on instructions from Ms Collier, the solicitors paid funds in the trust account out to her. The New South Wales Supreme Court held that the solicitors were liable to Ms Collier's creditors for breach of trust.[59] *Adams* was distinguished on the basis that the effect of the settlement agreement was that the solicitors held the payment from Lloyds on an express trust in favour of Ms Collier's creditors, so that any amount owing to them would be paid in priority to amounts owing to her.[60]

[84] As these decisions confirm, the two obligations imposed by s 89(1) were not absolute. A solicitor was (and is) subject to overriding duties to avoid committing or being a party to a criminal offence[61] and to take all reasonable steps to prevent any person from perpetuating a crime or fraud through his or her practice.[62] These exceptions to the otherwise strict obligations entitled a solicitor to decline to accept the instructions from the person concerned and also provided a defence to any criminal or disciplinary charge for contravention of s 89(1).[63]

[85] Similarly, solicitors would not be required to comply with the obligations if by doing so they would become liable, with the requisite knowledge, as a knowing

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56 At 69.
57 *Smith v Collier* [2001] NSWSC 194.
58 At [2].
59 At [19].
60 At [7], [9]–[17].
61 For example, section 220 of the Crimes Act 1961.
62 See, for example, Dal Pont, above n 45, at [19.10]–[19.1.5]; r 11.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008; s 15 of the Financial Transactions Reporting Act 1996;
63 *R v McLaughlin* [1985] 1 NZLR 106 (CA) at 107. See also r 4.2 of the Lawyers and Conveyancers Act: Conduct and Client Care Rules 2008 and Duncan Webb *Ethics, Professional Responsibility and the Lawyer* (2nd ed, LexisNexis, Wellington, 2006) at 196.

recipient of trust property transferred in breach or for dishonestly assisting that breach. As pointed out by Dal Pont:[64]

> Lawyers who carry out instructions that involve a fiduciary or trust breach may be found liable, if they exhibit the requisite knowledge, as a knowing recipient of trust property transferred in breach or for dishonestly assisting that breach. Liability in these cases is personal and unlimited, and so all prudent lawyers will make proper inquiry in receiving and transferring money or property on behalf of a client who is a trustee or fiduciary.

[86] Mr Woods for Mr Fletcher accepted that this statement in Dal Pont correctly summarised the law.

[87] In the present case there are two reasons why s 89(1) does not assist Mr Fletcher. First, he had dishonestly assisted Mr Hohepa to misappropriate the assests of the PWFM trust to a significant extent before he received any of the trust's money into his trust account. Second, contrary to the position in *Adams*, here there were allegations of dishonest purpose against Mr Fletcher that were found to be established by the Judge and are now upheld by this Court on appeal. In these circumstances the obligation under s 89(1) on Mr Fletcher to pay the funds out of his trust account as directed by Mr Hohepa was not applicable because by disbursing the funds of the PWFM trust in accordance with Mr Hohepa's instructions Mr Fletcher was dishonestly assisting Mr Hohepa's breaches of trust. The defence relied on by Mr Fletcher under s 89(1) is therefore not available to him.

[88] For these reasons we are satisfied that the provisions of s 89(1) did not provide Mr Fletcher with a defence to the claim for dishonest assistance. The Judge's finding of dishonest assistance is therefore upheld. For the reasons given at [5] above it is not necessary for us to consider the appeal against the Judge's findings of breach of fiduciary duty and knowing receipt.

Indemnity costs?

[89] Neither Mr MacDonald nor the Attorney-General sought indemnity costs against Mr Fletcher in the High Court and, as already noted, neither has cross-appealed to this Court against the High Court orders for scale costs in their favour.

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[64] At [19.35].

At our suggestion, however, both have sought orders for indemnity costs against Mr Fletcher in respect of his appeal to this Court.

[90] By r 53 of the Court of Appeal (Civil) Rules 2005 this Court has a wide discretion to make any orders as to costs that seem just. Further, under r 53E(3) the Court has express power to order a party to pay indemnity costs if the party has acted "unnecessarily" in bringing an appeal or some other reason exists which justifies the Court making an order despite the principle that the determination of costs should be predictable and expeditious. It is well-established that pursuit of a hopeless case may well justify an order for indemnity costs: *Bradbury v Westpac Banking Corporation*.[65]

[91] For Mr Fletcher, Mr Wood opposed any order for indemnity costs on the ground that nothing more than an order for scale costs was warranted. We do not agree. Once it was accepted, as Mr Wood did, that the High Court factual findings, which justified Mr Fletcher's liability for dishonest assistance, were not realistically open to challenge on appeal, the appeal was inevitably doomed to fail. Neither of the grounds raised by Mr Wood for challenging the High Court finding of liability for dishonest assistance was going to survive examination in this Court. Indeed, having heard Mr Wood's submissions on these grounds, it was unnecessary for us to call on counsel for Mr MacDonald and the Attorney-General to respond. The appeal was therefore a hopeless one which warrants orders for indemnity costs against Mr Fletcher.

[92] Orders for indemnity costs against Mr Fletcher are also warranted on the grounds that both Mr MacDonald, as trustee of the PWFM trust, and the Attorney-General, as protector of charities, are entitled to be reimbursed for the full amount of the legal costs reasonably incurred in opposing the appeal. The assets of the PWFM trust, which is a religious charitable trust, should not be further depleted in meeting any of the costs incurred either by its trustee, Mr MacDonald, or by the Attorney-General, in his capacity as protector of charities, in successfully opposing the appeal.

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[65] *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 401 (CA) at [29] and [73]–[74].

Nor in this case should the Attorney-General be required to meet his costs from taxpayer funds.[66]

[93] Mr Fletcher will therefore be ordered to pay reasonable indemnity costs to Mr MacDonald and the Attorney-General. If the parties are unable to agree on quantum, memoranda may be filed.

A stay?

[94] For completeness, we note that Mr Wood also raised the question of extending a stay of execution of the High Court judgment against Mr Fletcher, which was granted by Duffy J on 21 December 2011. The stay was granted on the conditions that it remained in force until 7 March 2012, the date of the hearing of the appeal, and that the judgment sum of $578,725.25, together with any outstanding costs, was paid to the solicitors for Mr MacDonald or a registered security over realty to that value was provided. As, however, the second condition imposed by the High Court in granting the stay was not met, no question of extending the stay arose.

Result

[95] For the reasons we have given the appeal is dismissed and Mr Fletcher is ordered to pay reasonable indemnity costs to both Mr MacDonald and the Attorney-General, together with usual disbursements.

Solicitors:
Therese M Slade, Auckland for Appellant
Armstrong Murray, North Shore City for Third Respondent
Crown Law,Wellington for Fourth Respondent

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66 *Laws of New Zealand* Charities (online ed) at [286].