IN THE COURT OF APPEAL OF NEW ZEALAND

CA108/2012
[2013] NZCA 449

BETWEEN	BARRY ROBERT SPENCER First Appellant
	DAVID JAMES UNDERWOOD AND PHILIP JOSEPH VAVASOUR Second Appellants
AND	BARRY ROBERT GIUSEPPE SPENCER First Respondent
	SPENCER GROUP LIMITED Second Respondent

Hearing:	16 and 17 April 2013 (further submissions received on 13 August 2013)
Court:	Arnold, Randerson and White JJ
Counsel:	C J Hodson QC for First Appellant H A Cull QC and P A Walker for Second Appellants J C Corry for First Respondent No appearance for Second Respondent (struck off)
Judgment:	27 September 2013 at 3:00pm
Reissued:	7 October 2013
Effective date of Judgment:	27 September 2013

JUDGMENT OF THE COURT

A We decline the application for leave to adduce further evidence on appeal.

B The appeal is allowed in part.

C **The judgment entered in the High Court is set aside.**

D **The appellants are ordered, jointly and severally to pay to the first respondent's solicitor, Mr David Booth, a total of $155,184 plus interest calculated in accordance with [156] hereof on the following terms:**

(a) **The judgment debt and interest thereon due to the first respondent in accordance with [160] hereof is to be paid to him; and**

(b) **Any balance is to be held by Mr Booth in trust pending the appointment of new trustees for the No.2 Trust and otherwise upon the terms of that Trust.**

E **The first respondent is entitled to judgment against all appellants jointly and severally for $65,000 together with interest calculated in accordance with [156] hereof.**

F **The costs order in the High Court is undisturbed.**

G **The appellants must pay jointly and severally the first respondent's costs in this Court for a standard appeal on a Band A basis and his usual disbursements.**

REASONS OF THE COURT

(Given by Randerson J)

Table of Contents

Introduction

[1] The matters at issue in this appeal arise from a family trust established in 1995 after the separation of the first appellant, Barry Spencer, and his first wife Alida.

[2] The couple had three children including Robert Spencer. Robert has a disability and his mother has pursued litigation on his behalf as his guardian. In terms of a Family Court order made in 1995, all three children were to be discretionary beneficiaries of the trust. In addition, there was to be a specific payment of $200 per week for Robert's maintenance.

[3] The trust was established with effect from 28 July 1995. We will refer to it as the No.2 Trust. The second appellants, Mr Underwood and Mr Vavasour, were trustees from the outset along with a solicitor, the late Mr Terrence Brandon. Barry Spencer became a third trustee in November 1996, replacing Mr Brandon. We will refer to them collectively as "the trustees". Robert and his two siblings were discretionary beneficiaries. Barry Spencer also later became a discretionary beneficiary of the trust.

[4] A principal asset of the No.2 Trust was a commercial building on Thorndon Quay, Wellington built on land leased from the Wellington City Council.[1] The building was heavily mortgaged and had little equity. There were a number of tenants and the building was managed by a company called Spencer Group Ltd (SGL). At material times Barry Spencer was a director and shareholder and was employed by the company as its manager.

[5] The Thorndon Quay property produced very little net income, if any. It was sold in October 2000 after being freeholded. The No.2 Trust is now insolvent and SGL was struck off the register of companies in 2004.

[6] Some of the weekly payments due to Robert were made in 1995, but they were stopped in December of that year and did not resume. Mrs Alida Spencer[2], on behalf of Robert, issued court proceedings in 1998 seeking a variation of the No.2 Trust deed. We will refer to this in more detail later. It was not until October 2001 that Robert issued proceedings against Barry Spencer personally, and against Messrs Barry Spencer, Underwood and Vavasour as trustees alleging irregularities in the administration of the No.2 Trust.[3] SGL was joined as a third defendant but had already been struck off the register of companies by the time of trial. The remedies sought included an inquiry into the trust's income and orders for the restoration of losses said to have resulted from breaches of trust.

[7] In a judgment issued on 19 October 2011, French J found that the trustees

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1 The leasehold interest was held by Roberts Family Investments Ltd on behalf of the No.2 Trust.

2 Mrs Spencer has since reverted to using her maiden name but, for convenience, we will refer to her as Mrs Spencer.

3 Mr Brandon was also initially a defendant but it appears he was no longer a party by the time of the hearing in the High Court.

had committed breaches of trust for which they were personally liable.[4] She also found that the trustees had acted dishonestly and were not entitled to protection under an exemption clause in the trust deed for the No.2 Trust or to relief under s 73 of the Trustee Act 1956.

[8] In a second judgment delivered on 3 February 2012, the Judge decided the quantum of losses sustained.[5] Judgment was given against Barry Spencer in his personal capacity and against the trustees for a total of $564,131 made up as follows:

(a)	Payments due to Robert up to 31 March 2004	$ 65,000
(b)	Interest thereon from 21 December 1995 to date of judgment (3 February 2012)	$ 52,125
(c)	Amount that ought to have been recovered from SGL	$ 80,000
(d)	Income that the Trust would have received from rent that should have been charged to SGL and from interest on the SGL debt	$100,373
(e)	Cash paid to SGL for management fees improperly charged to the Trust	$ 53,784
(f)	Interest on Barry Spencer's drawings at 31 March 2004	$ 17,403
(g)	Advances to Barry Spencer charged to children's current accounts	$ 30,878
(h)	Interest on the total of items (c) to (g) to 31 March 2004	$ 35,738
(i)	Interest from 1 April 2004 to 3 February 2012	$101,295
(j)	Costs	$ 25,816
(k)	Disbursements	$ 1,719
	Total	**$564,131**[6]

4 *Spencer v Spencer* HC Wellington CIV-2001-485-857, 19 October 2011.

5 *Spencer v Spencer* [2012] NZHC 55.

6 Judgment for the first two items was entered in favour of Robert personally. The remaining items were ordered to be restored to the No.2 Trust and held in a solicitor's trust account on the terms of the trust. This was appropriate since Robert was only one of four discretionary beneficiaries in respect of such items.

[9] This appeal brought by Barry Spencer and the trustees challenges almost all the findings of the High Court Judge as being wrong in fact and law.[7] A preliminary point is whether the terms of the 1995 court order meant that the No.2 Trust or the obligations thereunder did not come into effect. The argument is that the order was subject to a condition that was never fulfilled.

[10] In broad terms, the issues are:

(a) Whether the No.2 Trust (or the obligations under it) ever came into effect.

(b) Whether the trustees were in breach of trust and whether they and Barry Spencer in his personal capacity were liable for:

(i) Failing to pay Robert the $200 per week.

(ii) Failing to recover the debt due to SGL and to charge interest on it.

(iii) Charging management fees through SGL to the No.2 Trust or, if permitted to do so, charging excessively.

(iv) Failing to charge SGL rent for the use of the No.2 Trust's premises.

(v) Failing to charge Barry Spencer interest on his drawings from the No.2 Trust.

(vi) Charging advances made to Barry Spencer to the children's current accounts.

(c) If the trustees were in breach of trust in any respect, whether they are protected by the terms of the No.2 Trust deed and/or

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7 A pro-forma notice of appeal (CA766/2011) was filed after the liability judgment was issued but has been subsumed by the present appeal.

whether they are entitled to relief under s 73 of the Trustee Act?[8]

[11] We observe at the outset that the High Court Judge was placed in a most unsatisfactory position. First, only limited documentary records were available in relation to the affairs of the No. 2 Trust. Second, there was inordinate and unexplained delay of 10 years between the date the court proceedings were issued and the date of hearing. That led to understandable difficulty for the witnesses in recalling relevant events. And third, the appellants chose to represent themselves and were unable to provide the court with the assistance that could have been expected if they had engaged counsel. This meant that some issues important in the disposal of this appeal were never raised in the High Court.

The facts

[12] We now set out the undisputed factual material, drawing from the summary in the High Court judgment. Barry Spencer is a real estate agent and a property developer. In 1980, he had established a trust known as the Spencer Family Trust which, for convenience, we will call the No.1 Trust. After Mr and Mrs Spencer separated in 1992, relationship property proceedings issued in the Family Court were settled by a consent order dated 19 July 1995.

[13] The scheme of the order was that certain specified assets including the family home were to remain in the No.1 Trust for the benefit of Mrs Spencer and the children. The balance of the assets and liabilities of the No.1 Trust were to be settled upon the trustees of the No.2 Trust. Other key terms of the order were:

> 5.2 The Terms of the Trust Deed shall be in like terms (with necessary modifications) to those of the Spencer Family Trust provided that Alida Giuliana Maria Luisa Spencer[9] shall not be a beneficiary and Barry Robert Spencer may, at his discretion, be a beneficiary;
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> ...
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> 6. The Trustees of the No.2 Trust shall resolve to apply the net income of such Trust firstly:

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8 The Judge also found that life insurance premiums associated with the NZI mortgage on the Thorndon Quay property should not have been treated as an expense against income but no loss appears to have been attributed to this and we do not need to deal with it.

9 Mrs Spencer.

(a) In payment of the sum of $200.00 per week for the maintenance and support of Barry Robert Giuseppe Spencer, a child of the marriage.

(b) In payment of school fees of Alida Antonia Laura Spencer, a child of the marriage.

(c) In providing, according to the discretion and duty of the Trustees, for the general welfare, education and advancement in life of the 3 children of the marriage.

7. This order is subject to and conditional upon the NZI Life agreeing to accept a principal reduction of $150,000.00, to reduce interest to a sum not exceeding 11% p.a. and suspending payment of premiums on collateral life policies for a period of not less than 3 years.

8. The Trustees of the No.2 Trust only may waive this condition.

[14] Both Mr Underwood and Mr Brandon were trustees of the No.1 Trust at the time of the 1995 court order but they resigned soon afterwards and were appointed trustees of the No.2 Trust, along with Mr Vavasour.

[15] According to the first set of accounts prepared for the No.2 Trust for the period to 31 March 1996, capital of $227,851 was transferred to it from the No.1 Trust. The Judge found this was made up as follows:

Buildings (141-147 Thorndon Quay)	$874,000
Office furniture and equipment	$53,500
Total	**$927,500**
less mortgage to NZI	$900,000
balance building/office equity	$27,500
add Spencer Group debt	$184,512
add motor car	$12,000
add cash	$3,839
Total trust equity	**$227,851**

[16] It is not in dispute that, during the first financial year of the No.2 Trust, the debt of $184,512 owed by SGL increased by $11,250 (on account of rent owed by SGL) to a total of $195,762.

[17] After the No.2 Trust was established, seven fortnightly sums of $400 each were paid from the No.2 Trust to Robert. As noted earlier, those payments stopped in December 1995. When an explanation was sought by Mrs Spencer and her solicitors, Mr Underwood replied by letter of 20 December 1995:

> ... the trustees do not have the resources to commence making payments and that position will continue until Thorndon Quay has been relet and the income flow is sufficient to generate a surplus.

[18] Mrs Spencer continued to press for payment in 1996 but to no avail. She also requested a copy of relevant documents and information. This was not supplied. Mr Underwood told her that the beneficiaries were not entitled to obtain the information, relying on a clause in the trust deed. He advised Mrs Spencer that the No.2 Trust was still in financial difficulties.

[19] Matters rested there until 1998 when High Court proceedings were issued in Robert's name against the trustees and served on 22 May 1998. The statement of claim raised the non-payment of the $200 per week for Robert and also sought confirmation that the trust deed for the No.2 Trust was "in like terms (with necessary modifications) to those of the [No.1 Family Trust] ...", as required by the 1995 court order. Robert sought an order that the trust be audited and, if necessary, an order under s 64A of the Trustee Act varying the trust deed to reflect the original intention of the District Court.

[20] The trustees filed a statement of defence and a list of documents. A copy of the trust deed for the No.2 Trust was made available to Robert's solicitors. During 2000, the trustees offered Robert's solicitor the opportunity to view and examine the accounts for the No.2 Trust and Mr Underwood answered a number of questions put to him by Robert's legal adviser. Mr Underwood provided accounts for the No.1 Trust for the period 31 March 1989 to 31 March 1994.

[21] The Thorndon Quay property was sold in October 2000 with a small profit after repayment of the mortgage and other liabilities.

[22] On 29 March 2001 Robert Spencer's counsel filed a memorandum in the High Court for the purposes of a judicial settlement conference. The memorandum

stated there was no longer any need for an audit of the No.2 Trust since the trustees had provided information about the trust's activities. The memorandum referred to differences between the terms of the No.1 and No.2 Trusts which, it was said, did not conform to the 1995 court order. It also attached a schedule of proposed amendments to the No.2 Trust deed. The memorandum described the second claim in the proceedings as being for the "variation or rectification" of the No.2 Trust.

[23] On 4 July 2001 a consent order was made in the High Court requiring the trust deed for the No.2 Trust to be "rectified" in the terms contained in a schedule attached to the order. French J described the two most important changes effected by the rectification order as the deletion of the clause denying beneficiaries access to information and the inclusion of a more restrictive clause regarding payments to trustees. We will return to the details of these provisions when considering the specific issues to which they relate.

[24] Mrs Spencer subsequently obtained the accounts for the No.2 Trust for the years 1996 to 2004 showing combined losses of over $214,771. This led to a number of concerns and the issue of the present proceedings in October 2001.

[25] As earlier noted, SGL was struck off the register of companies in June 2004. Despite the small profit made on the sale of the Thorndon Quay property, the No.2 Trust was insolvent, its only asset being tax losses.

Did the No.2 Trust or the obligations under it ever come into effect?

[26] This issue focuses upon cls 7 and 8 of the Family Court order quoted at [13] above. Clause 7 made the court order conditional upon the mortgagee (NZI) agreeing to three things: a principal reduction of $150,000; the reduction of interest to a sum not exceeding 11 per cent per annum; and the suspension of the payment of premiums on collateral life policies for a period of not less than three years. Clause 8 provided that only the trustees of the No.2 Trust could waive this condition.

[27] It is common ground that the reduction in debt was the only one of the three matters specified in cl 7 that was ever satisfied. In the High Court, the trustees argued that the court order, and hence the obligation to pay Robert, never came into

force.

[28] The Judge concluded that this argument was entirely without merit. She reasoned that:

> [47] The trustees accepted the trust property from the № 1 Trust and assumed control over it. They did so in their capacity as trustees of the № 2 Trust which had been created pursuant to the Court order. Over the ensuing years, they dealt with that property as if they were unconditionally entitled to do so, including selling it. They also consented to a High Court judgment rectifying the trust deed in order to comply with the Family Court order. At no stage until now did they ever suggest that the reason they were not paying any money to Robert was because the order had not become unconditional.
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> [48] By their conduct, the trustees clearly waived the conditions. Alternatively, if waiver is not applicable because the trustees were previously unaware of the existence of cl 7 then in the circumstances they are clearly estopped from claiming the order never became unconditional.

[29] In a footnote, the Judge referred to a submission by Barry Spencer that the trustees had attempted to operate as if the court order was in force. However, the Judge said the evidence established that none of the trustees was aware of the existence of cl 7.

Interpretation of the condition

[30] An issue was raised about the interpretation of the condition. In particular, was cl 7 intended to apply to the entire order or only part of it? It appears this issue was not raised in the High Court.

[31] Clauses 1–5 of the order effected the major restructuring of the assets of the No.1 Trust and the creation of the No.2 Trust. As noted at [13] above, there was a division of assets between the two trusts to give effect to an agreed settlement of relationship property issues between Mr and Mrs Spencer. Clause 6 then required the trustees of the No.2 Trust to resolve to apply the net income of the trust to make the payments of $200 per week to Robert, to pay school fees to another child of the marriage and otherwise, to provide on a discretionary basis for the general welfare of all three children of the marriage.

[32] Read literally, cl 7 could have applied to all the terms of the order including

the restructuring of the No.1 Trust, the creation of the No.2 Trust and the division of assets. However, if cl 7 had been intended to apply to all of the provisions of the court order, it would have meant that the entire order would have become ineffective if the condition were not fulfilled. That would have meant that the entire arrangement was at an end with no resolution of the relationship property proceedings between Mr and Mrs Spencer that the order was intended to resolve.

[33] The plain objective of cl 7 was to reduce the trust's obligations to NZI under the mortgage and the associated life policies. It is reasonable to infer that the trustees were concerned they would not be able to fulfil their obligations under cl 6 unless they could achieve the reduction in outgoings they were seeking. We find that, on the true interpretation of the Family Court order, cls 7 and 8 were intended to apply only to the obligations of the trustees under cl 6 of the order.

Waiver/estoppel

[34] In any event, we are satisfied for the reasons the Judge gave, that the trustees waived cl 7 regardless of whether it applied to the entire order or only to the obligations under cl 6. We would add that the trustees clearly accepted the obligation to make the weekly payments to Robert as required by the court order. A total of $2,800 was in fact paid. The first fortnightly payment of $400 was made on 25 August 1995, just one month after the order. Six further payments of the same amount followed in September, October, November and December 1995 before they stopped.

[35] Counsel for the trustees, Ms Cull QC, accepted that Barry Spencer knew of the terms of the 1995 order at the time it was made and that Mr Brandon knew of it as well. Mr Underwood must have been aware of it too since he knew the weekly payments due under it were being made.[10] We are satisfied that all of the trustees in office in 1995 and 1996 (including Mr Vavasour) acquiesced in the payments being made to Robert. None of the trustees mentioned cl 7 as a reason for stopping the payments until years later after court proceedings were issued. The only reason given at the time the payments stopped was lack of funds.

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[10] The trustees admitted knowledge of the terms of the 1995 order in their statement of defence.

[36] Ms Cull argued that the waiver was not communicated to Robert and his mother. However, if the trustees were intending to rely on cl 6, it was incumbent on them to raise it at the time. Instead, by their conduct in making the payments to or on behalf of Robert, they communicated their acceptance of their obligation to him in the clearest possible way. In doing so, they plainly eschewed any reliance on cl 7.

[37] The Judge found, in the alternative, that the trustees were estopped from asserting the court order never became unconditional. It is unnecessary for us to determine whether she erred in that respect.

The breaches alleged

Failure to pay Robert the $200 per week

[38] The Judge noted that the trustees did not pass a formal resolution to apply the net income of the trust for the weekly payments to Robert. She said nothing turned on this since it was accepted that Robert was entitled as of right to the payments, subject only to the proviso that there was sufficient "net income" in the trust to make the payments. Whether that was so was very much in dispute.

[39] The obligation to pay Robert the $200 per week from the net income of the No.2 Trust was initially imposed by the 1995 court order, but the trustees accepted it as a term and obligation of the trust. If there were net income in the No.2 Trust from time to time, then the trustees would be in breach of trust if they did not pay it to Robert.

[40] Although the trust received total rental income of $974,681 from the Thorndon Quay property over the period from 1995 to 2000, it did not make a profit in any of those years other than 1996 ($263) and 2001 ($24,822). Over the period, there were accumulated losses of $214,771. As already noted there were heavy overheads including interest on the borrowings from NZI, ground rent, repairs, maintenance and depreciation. There were no significant sources of income for the trust other than the rental from the building.

[41] In the High Court, the case for the trustees was that the accounts showed

there was no net income available to pay Robert. On Robert's behalf, Mr R D Berry, a retired chartered accountant, gave evidence questioning a number of items in the accounts for the No.2 Trust. His view was that a number of items had been wrongly charged against income including depreciation, the payment of management fees and the inclusion of payments of insurance premiums as an expense. He also considered that rent ought to have been charged to SGL for its use of the building and that interest should have been charged on the SGL debt.

[42] Once those adjustments were made, Mr Berry concluded there would have been sufficient funds to pay Robert the total of $10,400 per annum to fulfil the requirement for the weekly payments due to him. In his closing submissions, Robert's counsel Mr Corry accepted the adjustments advocated by Mr Berry would not have resulted in net income in the trust in the years 1998 and 2000 but submitted there would have been sufficient accumulated income to cover those years.

[43] Mr Berry acknowledged that the existence of "net income" in the No.2 Trust meant there had to be sufficient cash available at the relevant time in order to make the payments to Robert. The onus of proof to that effect is an important issue which we discuss below.[11] We deal first with the nature of the SGL debt.

The SGL debt

Origins

[44] SGL was incorporated in 1990 by Mr Brandon and Mr Underwood. Barry Spencer said it was formed to provide a vehicle for him to continue working if he became bankrupt as a result of his exposure to the Bank of New Zealand arising from a property development in which he had been involved. Barry Spencer was not initially a director or shareholder of SGL, but was employed throughout as the company's manager. Later, Mr Brandon was replaced by Mr Vavasour as a shareholder and Barry Spencer also became a shareholder and director.

[45] The nature and origins of the SGL debt were examined in some depth in the High Court. As the Judge noted, the explanations for the debt varied. Barry Spencer

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[11] At [54] and following.

said that it reflected "creative accounting" or a "massaged figure" designed to demonstrate that the No.2 Trust was more substantial than it really was. Mr Underwood (as the accountant responsible for the No.2 Trust) said it was a real debt but suggested it represented the debt due by the beneficiaries in their current accounts in the No.1 Trust. He said that after the 1995 court order, SGL assumed that debt as part of the division of assets at that time.

[46] The Judge noted there were no accounts or other records to demonstrate how this debt was created or had been assumed by SGL. Although annual accounts were available for the No.1 Trust for the financial years 1989 to 1994, none were ever completed for the year ended 31 March 1995.

[47] We share the Judge's concerns about how the debt arose and how it could have been assumed by SGL. But we do not need to resolve this issue since it was accepted before us by the appellants that it was a real debt of $195,762 owed by SGL to the No.2 Trust.

Were the trustees in breach of trust by failing to take steps to recover the SGL debt?

[48] The first question is whether the trustees were in breach of trust by failing to consider or take steps to recover the SGL debt or interest thereon. The Judge found that it was incumbent on the trustees to at least make some attempt to recover the debt or to seek interest on it.[12] However, they did not even initiate inquiries. She was satisfied they had no intention of ever requiring payment of it. That conclusion was justified by evidence from the trustees that they regarded the debt as essentially representing amounts due by the beneficiaries in their current accounts in the No.1 Trust and from evidence that it was intended the debt would be written off in due course.

[49] We agree with the Judge that the trustees were in breach of trust at least by failing to consider whether recovery action should be taken. This would have required the trustees to make appropriate inquiries as to SGL's ability to pay and whether it would have been cost effective to take recovery action. There is no

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12 *Spencer v Spencer*, above n 4, at [181].

evidence that they did so.

[50] The obligation to explore recovery of the debt arose immediately upon the formation of the No.2 Trust in 1995. As we have said, the trustees made no effort to explore recovery of the debt at that time. Subsequently, however, they did offset the debt against management fees that SGL claimed from the trust. It was not until August 1997 that the first invoice (for $5000) was issued by SGL to the trust for management fees. Four more invoices were issued in May 1999 purporting to cover the years 1995 to 1999. A statement of account rendered by SGL on 11 June 1999 showed that the amount owing by the trust at that date was $144,779.56. As the Judge noted, this was after the first court proceedings were issued and at a time when Barry Spencer was proposing to sell the Thorndon Quay property.

[51] The offsetting of the SGL debt did not appear in the annual accounts for the No.2 Trust until the year ended 31 March 1999. The annual accounts for that year show the SGL debt was reduced from $195,762 to $70,983. In the following year, the annual accounts show the SGL debt had been reduced to nil.

[52] Clearly, the way in which the offsetting came about raises some questions, although it does at least demonstrate that the trustees considered that the SGL debt was a real debt. The question whether any management fees were properly payable, and, if so, in what amount, becomes critical. If no management fees were properly payable, the consequence is that none of the SGL debt was properly extinguished; if the payment of management fees was authorised in principle but the amount was excessive, any amount forgiven in excess of a proper fee was wrongly forgiven.

[53] For reasons which we set out below, we consider that the management fees were not authorised. It follows that, prima facie, the SGL debt could not be legitimately extinguished by setting off the management fees against this. Accordingly, issues relating to the recovery of the balance of the SGL debt must be considered, in particular, where the onus of proof lies on the question whether recovery was possible and what the evidence indicates about SGL's capacity to pay. There may also be an issue as to whether the trustees are entitled to protection from liability to the extent the management fees were found to be reasonable.

The onus of proof of loss

[54] The assumption made by the Judge and by all parties at the hearing before us was that the onus was on Robert to establish that there was net income in the No.2 Trust despite the losses shown in the accounts of the trust over the relevant period. However, after the hearing, we sought and received further submissions on this issue since our research showed that this assumption might be incorrect.

[55] Predictably, the trustees have submitted that the onus of proof of loss remained on Robert as the plaintiff beneficiary while Robert has argued to the contrary that the onus is on the trustees. We have concluded that Robert's submission is correct for the reasons that follow.

[56] Where there has been a breach of trust in failing to recover an acknowledged debt due, trustees may seek to exonerate themselves by demonstrating that any attempt to do so would have been fruitless. However, the onus of proof in this respect is on the trustees.

[57] Early authorities in the United Kingdom support these principles which remain applicable today. The leading English authority is the Court of Appeal's decision in *In re Brogden; Billing v Brogden.*[13] Delivering the first judgment, Cotton LJ said:[14]

> In my opinion it is not for the *cestuis que trust* seeking to make the trustee liable, to shew that if he had done his duty he would have got the money for which they are seeking to make him answerable. It is the trustee who is seeking to excuse himself for the consequences of his breach of duty. It was his duty to take active proceedings … by way of action at law, if necessary; and if the trustee is to excuse himself, it is for him to shew that if he had taken proceedings no good would have resulted from it. Once shew[n] that he has neglected his duty and *prima facie* he is answerable for all the consequences of that neglect …

[58] Fry LJ agreed. He accepted that a trustee has a discretion as to the mode, manner and timing of carrying his duty into effect but he said this is not an absolute

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13 *In re Brogden; Billing v Brogden* (1888) 38 Ch D 546.
14 At 567–568.

discretion. It is always limited by the dominant duty to recover, secure and duly apply the trust fund.[15] He added:[16]

> When the *cestui que trust* has shewn that the trustee has made default in the performance of his duty, and when the money which was the subject of the trust is not forthcoming, the *cestui que trust* has made out, in my judgment, a *prima facie* case of liability upon the trustee, and if the trustee desire[s] to repel that by saying that if he had done his duty no good would have flowed from it, the burden of sustaining that argument is plainly upon the trustee.

[59] Lopes LJ also agreed. He considered the trustee was bound to make demand upon the debtor and, if necessary, to issue proceedings to recover the debt. He continued:[17]

> I know of nothing which would excuse the neglect of such action on the part of a trustee, unless it be a well-founded belief that such action on his part would result in failure and be fruitless, the burden of proving the grounds of such well-founded belief lying on the trustee setting it up in his own exoneration. No consideration of delicacy, and no regard for the feelings of relatives or friends, will exonerate him from taking the course I have indicated.

[60] On the facts, the trustee in *Brogden* was held liable since the evidence showed that if he had taken steps earlier, the debt could have been recovered. By delaying, only a small portion of the debt had been recovered.

[61] In considering whether to take proceedings to recover the debt, trustees may take into account the position of the debtor, the amount of the debt and the probability of the proceedings being successful: *Re Owens*; *Jones v Owens*.[18] In that case, trustees were exonerated where it was reasonable for them to have accepted assurances of payment from the debtor after the sale of his farm. The trustees had acted in good faith.

[62] The propositions confirmed in *Re Brodgen* are supported by other English

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15 At 571.
16 At 572–573.
17 At 574.
18 *Re Owens*; *Jones v Owens* (1882) 47 LT 61 (CA) at 63.

cases[19] and the law has also been confirmed in a range of standard texts and other sources of law.[20]

[63] It was submitted on behalf of Barry Spencer and the trustees that the onus of proof remained on Robert throughout and did not shift to them. The decision of this Court in *Scott Timber & Hardware Co Ltd v Northern Steam Ship Co Ltd* was cited in support of this proposition.[21] The Court was there considering the effect of a clause in a bill of lading which exempted the ship owner from liability for loss or damage. It was held that if the evidence adduced by the plaintiff showed that it was probable that negligence was the cause of the damage then the plaintiff succeeded.[22] This was not because of any change in onus on the defendant, but because of the weight of evidence before the court. If the ship owner sought to displace the conclusion that the court would be likely to come to on the plaintiff's evidence, then it was in the ship owner's interest to call other evidence. This was not properly referred to as an onus on the ship owner. Rather, it was nothing more than the ship owner protecting himself from the result that might flow from the evidence by ensuring that other evidence was available which, on the balance of probabilities, would lead a court to a finding of no negligence.

[64] We do not consider *Scott Timber* has any bearing upon the present case which is concerned with alleged breach of duty by the trustees. We are satisfied that it was sufficient for Robert to establish that there was a debt (a fact which is now admitted) and that no steps have been taken to recover that debt. It then fell upon the trustees to adduce evidence to establish that, despite their inaction, any steps to recover the debt would have been fruitless or ineffectual. In circumstances where the trustees were prima facie guilty of a breach of duty owed to the beneficiaries, it was for the

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19 *Clack v Holland* (1854) 19 Beav 262 (Ch); *In re Stevens; Cooke v Stevens* [1898] 1 Ch 162 (CA) at 171; and *Re Greenwood; Greenwood v Firth* (1911) 105 LT 509 (Ch).

20 John Mowbray and others *Lewin on Trusts* (18th ed, Sweet & Maxwell Ltd, 2008) at [34–19]; Greg Kelly and Chris Kelly *Garrow and Kelly Law of Trusts and Trustees* (7th ed, LexisNexis, Wellington, 2013) at 672–673; *Halsbury's Laws of England* (4th ed, re-issue, 2007) vol 48 Trusts at [958]–[960]; and *Laws of New Zealand* Trusts (Re-issue 1) at [294]–[295].

21 *Scott Timber & Hardware Co Ltd v Northern Steam Ship Co Ltd* [1961] NZLR 1004 (SC).

22 At 1007.

trustees to show that they ought to be exonerated. That is consistent with the approach of the Supreme Court in *Premium Real Estate Ltd v Stevens*.[23]

[65] Counsel for the appellants also referred to cls 10.22 and 10.25 of the trust deed. However, we are satisfied that neither of these provisions has any application in relation to the SGL debt. Clause 10.22 deals with the power of the trustees to forgive or release any debt due to the trust fund by a beneficiary, not a third party such as SGL. And cl 10.25 relates to the power of the trustees to lend or advance trust monies to others. There is no evidence that the trustees ever agreed to lend or advance monies to SGL. Rather, the proposition advanced by the trustees was that SGL had somehow assumed the debt which the beneficiaries owed to the No.1 Trust. As noted above, no documentary evidence was ever produced to establish how this came about.

[66] For completeness, we record that we also sought submissions from counsel as to the possible application of s 20 (e) and (g) of the Trustee Act. However, neither party sought to rely on these provisions and we are satisfied that, on the facts, they do not arise for consideration.

What was the evidence of SGL's ability to satisfy the debt?

[67] The only documentary evidence offered in relation to SGL's financial state was its cashbook records which were introduced by consent. Mr Berry did not refer to these records in his evidence and did not suggest he had analysed them. However, counsel for Robert put some of SGL's cashbook records to Barry Spencer with the leave of the Judge after re-examination was complete. Barry Spencer was asked about a term deposit of $80,000 shown in the cashbook at August 1995, soon after the No.2 Trust was established. As this question came out of the blue some 16 years later, it is not surprising that Barry had no recollection of the deposit. Mr Underwood was also asked about this later in cross-examination and was unable to recall what the deposit represented or how long the funds had remained on deposit.

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[23] *Stevens v Premium Real Estate Ltd* [2009] NZSC 15, [2009] 2 NZLR 384 at [85], Blanchard J delivering judgment for himself, McGrath and Gault JJ). Tipping J did not touch on the onus point but he agreed with the reasoning of the majority. A different approach was advocated by the Chief Justice at [37]–[41].

[68] The Judge found on the basis of the cashbook evidence that at least $80,000 was available to meet the debt (in part) if payment had been sought in August 1995.[24] The Judge summarised the evidence on this topic in these terms:

> [178] The only evidence that would suggest some funds were available is Spencer Group's cash book. It shows that by 8 August 1995, $180,000 had been paid out through the bank account to commercial call or term deposit, and $100,000 paid back, a net outflow to commercial call or term deposit of $80,000. Those funds remained available, albeit on a reducing basis, for several months. There was also evidence that between October 1995 and February 1996, withdrawals were made from the commercial call account totalling $57,500.

[69] The trustees challenged the Judge's conclusion that, in August 1995, SGL had $80,000 on term deposit and, on a reducing basis for several months thereafter. While the cashbook shows that $80,000 remained on deposit at 31 August 1995, the cashbook records reveal that the funds deposited had reduced to $25,000 by the end of September, $15,000 by the end of October and to $3,000 by the end of November 1995.

[70] If the onus of proof had been on Robert to establish that SGL could have repaid at least $80,000 to the No.2 Trust, it may be doubted that the existence of deposits of these amounts for a brief period would have afforded sufficient proof. A proper analysis of income and outgoings over time as well as details of the assets and liabilities of the company would have been expected. But the obligation to show that SGL could not have paid that amount was on the trustees and they did not attempt to do so. It was for them to analyse SGL's records and financial statements and prove that the debt could not have been paid. They did not do so despite the fact that the recovery of the debt was known to be an important part of Robert's allegations of breach of trust. Merely to make unsupported assertions that SGL could not have paid the debt did not meet the onus of proof.

[71] We conclude that the trustees did not demonstrate that SGL could not have paid the debt if they had attempted to recover it. We deal later with the consequences of that failure.

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24 *Spencer v Spencer*, above n 4, at [181].

The management fees charged by SGL

[72] In the High Court, it was alleged that the trustees were in breach of trust by employing SGL to manage the Thorndon Quay building and that, in any event, excessive fees had been charged. The Judge approached this issue under three headings:

(a) What were the fees charged?

(b) Was charging the fees a breach of the trust deed?

(c) Were the fees excessive?

The fees charged

[73] The trustees maintained that they engaged SGL to manage the property on the basis of an agreement that SGL would charge the No.2 Trust a management fee of 7.5 per cent on both rent and outgoings (except mortgage payments). The trustees relied on a letter dated 24 April 1995 on SGL letterhead, addressed to the trustees of the Spencer Family Trust.[25] It covered both management fees and rent to be paid by SGL for its use of part of the property. The letter was signed by Mr Barry Spencer on behalf of SGL and marked "approved" on 26 April by Mr Underwood and Mr Vavasour. The letter stated:

> RE: Management Fees/Office Rental – Spencer Family Trust
>
> A brief note to confirm in writing the details of our agreement regarding fees for managing the affairs of the Spencer Family Trust and the Rental of office space for Spencer Group Limited.
>
> Spencer Group Ltd will be paid 7.5% of all receipts and disbursements made on behalf of the Spencer Family Trust as from the time of Barry and Alida's separation, 28/9/92.
>
> Office space occupied by Spencer Group Ltd, Top floor 141 Thorndon Quay, will be offset against the management fee.
>
> The office rental has been agreed at $100 per week or $5,200 p.a. applicable from the same date.

[74] The Judge was critical of the evidence on this point for a number of reasons.

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[25] The No.1 Trust.

First, the letter purported to record an agreement between SGL and the then trustees of the No.1 Trust (the No.2 Trust had not come into being at that stage). Second, there was no written record of the trustees of the No.2 Trust ever resolving to adopt the agreement. Third, the agreement purported to backdate the fees to 1992 (giving rise to a potential liability of approximately $100,000 which was not disclosed at the time of the High Court order in 1995 nor shown as a liability in the opening accounts of the No.2 Trust). The Judge said it was difficult to avoid the conclusion that the letter was designed to advantage Barry Spencer at his wife's expense and secure some form of leverage.

[75] The Judge went on to note that the arrangement recorded in the letter of 24 April 1995 contradicted the minutes of the inaugural meeting of the No.2 Trust on 28 July 1995 which stated that Barry Spencer had offered to manage the trust's investments without fee. The minutes also recorded that the trustees resolved to accept the offer on a trial basis, to be reviewed at 31 March 1996. There was no written record of any such review having taken place, yet Barry Spencer had testified that it was agreed the review date would be brought forward and that SGL began charging management fees from August 1995 at the previously agreed rate.

[76] As earlier noted, SGL did not issue invoices until some time later between 1997 and 2000.[26] The total fees invoiced by SGL amounted to $256,152 (GST exclusive). Of that sum, $167,752 comprised the management fees charged on the 7.5 per cent basis while the remaining $88,400 comprised fixed fees charged for various specified projects. The No.2 Trust satisfied these fees partly by writing them off against the SGL debt owed to the trust and partly in cash. The total written off was $195,762 while the trustees made cash payments to SGL totalling $53,784, over the period August 1997 to December 2000.

Was it a breach of trust for the trustees to employ Barry Spencer and thereby incur management fees?

[77] In the High Court, it was contended on Robert's behalf that the trust deed for the No.2 Trust, in its rectified form, prohibited the trustees from employing

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[26] The first was issued in August 1997; four more were issued in May 1999 covering the period 1995 to 1999; thereafter further invoices followed, the last being November 2000.

Barry Spencer to undertake work on behalf of the trust. As the Judge noted, the original form of the trust deed for the No.2 Trust dated 28 July 1995 did not contain any such prohibition. Clause 10.26 of the original deed empowered the trustees:

> 10.26 To employ and pay any person firm company or corporation (including any Trustee and including any nominee company controlled by a solicitor or chartered accountant alone or in partnership and notwithstanding that such solicitor or chartered accountant may be a Trustee hereof) to do any act of whatever nature relating to the trusts hereof including the receipt and payment of money without being liable for loss incurred thereby.

[78] And cl 11.03 of the original deed provided:

> 11.03 No Trustee shall be disqualified by his office as such from contracting with the Trustees either as vendor purchaser or otherwise nor shall any such contract or any other arrangement or transaction entered into by the Trustees in which any one or more of the Trustees may be in any way interested by thereby void or voidable nor shall any Trustee so contracting or being so interested be liable to account to the Trustees for any profit realised from any such contract, arrangement or transaction.

[79] The effect of the order for rectification in 2001 was to insert a new cl 5(m) in the following form:

> 5. THE Trustees shall have and may exercise either alone or together with any other person or persons the following powers authorities and discretions namely:
>
> (m) TO employ and pay any person, firm, company or corporation (including any trustee other than the settlor) to do any act of whatever nature relating to the trusts hereof including the receipt and payment of money without being liable for loss incurred thereby <u>AND IT IS DECLARED</u> that any trustee for the time being hereof being a solicitor or accountant or other person engaged in any profession or business and any firm of which any such person may be a partner shall be entitled to charge and be paid all proper professional and other charges for any business or act done whether by such person or such firm in connection with the Trust Fund or income thereof including acts which a trustee could have done personally <u>BUT IT IS EXPRESSLY DECLARED</u> that neither **BARRY ROBERT SPENCER** nor the personal representative of **BARRY ROBERT SPENCER** shall be entitled to charge or be paid for any act service or business performed by **BARRY ROBERT SPENCER** as such trustee or to apply to the Court for commission under the provisions of Section 72 of the Trustee Act 1956 (or any statutory modification or re-enactment thereof) or to receive or be paid any commission or share of commission granted by the Court upon the application of any trustee hereof or in any other manner to

> receive or be paid any benefit whatsoever for any act service or business performed as a trustee hereof;

[80] This clause was required in terms of the 1995 court order which stipulated that the trust deed for the No.2 Trust had to be "in like terms (with necessary modifications)" to those of the No.1 Trust. The latter included a clause in similar terms.[27]

[81] It is not in dispute that cl 5(m) differed markedly from cl 11.03 of the original trust deed for the No.2 Trust. The rectified clause made it clear in the opening words that the trustees could not employ or pay the settlor to undertake work on behalf of the trust. This precluded Mr Barry Spencer as settlor from undertaking any such work. The rectified clause went on to expressly declare that neither Barry Spencer nor his personal representative was entitled to charge or be paid for any act, service or business performed by Barry as trustee.

[82] In the High Court, French J rejected an argument presented by the trustees that the prohibition in cl 5(m) applied only to work undertaken by Barry Spencer in his capacity as a trustee. It was argued that the trustees had employed SGL and that Barry Spencer had issued the invoices as the manager of SGL, not as the settlor or as a trustee.

[83] The Judge concluded that:

> [108] The clear thrust of cl 5(m) is that the settlor is in a special category and that while other trustees may charge for work undertaken for the benefit of the trust, the settlor, even if he or she is also a trustee, may not do so. I also accept [Robert's counsel's] submission that for consistency, and in order to make sense of the clause, the words "as such trustee" mean "while a trustee".

[84] The Judge did not consider it was right that the intent and purpose of the clause could be defeated by:[28]

> … the simple expedient of using a limited liability company in circumstances where for all intents and purposes the company in question is the alter ego of the settlor.

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27 Also cl 5(m).

28 At [109].

[85] She added:

> [110] While Barry sought at times to deny this, I am satisfied on the evidence he and Spencer Group were (in substance, if not in form) one and the same. The original purpose in creating the company was to provide a legal entity available for Barry in the event of his bankruptcy and once the immediate threat of bankruptcy had dissipated, the company remained as a vehicle for his personal benefit. He was a director and at all material times a shareholder. Company records show a single joint shareholding, Mr Spencer, Mr Vavasour and Mr Underwood jointly holding 100 shares. There was no suggestion that Messrs Vavasour and Underwood, or indeed anyone else for that matter other than Barry, was intended to receive any benefit. Barry had complete autonomy in the running of the company. He was not accountable to anyone else. Significantly, the trustee minutes quoted above record that it was Mr B R Spencer who made the offer to manage. In several instances, invoices issued in the name of the company speak of "my fee".

[86] The Judge went on to express the clear view that, for the purposes of cl 5(m), the word "settlor" should be given a wide interpretation so as to include any legal entity controlled and beneficially owned by the settlor. On that footing, the Judge found that Mr Barry Spencer had acted in breach of trust by charging the trust and that it was a breach of trust for the trustees to pay the fees or to write them off against the debt owed by SGL.

[87] The appellants contend that the Judge had erred in the conclusions reached on this issue. Essentially, they raise the same arguments that they relied upon in the High Court. An initial point raised was whether the rectification order applied retrospectively.

Retrospective application

[88] The Judge found that the 2001 rectification order applied retrospectively to the date of commencement of the No.2 Trust in July 1995. We agree with her finding in that respect. It is consistent with the conceptual basis on which rectification at common law rests.[29] A court may order rectification where an agreement as written does not reflect the common intention of the parties at the time the agreement was made. The effect of an order for rectification is to correct the

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[29] Andrew Butler *Equity and Trusts in New Zealand* (Thomson, Reuters, Wellington, 2009) at [29.1.1]. G E Dal Pont *Equity and Trusts in Australia* (5th ed, Thomson Reuters, Pyrmont, Australia, 2011) at 1095.

agreement so that it is expressed as the parties intended at the outset. Rectification operates retrospectively to the date of the agreement.[30] In that respect it differs from a variation ordered by statute which generally operates prospectively.[31]

[89] In this case, the deed for the No.2 Trust did not conform to the agreement underlying the 1995 court order made with the consent of the parties. We agree with the Judge that the effect of the 2001 order for rectification was to treat cl 5(m) as operative from the time of the July 1995 court order.

The effect of clause 5(m)

[90] We are not persuaded that the Judge erred in the conclusions she reached on this point. It is a general principle of equity that a trustee must act gratuitously.[32] There are two reasons for this rule. First, a trustee is not permitted to derive a benefit from the trust property. Second, the interest and duty of the trustee must not conflict.[33]

[91] A well established exception to these general principles is that a trustee may be employed by a trust if authorised to do so by the trust deed. But equity has always been astute to enforce the fiduciary duty of trustees not to profit from the trust property. The corollary is that charging clauses in trust instruments have been strictly construed.[34]

[92] We agree with the Judge that the intention of cl 5(m) was clear. Barry Spencer was not to be employed to perform work for the trust. Although any trustee could be employed "to do any act of whatever nature relating to the trusts", the settlor was expressly prohibited from doing so. That prohibition applied irrespective of the second part of the clause which expressly prohibited Barry Spencer from charging for any act, service or business performed by him as

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30 Butler, above n 29, at [29.1.2].

31 For example, under s 64 of the Trustee Act 1956.

32 John Brown (ed) *New Zealand Master Trusts Guide* (3rd ed, CCH New Zealand Ltd, Auckland, 2011) at 114. Nicky Richardson *Nevill's Law of Trusts, Wills and Administration* (11th ed, LexisNexis, Wellington, 2013) at 252. Dal Pont, above n 29, at 643.

33 Butler, above n 29, at 127.

34 *New Zealand Master Trusts Guide*, above n 32, at 114. Dal Pont, above n 29, at 643 citing *Re Spedding (deceased)* [1966] NZLR 447 (CA) at 465–466 per McCarthy J. Butler, above n 29, at 128.

trustee.

[93] If Barry Spencer had personally managed the tenancies of the trust's building rather than through a company, it would, we think, have amounted to work he was performing on behalf of the trust in his capacity as trustee. His work was in managing the tenancies and in collecting the rentals which were the only source of income for the trust. It cannot have been intended that Barry Spencer could avoid the prohibition against a trustee charging for his work by undertaking that work through a company which he controlled and in which he had a material beneficial interest.

[94] This is not a matter of lifting the corporate veil as the appellants contended. Rather, it is a matter of interpretation. Properly construed, the prohibition against charging applied to Barry Spencer for work done for the trust in his personal capacity or through a company or other entity in which he had any material beneficial interest.

[95] We conclude that the trustees were in breach of trust in employing Barry Spencer through SGL to manage the building and in paying or offsetting the management fees SGL charged.

Were the management fees excessive?

[96] The Judge found that, at best for the appellants, the most that could reasonably have been charged for management of the building was approximately $12,000 a year. She based this conclusion on the evidence of an experienced valuer and property manager, Mr O'Sullivan. His evidence was that management fees at the relevant time for the building would usually be assessed on a fixed fee basis. He said it was rare for a property manager to charge percentage fees on a commercial building at the relevant time. He assessed a reasonable fee at $8,500 per annum.

[97] The trustees disputed Mr O'Sullivan's evidence but did not call any independent expert evidence on this topic. Barry Spencer maintained that the building was extraordinarily difficult to manage and this justified a higher fee. The Judge considered these problems were overstated. However, Mr O'Sullivan had

accepted that if the comments about the building being complex were fully justified, an additional $3,000 to $4,000 above his figure of $8,500 could be warranted.

[98] The trustees relied on a letter received from a Mr Hastings in which he advised that he would expect to secure a fee of at least 7.5% if he were invited to manage the building. Mr Hastings was not called to give evidence. The Judge preferred the evidence of Mr O'Sullivan and did not attach weight to Mr Hastings' letter other than to note that it showed the trustees had sought advice on management fees in 1999.

[99] The appellants strongly attacked the Judge's findings on excessive fees on a variety of grounds and sought leave to adduce further evidence on this and related subjects. We are not willing to grant leave since the trustees were well aware that this was an issue for trial. The evidence was available then and ought to have been called at trial.

[100] Taking all the evidence into account, the Judge concluded that a reasonable management fee would have been $10,000 per annum. We are not disposed to interfere with the Judge's factual conclusions bearing in mind that she had the advantage of seeing and hearing the witnesses. There was a proper evidential foundation for her conclusions.

Conclusion

[101] We agree with the Judge that the trustees were in breach of trust in incurring the management fees payable to Barry Spencer through SGL. We also agree that the management fees were excessive.

Should SGL have been charged rent for the use of the premises?

[102] The Judge found rental should have been charged to SGL at the rate of $100 per week for its occupation of a part of the Thorndon Quay building up to the time Barry Spencer vacated the property in October 1999. This amounted to a figure of $21,600.

[103] The letter of 24 April 1995[35] said it was agreed that SGL would pay rent of $100 per week. This was to be offset against the management fees SGL was to charge the trust. That did not happen. Instead, the sum of $11,250 was added to the SGL debt in respect of rent although this did not cover the full period of SGL's occupation of the premises. The Judge noted that Mr Underwood's evidence was vague about the reasons why SGL did not continue to pay rent and that he had appeared to accept that rent should have been allowed for. This conclusion was supported by the figures produced by Mr Underwood in a revised schedule of income for the trust.

[104] Before us, it was suggested that SGL did not have sufficient funds to pay the agreed rent but as the trustees did not provide any evidence to support this suggestion, they did not discharge the onus of proof on this issue.

[105] We therefore conclude that the Judge was right to treat the failure to collect the rent of $21,600 was a breach of trust.

Interest on Barry Spencer's drawings and amounts debited to the children's current accounts

[106] The Judge found that Barry Spencer had taken drawings from the No. 2 Trust partly to cover personal expenses and partly as payments to his second wife. Although his second wife had loaned substantial sums to the trust, the Judge found that the amounts loaned did not always cover the drawings. In the final accounts for the trust, Barry Spencer was shown as owing the trust $19,323, most of which, the Judge found, was written off in the final year as a distribution.

[107] In addition, Barry Spencer took drawings from the trust which were applied for the benefit of the children. These were charged to the children's current accounts in the trust and shown as debts owing by them to the trust. These debts were also written off as distributions.

[108] Robert claimed that Barry Spencer should be required to restore drawings charged to the children and should also pay interest, both on his personal drawings

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35 Referred to at [73] above.

and those he charged to the children. The Judge agreed that the trustees had acted in breach of trust in failing to charge interest on Barry's drawings and in charging the children's current accounts with advances made to Barry Spencer.

[109] The Judge did not give any reasons for her conclusion that Barry Spencer should pay interest on his drawings from the trust. We do not consider there was any proper foundation for Robert's claim in that respect. As Mr Hodson QC submitted, Barry Spencer was a discretionary beneficiary of the trust and had little income other than the modest salary he was drawing as a manager of SGL.

[110] There is no general obligation on trustees to charge interest on drawings accounts within a family trust. The trustees had a discretion whether to do so. A person seeking to establish a breach of trust where the exercise of the trustees' discretion is involved faces a heavy onus. As it is put by Dal Pont:[36]

> ... the trustee's discretion must be exercised in accordance with the purpose for which it was conferred. It must not be exercised irresponsibly, capriciously or wantonly, as such conduct would not fulfil the required good faith and real and genuine consideration the exercise demands. ... "the court can have no authority to usurp the functions so conferred on the trustees except where such a course is shown to be necessary in order to give effect to the intention evidenced by the terms of the trust instrument."
>
> ... It is clear that the trustee's discretion cannot be challenged solely on the ground that the court would not have reached the same conclusion(s) on the facts as the trustee, or that it generates an unfair outcome. More generally, a court will not interfere with a discretionary decision of a trustee in the absence of bad faith. A heavy onus lies on a person seeking review of a trustee's discretion. This is also because in an imperfect world trustees do make decisions based on less than complete information and less than full analysis and discussion, meaning that "there is a real difficulty in formulating the test for determining when a decision is so flawed as to be invalid". ... Honest blundering, carelessness or even gross negligence in a trustee exercising a discretion does not amount to bad faith, although fraud and the making of a decision for an ulterior motive will do so.

[111] As we are not satisfied that Robert discharged the heavy onus he faced on this issue, we consider that the Judge erred in determining that interest should have been charged on Barry Spencer's drawings.

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36 Dal Pont, above n 29, at [23.30]–[23.35] (footnotes omitted).

[112] As to the drawings charged to the children's accounts within the trust, Mr Corry accepted that the children had received the benefit of the sums drawn by Barry and spent on their behalf. Since the children were discretionary beneficiaries, we are unable to discern any impropriety in that respect. The trust did not sustain any loss in consequence. The trustees were exercising their discretion to make payments from the trust for the benefit of the children. We find the Judge erred in ordering the restoration of the advances made to Barry Spencer that were charged to the children's current accounts.

Conclusions to this point

[113] We agree with the Judge that the trustees were in breach of trust in three respects:

(a) Failing to deal properly with the SGL debt: the trustees made no attempt to recover this debt; their belated attempts to offset the management fees against the debt were not legitimate because the trustees were not authorised to incur those fees; and, in any event, the fees were excessive. Had the debt been recovered, the trust would have had net income to pay Robert the amount due to him of $200 per week. The trustees have not discharged the onus of proof to show the SGL debt could not have been recovered.

(b) Making payments of $53,784 in cash to SGL in part payment of the management fees.

(c) Failing to require the payment of rent for the space occupied by SGL in the Thorndon Quay property.

[114] The remaining issue on liability is whether the trustees were entitled to protection under the terms of the trust deed or under s 73 of the Trustee Act.

Were the trustees entitled to protection under the terms of the trust deed or entitled to relief under s 73 of the Trustee Act 1956?

[115] Clause 10 of the trust deed for the No.2 Trust provided:

> 10. NO trustee acting or purporting to act in the execution of the trusts of these presents shall be liable for any loss not attributable to his or her own dishonesty or to the wilful commission or omission by him or her of an act known to be a breach of trust and in particular no trustee shall be bound to take or be liable for failure to take any proceedings against a co-trustee for any breach or alleged breach of trust committed by such co-trustee.

[116] The Judge was highly critical of the way in which the trustees had conducted themselves. She found that the trustees had a strong sense of outrage at being sued and she described them as having a sense of "righteous self-indignation". She said the trustees might well have believed that what they were doing was morally justifiable, but she gained the clear impression the trustees considered that the relationship property settlement was unfair to Barry Spencer and that his former wife was being unreasonable. Further, she found that the trustees considered Robert was well provided for by the No.1 Trust. This was, she said, a key reason for the trustees not making the payments to him despite their knowledge of the terms of the court order. The Judge also concluded that the trustees essentially regarded the No.2 Trust as being the property of Barry Spencer and that, to all intents and purposes, they could deal with that property as they saw fit despite knowing that Robert was the only one of the beneficiaries who had priority.

[117] The Judge noted that a person could act dishonestly for the purposes of the exemption clause even though he or she genuinely believed their actions were morally justified, citing the decision of this Court in *Wong v Burt*.[37] Applying the same case, the Judge considered that the trustees had not acted as honest persons would in the circumstances. She saw no need to differentiate between any of the three trustees. Mr Underwood and Mr Vavasour had, she considered, allowed their friendship with Barry Spencer to override their legal obligations to the Spencer children and to Robert in particular. They operated the trust as if it were for the sole benefit of Barry Spencer although they knew it was not.

[118] Addressing the effect of the rectification order in 2001, the Judge said:

> [198] For completeness, I should also record that I have considered the implications of the fact the trust deed was initially defective and what role that may have played in the trustees' actions. There is no evidence to

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[37] *Wong v Burt* [2005] 1 NZLR 91 (CA).

> suggest that any of the defendant trustees were responsible for drafting the defective deed or were aware of its deficiencies prior to May 1998. In those circumstances, it would obviously be unfair to make them personally liable for breaches that occurred as a result of those deficiencies. However, once the first set of proceedings was served on them in May 1998 they were clearly put on notice as to the exact terms of the Family Court order and the deed under which they were supposed to be operating. Thereafter, they cannot be heard to say they did not know and understand the terms of the order and their obligations.

[119] The Judge concluded that the exclusion clause in the trust deed did not afford the trustees a defence. Nor did she consider they had made out a case for protection under s 73 of the Trustee Act. She was satisfied that none of the trustees acted reasonably or honestly.

Discussion

[120] The issue of what constitutes dishonesty for the purposes of exclusion clauses in trust instruments has been the subject of some controversy in the United Kingdom and has included analogies with the state of mind necessary to establish accessory liability in knowing assistance cases.

[121] In *Wong v Burt*,[38] this Court considered an exclusion clause in terms similar to those in the present case. The relevant clause provided that no trustee was liable:

> ... for any loss not attributable to his or her own dishonesty or to the wilful commission by him or her of an act known to be a breach of trust.

[122] Summarising the principles to be applied, this Court said:

> [51] On any question of personal liability, the trustees bear the onus of establishing that they are protected by one or both of these exemptions. And any exemption clause is construed narrowly against trustees seeking to rely on it (*Walker v Stones* [2000] 4 All ER 412 at 445-446 per Slade LJ).
>
> [52] *Walker v Stones* (supra) appears to be the leading decision. There, the English Court of Appeal applied a holding of the Privy Council in *Royal Brunei Airlines Sdn Bhn v Tan* [1995] 3 All ER 97 that the essential question is whether the trustees acted dishonestly. Lord Nicholls said:
>
>> [A]cting dishonestly or with lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard (at 105).

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38 *Wong v Burt*, above n 37.

> [53] Although at first sight the word "honest" may point to a state of mind, its scope is not so limited. A person can be acting dishonestly, according to the ordinary use of language, even though he or she genuinely believes that his or her actions are morally justified.

[123] The decision of the English Court of Appeal in *Armitage v Nurse* was not discussed in *Wong v Burt* in any detail.[39] The Court in *Armitage* was considering the scope of a clause exempting trustees from liability except in the case of "actual fraud". Delivering the leading judgment, Millett LJ focussed very much on the subjective intentions of the trustees, concluding that even a deliberate breach of trust would not necessarily be fraudulent provided the trustees honestly believed they were acting in the best interests of the beneficiaries.[40]

[124] *Armitage* has been the subject of much debate[41] and was partially qualified in *Walker v Stones* in which the English Court of Appeal was considering a clause exempting liability for anything "other than wilful fraud or dishonesty".[42] Sir Christopher Slade delivered the leading judgment in *Walker* which dealt with the liability of a solicitor-trustee. Sir Christopher Slade held that although a trustee may hold an honest belief that he was acting in the best interests of the beneficiaries, the exclusion clause could not avail the trustee if the belief was "so unreasonable that, by any objective standard, no reasonable solicitor-trustee could have thought that what he did was for the benefit of the beneficiaries".[43]

[125] Sir Christopher went on to refer to the "impossibility of eliminating reference to objective standards".[44] He cited the passage from the judgment of the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan* which this Court relied upon in *Wong v Burt*.[45] *Royal Brunei* was a dishonest assistance case but it is important in identifying both subjective and objective elements in relation to dishonesty in that context. Lord Nicholls said:[46]

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39 *Armitage v Nurse* [1998] Ch 241 (CA).
40 At 250.
41 See, for example, A S Butler and D J Flinn "What is the least we can expect of a Trustee? Exclusion of Trustee Duties and Exemption of Trustee Liability" [2010] NZ L Rev 459.
42 *Walker v Stones* [2000] 4 All ER 412 (CA) at 419.
43 At 443.
44 At 444.
45 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3 All ER 97, [1995] 2 AC 378 (PC).
46 At 105–106.

> 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, *R v Ghosh* [1982] 2 All ER 689, [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.

[126] Lord Nicholls' remarks in *Royal Brunei* were relied on by this Court in *Wong v Burt* for the proposition that dishonesty means "simply not acting as an honest person should", judged by an objective standard. But the full passage from *Royal Brunei* shows that the test for dishonesty also includes a subjective element.

[127] In essence, Lord Nicholls said that, for the most part, dishonesty is to be equated with "conscious impropriety". The conduct at issue is to be assessed in the light of what the person actually knew at the time. But that does not mean individuals are free to set their own standards of honesty. The standard of honesty is to be assessed objectively. Relevantly to the present case, an honest person does not participate in a transaction if he or she knows it involves a misapplication of trust assets to the detriment of the beneficiaries.

[128] In the United Kingdom, the courts have continued to grapple with the concept of dishonesty in the dishonest assistance cases. In what Tipping J described in the

Supreme Court's decision in *Westpac New Zealand Ltd v MAP & Associates Ltd* as a "volte-face",[47] the Privy Council in *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* held 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.[48] If by ordinary standards a defendant's mental state would be regarded 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.[49]

[129] In the *Westpac* case, the Supreme Court adopted the *Barlow Clowes* approach[50] and added that wilful blindness may also equate to actual knowledge that the transaction is one in which the assistor cannot honestly participate:

> [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.

[130] This Court applied the *Westpac* decision in *Fletcher v Eden Refuge Trust*,[51] another dishonest assistance case.

[131] We conclude that in New Zealand, the assessment of a trustee's honesty comprises both subjective and objective elements. A critical first step is to establish what the trustee actually knew about the terms of the trust relevant to the breach

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47 *Westpac New Zealand Ltd v MAP & Associates Ltd* [2011] NZSC 89, [2011] 3 NZLR 751 at [26].

48 *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2005] UKPC 37, [2008] 1 All ER 333 at [10]. The "volte-face" was in respect of the view taken by the House of Lords in *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164.

49 Most recently the Privy Council has addressed the dishonesty issue again in *Spread Trustee Co Ltd v Hutcheson* [2011] UKPC 13, [2012] 2 AC 194 but the principal focus was on the scope of trustee exemption clauses under the law of Guernsey.

50 *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd*, above n 48, at [26].

51 *Fletcher v Eden Refuge Trust* [2012] NZCA 124, [2012] 2 NZLR 227.

alleged and whether the trustee knew that the impugned conduct amounted to a breach of trust. The trustee's knowledge might include constructive knowledge arising from wilful blindness in the sense described in *Westpac* although we do not need to determine that in this case. The second step requires an assessment of whether, in the light of what the trustee knew, he or she acted in the way an honest person would in the circumstances. This is to be assessed on an objective basis. A trustee who believes his or her actions or omissions were in the best interests of the beneficiaries will not necessarily be entitled to protection.

This case

[132] French J recognised that it was necessary to consider what the trustees in the present case knew when they entered into the management fees arrangement with SGL. She accepted it was not reasonable to find dishonesty until the trustees knew that SGL and Barry Spencer were not permitted to charge the management fees to the No.2 Trust. The Judge found that the trustees became aware of this when they were served with the High Court proceedings seeking rectification in 1998. That conclusion is challenged by the appellants.

[133] The statement of claim in the rectification proceedings focused first on the failure to make the weekly payments to Robert. However, it also stated that Robert required confirmation that the trust deed for the No.2 Trust was "in like terms (with necessary modifications) ..." as the No.1 Trust deed, as required by the 1995 court order.

[134] A copy of the trust deed for the No.2 Trust was sent to Robert's advisers soon after the court proceedings were served. But Mr Corry accepted that no issue was raised about management fees until after 26 July 2000 when the trustees made available the annual accounts for the No.2 Trust. That led to the series of questions and answers in September 2000.

[135] The trustees were cross-examined in the High Court about their knowledge of the inconsistency between the trust deeds for the two trusts with specific reference to the differences in the charging clauses. Barry Spencer acknowledged he would have read the 1995 court order at the time it was made and that he would have read the

statement of claim in the court proceedings served in 1998. He said he took legal advice at the time and was told there were differences between the two trust deeds. However, he specifically denied being told there should have been a clause in it prohibiting him personally from being paid for services rendered to the trust.

[136] Mr Underwood was also questioned on this topic. Understandably, he had no recollection, 13 years after the proceedings were served, about the terms of the statement of claim. He agreed he would have obtained advice from the lawyers representing the trustees but he expected the court proceedings would not go ahead. He "very much doubted" whether he was made aware of the differences between the trust deed for the No.2 Trust as originally executed and its form after it was rectified. In any event his view was that there had been no breach of the prohibition against Barry Spencer charging because the work he was doing was not in his capacity as a trustee.

[137] Mr Vavasour was not asked specifically about his knowledge of differences between the deeds for the two trusts. He described himself as an "experienced property professional". He accepted he would have seen the 1995 court order at the time but did not read every clause. He pointed out that he was not a solicitor. By implication, he was saying that he was not aware of the differences in the terms of the charging clauses.

[138] The Judge did not make any adverse credibility finding in respect of the trustees' evidence on the knowledge issue.

[139] All three trustees were adamant that they believed they had acted at all times in the best interests of the beneficiaries. They insisted that Barry Spencer had been very successful in his management of the building in difficult conditions and in ultimately achieving its sale at a small profit, particularly given the very large debt the building was carrying. All denied any breach of trust and maintained they had acted properly. They emphasised that if SGL had not managed the building, some other company would have been required to do so at the No.2 Trust's expense.

Conclusion on whether the trustees were entitled to protection under the trust deed or to relief under s 73 of the Trustee Act

[140] In common with the High Court Judge, we do not accept the appellants' submissions that they acted honestly and did not wilfully commit a breach of trust in relation to the $200 per week due to Robert. They each knew there was an obligation to pay this sum to Robert if there was net income in the No.2 Trust. That depended in turn on whether SGL had the resources to meet all or part of the SGL debt which the trustees now accept was due. The trustees have not satisfied the onus on them to show that the SGL debt could not have been recovered (or at least sufficiently recovered to meet the amounts due to Robert). It is clear that they never considered recovering this debt for reasons the Judge found to be extraneous.[52] We agree with the Judge's assessment that, objectively considered, the trustees did not act as honest trustees would in relation to the amounts due to Robert.

[141] The position of the trustees is more complicated in respect of the management fees. The relevant cash payments were all made well before the rectification order was made in July 2001. The building had been sold some nine months earlier. While we agree with the Judge that the service of the rectification proceedings in May 1998 put the trustees on notice as to the terms of the 1995 court order, we are not able to accept the further step that the trustees must then have been aware of the differences in the charging clauses between the No.1 and No.2 Trust deeds. That is a further step that would have required the trustees specifically to compare the terms of the two deeds to identify the differences. It is reasonable to expect the trustees as lay people to rely on their lawyers to undertake this task. We have outlined the evidence of the trustees on this point which is supported by the absence of any documentary evidence to show that the prohibition on charging was raised as an issue until after the last of the fee payments was made.

[142] We therefore do not consider there is any basis in the evidence for the Judge to conclude that the trustees were aware of the prohibition against charging the management fees until after the last of the payments was made in December 2000.

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52 See [116] above.

[143] The subjective beliefs of the trustees are not necessarily determinative of this issue but they clearly believed that Barry Spencer or SGL was entitled to charge management fees and that they were acting in the best interests of the beneficiaries. The difficulty for the trustees, however, is the Judge's finding that the fees incurred were excessive. Of the fees charged on a percentage basis amounting to $167,752, she found that a reasonable fee for the period at $10,000 per annum was only $54,000. The Judge made no quantified finding about the reasonableness of the additional fees for specific projects totalling $88,400 but she observed that there was an element of double-charging since a significant proportion of the specific projects related to work covered by the percentage fee. No point was taken on appeal in relation to this conclusion.

[144] The extent of the excessive fees must be at least $113,752 representing the difference between the percentage fees charged of $167,752 and the $54,000 the Judge found to be reasonable. In incurring such excessive fees for a trust that the trustees knew had little or no income but had obligations to Robert, the trustees could not be said to have acted reasonably or honestly.

[145] At best, the trustees might have been entitled to protection under cl 11 for the amount of $54,000 which the Judge found to have been a reasonable fee but, viewed in the overall context, their conduct could not be regarded as honest and reasonable. They were not therefore entitled to the protection of cl 11.

[146] It remains to consider whether relief ought to have been granted in the alternative under s 73 of the Trustee Act. That section provides:

> **73 Power to relieve trustee from personal liability**
>
> If it appears to the court that a trustee, whether appointed by the court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed the breach, then the court may relieve him either wholly or partly from personal liability for the same.

[147] This section requires a trustee to show not only that he or she acted honestly and reasonably but also that he or she ought reasonably to be excused. Our conclusions in relation to cl 11 necessarily mean that there is no basis upon which the trustees could be excused under this section.

Quantum

[148] The quantum of the losses must be re-assessed in the light of our findings. The first item is the sum of $80,000 that the Judge found could have been recovered from SGL if the trustees had taken steps to recover the debt in 1995. Robert's claim in respect of this sum was limited to $80,000 and he did not cross-appeal on that issue. This sum is properly recoverable from the trustees.

[149] The second item relates to the management fees improperly incurred. Robert's claim in this respect was limited to the recovery of the amounts paid to SGL in cash. Under this heading, the trustees are liable for $53,784.

[150] The third item is the sum of $21,400 for rent not recovered from SGL.

[151] The total of these amounts is $155,184. We do not uphold any of the other items awarded in the High Court and deal with the interest awarded separately below. We note that the award of $80,000 in relation to the SGL debt and the payments of $65,000 to Robert could not both have been awarded. That is because the $80,000 recoverable from SGL was the only source of the $65,000 payable to Robert.

Result

[152] Robert is personally entitled to judgment for $65,000 being the sum of $200 per week from December 1995 until 31 March 2004 when the trust closed off its books.

[153] The balance of the judgment amounts are to be restored to the No.2 Trust and will fall for distribution in accordance with the terms of the trust deed. We understand it is envisaged that new trustees will be appointed who will be required to

exercise their discretion as to how the surplus is to be distributed. In the meantime, as the High Court did, we will provide for the surplus to be held in a solicitor's trust account.

Interest

[154] We do not consider the Judge correctly approached the award of interest. First, no allowance was made for the inordinate and unexplained delay by Robert (or on his behalf) in advancing his claim after he commenced proceedings in 2001 and until the case was heard some ten years later in 2011. The proceedings ought to have been disposed of within approximately two years by, say, the end of 2003. In awarding interest, the court has power to take into account delay by the claimant.[53] We do not consider interest should be paid for the period from 31 December 2003 until the date of final judgment in the High Court on 3 February 2012. However, interest should resume on the judgment amounts after that date until payment.

[155] Second, the amounts due to Robert and for the rent were payable progressively, so interest should run from the end of the year in which these payments were due. Similarly, the cash for management fees was paid on varying dates and interest should be recoverable only from the end of the years when those payments were made.

[156] We adopt the rate of 5% per annum which the Judge applied. On that footing, the appellants jointly and severally must pay interest at 5% per annum to be calculated as follows:

(a) On the sum of $65,000 payable to Robert personally:

(i) From the end of each of the years in which the $200 per week was payable until 31 December 2003; and

(ii) From 3 February 2012 until the date of payment.

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53 Butler, above n 29, at [31.5.1] and [31.6.2].

(b) On $15,000 (being the balance of the sum of $80,000 after deduction of the $65,000 due to Robert) at 5% per annum:

(i) From 31 December 1995 until 31 December 2003; and

(ii) From 3 February 2012 until the date of payment.

(c) On the sum of $53,784 at 5% per annum:

(i) From the end of each year in which the cash payments to SGL were made until 31 December 2003; and

(ii) From 3 February 2012 until the date of payment.

(d) On the sum of $21,400 at 5% per annum:

(i) From the end of each year in which the rent was due until 31 December 2003; and

(ii) From 3 February 2012 until the date of payment.

Disposition

[157] We decline the application for leave to adduce further evidence on appeal.

[158] For the reasons given the appeal is allowed in part and the judgment entered in the High Court is set aside.

[159] The appellants are ordered, jointly and severally to pay to the first respondent's solicitor, Mr David Booth, a total of $155,184 plus interest calculated in accordance with [156] hereof on the following terms:

(a) The judgment debt and interest thereon due to the first respondent in accordance with [160] hereof is to be paid to him; and

(b) Any balance is to be held by Mr Booth in trust pending the appointment of new trustees for the No.2 Trust and otherwise upon the terms of that Trust.

[160] The first respondent is entitled to judgment against all appellants jointly and severally for $65,000 together with interest calculated in accordance with [156] hereof.

Costs

[161] We do not propose to disturb the costs orders made in the High Court. The first respondent has been largely successful in this Court. The appellants must pay jointly and severally the first respondent's costs in this Court for a standard appeal on a Band A basis and his usual disbursements.

[162] Leave is reserved to any party to apply further if any issue arises as to the calculation of the interest due.

Solicitors:
Treadwells, Wellington for First Appellant
Brandons, Wellington for Second Appellants
David Booth, Wellington for First Respondent