IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-008377

BETWEEN	VICTORIA STREET APARMENTS LIMITED (IN LIQUIDATION) First Plaintiff
AND	TREASURY TECHNOLOGY DISTRIBUTION LIMITED Second Plaintiff
AND	SUREN SHARMA First Defendant
AND	SUREN SHARMA AS TRUSTEE OF THE SHARMA FAMILY TRUST NO. 2 Second Defendant
AND	SUREN SHARMA AS TRUSTEE OF THE SHARMA FAMILY TRUST Third Defendant
AND	QUAY STREET APARTMENTS LIMITED Fourth Defendant
AND	MUTUAL TRUST PROPERTIES LIMITED Fifth Defendant
AND	MISSION TRUSTEE ONE LIMITED AND MISSION TRUSTEE TWO LIMITED Sixth Defendants and Ninth Third Parties
AND	REGINALD JAMES WATT Third Party

Hearing: 4-8 July 2011

Counsel: D W Grove for the Plaintiffs
D E Smyth for the Defendants

Judgment: 21 September 2011

Reasons: 14 October 2011

REASONS JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 14 October 2011 at 10.00 am, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Counsel: D W Grove P O Box 130 Shortland Street Auckland 1140 for the Plaintiffs
D E Smyth P O Box 105270 Auckland City Auckland 1143 for the Defendants

[1] The first plaintiff, Victoria Street Apartments Limited (VSAL), is a company in liquidation. The second plaintiff, Treasury Technology Distribution Limited (Treasury), is a creditor of VSAL. Until VSAL was placed in liquidation, the first defendant, Suren Sharma, was its sole shareholder and director. The other defendants are entities with whom Mr Sharma is personally associated.

[2] VSAL and Treasury allege that, fraudulently and in breach of his duties as a director of VSAL, Mr Sharma has made improper payments from VSAL's funds for the benefit of himself and the other defendants. The effect of the payments has been that VSAL could not pay the debts it owed to its creditors, including Treasury. The plaintiffs seek orders from the Court that would enable VSAL to recover the payments from either Mr Sharma or the other defendants.

[3] Mr Sharma and the other defendants deny that the payments made were improper, or that he has otherwise breached his duties as a director to VSAL. They also contend that any recovery by VSAL of those payments is now barred by the Limitation Act 1950.

[4] For the reasons set out below, I have found that the plaintiffs have proved their claims against the defendants.

Background

[5] VSAL was incorporated on 19 March 2003. It had a role in the development of a commercial building in Victoria Street, Wellington, into residential units. Treasury was carrying out the conversion and had purchased the property in Victoria Street from Australasian Investments Proprietary Limited for $1.35M. To assist Treasury to raise finance, VSAL entered into an agreement with Treasury to purchase the property after it was developed. Initially, the price was $6.4M plus GST (if any was payable) to be paid on the possession date. Later, the agreement was varied and the price increased to $6.7M, plus GST.

[6] Under the terms of the variation, it was agreed that unit titles for the proposed residential units were to be issued in Treasury's name but held on behalf of VSAL.

On the sale of each unit, the net proceeds were to be applied to reduce the purchase price payable to Treasury under the agreement. Clause 5 of the variation provided that if for any reason the full purchase price plus GST had not been paid to Treasury in the manner set out in the variation, then Treasury could require the balance of the purchase price, plus GST then outstanding, to be paid by notice in writing to VSAL.

[7] The sale of the units to third parties commenced in March 2004. By 20 October 2004, the last unit was sold to a third party. The remaining two units (the penthouse and the ground floor) were acquired by Treasury in September 2005.

[8] Despite the price recorded in the sale and purchase agreement and the variation being exclusive of GST (in the original agreement this was qualified by the words "if payable", whereas the variation had no such qualification), Treasury adopted a stance against the Commissioner of Inland Revenue where it contended that no GST was payable on the sale to VSAL. Treasury pursued this challenge until 2009, when the position was resolved in the Commissioner's favour. Consequently, Treasury did not issue a tax invoice for GST payable under the sale and purchase agreement until 2 February 2009. The amount sought came to $773,125.

VSAL's liabilities and the arbitral award

[9] VSAL disputed it was liable to pay the GST. The dispute went to arbitration. At the same arbitration, the arbitrator was asked to determine a dispute between VSAL and the trustees of the Otis Family Trust (Otis) regarding a debt of $350,000, being the unpaid balance of an advance of $400,000 that Otis claimed it had made to VSAL.

[10] The arbitrator found in favour of Treasury and Otis. VSAL was found to owe a debt of $350,000 to Otis, as well as the GST debt of $773,125 to Treasury. These creditors then took steps to recover payment of the debts, which led to VSAL being placed in liquidation.

Issue estoppel

[11] The arbitral award is relevant to this proceeding. Relying on the law of issue estoppel, VSAL and Treasury contend that the award is binding on Mr Sharma, even though he was not a party to the arbitration. If they are right, Mr Sharma cannot deny the existence of the Otis and Treasury GST debts in this proceeding, or his knowledge of them at the time he made the allegedly improper payments (the suspect payments) to the other defendants.

[12] Mr Sharma disputes the application of issue estoppel. He contends that as he was not a party to the arbitration, he cannot be bound by any of the findings in the arbitral award.

[13] The plaintiffs' reliance on issue estoppel led to them objecting to the parts of Mr Sharma's evidence where he denied VSAL owed liabilities to Otis and Treasury. I dealt with the plaintiffs' evidence objection by admitting the evidence de bene esse.

[14] The plaintiffs argue in the alternative that the evidence they have led in this proceeding is sufficient to prove the existence of the liabilities and Mr Sharma's knowledge of them at the relevant time. However, since they rely primarily on the findings in the arbitral award, I consider that the first step is to determine the effect, if any, that issue estoppel has on its defence.

Elements of issue estoppel

[15] A checklist of the technical elements required to establish an issue estoppel is conveniently given in CEF Rickett "The Travails of Issue Estoppel" (1992) 22 VULR 115 at 116:

> (i) a final judgment;
>
> (ii) between the same parties and/or their privies;
>
> (iii) litigating in the same capacity;
>
> (iv) on the same issue;

(iv) which must be pleaded.

[16] The plaintiffs have pleaded issue estoppel in their reply to Mr Sharma's defence. Thus, the final requirement is clearly present. The other elements require more attention. The purpose and policy behind issue estoppel informs this enquiry.

Purpose and policy of issue estoppel

[17] The concept of res judicata, which embraces cause of action estoppel, issue estoppel, and abuse of process is the means by which judicial process achieves the public interest of ensuring that litigants are not "twice vexed" by the same claim or point and that there is an end to litigation: see *Joseph Lynch Land Co v Lynch* [1995] 1 NZLR 37 at 42-43; *Gregoriadis v Commissioner of Inland Revenue* [1986] 1 NZLR 110 at 114; and *Shiels v Blakeley* [1986] 2 NZLR 262 at 266. In *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525 at 550, Tipping J referred to Lord Upjohn's summary in *Carl-Zeiss-Stiftung v Rayner & Keeler Ltd* [1966] 2 All ER 536 of the broader principles on which res judicata is founded:

> Lord Upjohn succinctly summarised the broader principles involved in the following words:
>
> "The broader principle of res judicata is founded on the twin principles so frequently expressed in latin that there should be an end to litigation and justice demands that the same party shall not be harassed twice for the same cause. It goes beyond the mere record; it is part of the law of evidence for, to see whether it applies, the facts and reasons given by the judge, his judgement, the pleadings, the evidence and even the history of the matter may be taken into account (see *Marginson v Blackburn Borough Council* [1939] 1 All ER 273; [1939] 2 KB 426)."

[18] Issue estoppel has a broader application than cause of action estoppel. For cause of action estoppel, "the cause of action sought to be estopped must be precisely the same as that upon which there has been an earlier adjudication" (see *Joseph Lynch*, 40-41), whereas issue estoppel focuses on:

> [T]he prior resolution of issues rather than causes of action ... issue estoppel precludes a party from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him.

[19] In *Fidelitas Shipping Co Ltd v V/o Exportchleb* [1965] 2 All ER 4 at 9, Lord Denning MR described the application of issue estoppel in this way:

> [W]ithin one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that once an issue has been raised and distinctly determined between the parties, then as a general rule, neither party can be allowed to fight that issue all over again.

A final judgment

[20] A decision of an arbitrator can form the basis of issue estoppel: see *Fidelitas Shipping Co Ltd* at 10:

> Issue estoppel applies to an arbitration as it does to litigation. The parties having chosen the Tribunal to determine the disputes between them as to their legal rights and duties are bound by the determination by the tribunal of any issue which is relevant to the decision of any dispute referred to that tribunal.

[21] And it is noted in *Russell on Arbitration* (22nd ed, Sweet & Maxwell Ltd, London, 2003) at [6-208]:

> As between the parties a valid award is conclusive evidence of the law and facts found by it. So long as it is unimpeached evidence to contradict the award or any of the individual issues of law or fact with which it deals will be inadmissible.

[22] There has been no appeal against the arbitral award; accordingly, it constitutes a final judgment on the issues determined by it.

The same issue

[23] In *Joseph Lynch* at 41, the Court of Appeal noted that in both *Halsbury's Laws of England* (4th ed reissue, LexisNexis, UK, 1991) (Estoppel) at [977] and in *Fidelitas Shipping Co Ltd,* there were references to the need for the point said to be the subject of issue estoppel to have been "distinctly put in issue" in the previous litigation. In *Craddock's Transport Ltd v Stuart* [1970] NZLR 499 at 504, North P said that before an issue estoppel could arise, the issue in the second cause of action needed to be "identical" to the issue that had already been decided in

the first cause of action. In the same case, Turner J at 515 spoke of the need for the issues to be "precisely the same in the two proceedings".

[24] The arbitral award the plaintiffs now rely upon as creating an issue estoppel resulted from an arbitral hearing between Treasury and Otis on the one hand and VSAL on the other. Before the arbitrator, Treasury and Otis contended that VSAL owed them debts of $773,125 and $350,000 respectively. The latter was said to be the outstanding balance of an advance of $400,000. VSAL disputed this. At this time, VSAL's sole director and shareholder was Mr Sharma, who participated in and gave evidence at the arbitral hearing as VSAL's representative. In order to reach a determination, the arbitrator needed to determine whose evidence he preferred and whose evidence he rejected regarding these debts.

[25] In the arbitration, Mr Sharma contended that the $400,000 was not a loan from Otis, but was a payment to VSAL from another company (Point of Difference Limited) which had used Otis as a conduit to transfer money to VSAL. The alleged purpose of this arrangement was to permit Reginald Watt, the third party in this proceeding, who was then bankrupt, to enjoy the benefit of those funds. This was possible because the shareholder of Point of Difference Limited was a trust associated with Mr Watt. Point of Difference Limited was experiencing financial difficulties and Mr Sharma contended that the idea was to remove the funds from Point of Difference Limited (and its creditors) and place them elsewhere. Mr Sharma said that he was content for them to go to VSAL where he would have let Mr Watt draw on them. He offered no explanation as to why the funds first needed to go through Otis. This was Mr Sharma's evidence for why VSAL did not owe a debt to Otis.

[26] The arbitrator found that the sum of $400,000, which VSAL received by payment of a cheque from Otis, was an on demand loan from Otis to VSAL. As VSAL had already paid $50,000 of this amount following a demand from Otis, there was a remaining debt of $350,000: see [32] of the arbitral award. To reach his conclusion on the $400,000 payment, the arbitrator had to, and did, reject Mr Sharma's evidence regarding this payment.

[27] The arbitrator found that VSAL had repaid $50,000 to Otis on 31 October 2003, following a demand from Otis, of which Mr Sharma had denied knowledge. However, the arbitrator expressly rejected this denial. He was satisfied that Mr Sharma would have known of the written request for payment which Otis had faxed to VSAL. The arbitrator found that Mr Sharma's evidence to the contrary was either the result of forgetfulness or he was being untruthful. The arbitrator did not record expressly in the award that Mr Sharma knew that the total amount of $400,000 was a loan from Otis to VSAL. Nonetheless, the findings on the Otis loan support the inference that the arbitrator had also concluded that Mr Sharma knew the entire amount was a loan from Otis.

[28] When it came to the GST liability, the arbitrator found at [73] of the arbitral award that Mr Sharma knew Treasury was "endeavouring to persuade" the Commissioner of Inland Revenue that its sale to VSAL should be zero-rated for GST. Treasury ultimately did pay the GST of $773.125: see [76] of the arbitral award. The arbitrator found that Mr Sharma knew at the time that if Treasury could not persuade the Commissioner, Treasury would expect VSAL to meet its contractual obligations to pay the GST:

> I do not accept that [Treasury] represented that GST was not payable. The agreement for sale and purchase covered the eventuality of GST being subsequently payable. The tax invoice in September 2005 covered the same point. Although I have difficulty in accepting all of the evidence given by both [Treasury] and Mr Sharma, the facts support the view that Mr Sharma was in error when he claimed that the representation [that GST was not payable] was made. I am satisfied he knew at all times that [Treasury] was endeavouring to persuade the IRD that GST was not payable but that if it transpired it was payable [Treasury] would expect VSAL to meet its contractual obligations.

[29] The arbitrator's findings on the $400,000 debt to Otis and the GST debt of $773,125 to Treasury are binding on VSAL, Otis, and Treasury as they were all parties to the arbitration, whereas Mr Sharma and the other defendants were not. The defendants contend, therefore, that the arbitrator's findings have no effect on their defence against VSAL's claims.

[30] In his capacity as VSAL's sole director and shareholder, Mr Sharma appeared before the arbitrator and unsuccessfully disputed VSAL's liability for the Otis and

GST debts, and his knowledge of that liability. The same questions regarding these debts and Mr Sharma's knowledge of them are now being raised in this proceeding, albeit for a different purpose. Here, the plaintiffs rely on the existence of these debts and Mr Sharma's knowledge of them for the purpose of establishing that the payments he made to himself and the other defendants were made in breach of his fiduciary duties to VSAL. Company directors owe fiduciary duties of good faith and loyalty to their companies. They breach those duties when they act to further their own interests, or the interests of those with whom they have a personal connection, and in doing so jeopardise the company's solvency at a cost to its creditors: see *Sojourner v Robb* [2007] NZCA 493, [2008] 1 NZLR 751. If, in making payments to himself and the other defendants, Mr Sharma has acted to further his own interests or those of the other defendants at the expense of VSAL and its creditors, he will have breached his duties as a director of VSAL. It is relevant, therefore, to know what debts VSAL owed at the time the payments were made.

[31] The existence of the Otis and Treasury debts, and Mr Sharma's knowledge of them are, therefore, relevant to this proceeding. Whilst the purpose of proof of the debts is different, the same issue of whether or not there were debts, and Mr Sharma's knowledge of them, is present here just as it was in the arbitration. Similarly, the same evidence to dispute the debts is being advanced by Mr Sharma yet again. The points Mr Sharma now wants to raise as part of his defence were "distinctly put in issue" by him earlier in the arbitration. Thus, I am satisfied the same issues regarding these debts are being raised in this proceeding.

Same parties and/or their privies

[32] Here, the "same parties" requirement is satisfied by VSAL and Treasury. Treasury was a claimant in the arbitration, and now appears as a plaintiff. Whilst VSAL was a defendant in the arbitration, it now appears as a plaintiff. Mr Sharma was not a party in the arbitration. But as the sole director and shareholder of VSAL, he participated in the arbitration as the *alter ego* of VSAL. The company could only participate in the arbitration through its sole director and shareholder. The question is whether this is enough to make Mr Sharma VSAL's privy, so that the findings in the arbitral award on VSAL's liability to pay the Otis and GST debts estop his

denials of the debts. In other words, unless he is estopped, Mr Sharma will be free to dispute the Otis and Treasury debts again, which introduces the prospect of this Court accepting his evidence and finding that the debts do not exist, even though they have led to an arbitral award against VSAL, and the company's failure to pay the award has led to it being placed in liquidation.

[33] The principles for determining if someone is a privy of a party in an earlier proceeding can be found in *Shiels v Blakeley* [1986] NZLR 262 at 268:

> Privity in this sense denotes a derivative interest founded on, or flowing from, blood, estate, or contract, or some other sufficient connection, bond, or mutuality of interest. No case has yet sought to define exhaustively the degree or nature of the link necessary to render a person privy in interest.

[34] Here, privity can only arise through Mr Sharma's connection with VSAL as its sole director and shareholder constituting "some other sufficient connection, bond, or mutuality of interest". In *Shiels v Blakely*, the Court of Appeal considered the relevant authorities on how this might arise and from these formulated a test, at 268 (*emphasis added*):

> In *Carl Zeiss Stiftun v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, Lord Reid said that privity of interest may arise in many ways 'but it seems to me to be essential that the person now to be estopped from defending himself must have had some kind of interest in the previous litigation or its subject-matter'. Lord Guest, at p 936, said that 'Before a person can be privy to a party there must be community or privity of interest between them'. The nature of the connected interest was further discussed in *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510. There Sir Robert Megarry V-C, at p 515, held that there must be a sufficient degree of identity between the party to the first action and the party whom it is sought to estop in the second to make it just to hold that the first decision should be binding on a party in subsequent proceedings. Nourse J adopted that approach in *Official Custodian for Charities v Mackay (No 2)* [1985] 2 All ER 1016.
>
> We conclude that there must be shown *such a union or nexus, such a community or mutuality of interest, such an identity between a party to the first proceeding and the person claimed to be estopped in the subsequent proceeding*, that to estop the latter will produce a fair and just result having regard to the purposes of the doctrine of estoppel and its effect on the party estopped.

[35] In *Laughland v Stevenson* [1995] 2 NZLR 474, Hillyer J found that there was sufficient community of interest between Mr Stevenson and the company of which he was a director and which had been involved in earlier litigation with Mr and

Mrs Laughland. After considering the principles expressed in *Shiels v Blakely* and how they applied to the case before him, Hillyer J concluded at 478:

> In my view, such a community of interest between Mr Stevenson and the company does exist in this case. It is clear that Mr Stevenson was, and is, intimately connected with the company. In an affidavit filed in these proceedings he states: "I have always been prominent in the company's affairs to the end that it might have been regarded as my alter ego in a business sense."

[36] Similarly, in *Matai Industries Ltd v Jensen*, Tipping J found that a company was estopped from bringing proceedings against the New Zealand Government on the ground its shareholders had brought an earlier proceeding against the Government. Tipping J found that the company was the privy of the shareholders, at 550:

> While acknowledging that there was not an exact identity of parties, [counsel for the Attorney-General] Mr Mathieson contended that for present purposes the company should be regarded as privy to the shareholders action. There is considerable force in that proposition because although in name an action by the shareholders, the proceedings were in substance a claim that the Government had reached a certain agreement with the company. Although it is trite law that a company is a distinct legal entity from its shareholders, the present action ... has in substance been brought by the company on account of the shareholders who are themselves bound by the rules of res judicata in respect of the earlier proceedings. If one adopts Lord Wilberforce's approach [in *Carl-Zeiss-Stifung v Rayner and Keeler Ltd*] there is no doubt that the people behind both proceedings are the shareholders. It could also be said in relation to Lord Reid's possible extension of the doctrine of privity [also in *Carl-Zeiss*] that here the shareholders having failed in the first proceedings are putting forward the same claim by the device of utilising the company for the purpose.

[37] Whether a director or shareholder can be the privy of a limited liability company will, I consider, turn on the size of the company shareholding and the number of directors it has. With large companies having numerous shareholders and directors, it is difficult to see how there could always be the necessary mutuality of interest between the company and individual shareholders and directors. But here, at all relevant times, Mr Sharma was the sole director and the sole shareholder. In the arbitration, VSAL could only express its stance on the liabilities then alleged against it through Mr Sharma. As is recognised by the rules of attribution developed in company law in E Ferran *Corporate Attribution and the Directing Mind and Will* [2011] 127 LQR 239:

> A company is a legal person but it can only act through natural persons, hence the need for rules governing the attribution to companies of the acts and states of minds of individuals.

[38] In Meridian Global Funds Management Asia v Securities Commission [1995] 3 NZLR 7 at 11, the Privy Council said:

> A company exists because there is a rule (usually in a statute) which says that a persona ficta shall be deemed to exist and to have certain of the powers, rights and duties of a natural person. But there would be little sense in deeming such a persona ficta to exist unless there were also rules to tell one what acts were to count as acts of the company. It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called "the rules of attribution".

[39] Later, at 12, the Privy Council said:

> The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations.

[40] In the arbitration it was the application of these general principles of attribution that allowed the arbitrator to attribute Mr Sharma's conduct vis-à-vis the subject liabilities to the company. It was also the application of those principles by which Mr Sharma gave evidence for VSAL to dispute the existence of the liabilities. He was the only natural person through whom VSAL could act when it gave evidence to the arbitrator to dispute the liabilities. In such circumstances, it would make nonsense of the purpose and policy of the law of issue estoppel to allow Mr Sharma to re-litigate the same issue regarding those liabilities that was before the arbitrator.

[41] I am satisfied, therefore, that here there is sufficient community or mutuality of interest between VSAL on the one hand and Mr Sharma on the other as to make Mr Sharma the privy of VSAL. Accordingly, Mr Sharma is estopped from raising the same issues in different proceedings that have already been raised by VSAL and ruled on by a Tribunal of competent jurisdiction in a final judgment. Mr Sharma can quite properly be seen as the *alter ego* of VSAL at the time of the arbitration.

Litigating in the same capacity

[42] In both sets of litigation, the party (or privy) against whom the estoppel is sought to be applied must be litigating in the same capacity. In the arbitration, Mr Sharma, in his capacity as director of VSAL, disputed liability for and knowledge of the Otis and Treasury debts. The evidence he proffered in support of the company's position was by way of a defence. In the present proceeding, also by way of defence, Mr Sharma again seeks to dispute the same issues; only now the purpose of raising the defence is different. In the arbitration VSAL simply sought to defend itself from being found liable for the Otis and Treasury debts. In the present case, Mr Sharma seeks to establish that at the time he made payments to himself and to the other defendants there were no other debts; he does this so that there can be no complaint about his conduct. On each occasion his stance has been defensive. Thus, he is litigating in the same capacity.

Conclusion on issue estoppel

[43] I am satisfied that here, all the elements required to found an issue estoppel are present. Accordingly, I find that Mr Sharma cannot deny that when he made payments to himself and to the other defendants, he knew VSAL was indebted to Otis and Treasury.

[44] All defendants are represented by the same counsel. In his closing address, on behalf of Mr Sharma, he submitted that the other defendants were not parties to the arbitration and so no issue estoppel could arise against them. I accept that. However, the plaintiffs have not sought to establish issue estoppel against the other defendants, nor do they need to. The issue estoppel is raised to establish that VSAL had creditors at the time Mr Sharma made payments from VSAL to the other defendants. Their existence is used to found an argument that Mr Sharma has breached the fiduciary duties he owed to the company as a director, and that in these circumstances, he could not dispense with the duties as the sole shareholder. The existence of the debts has nothing to do with the other defendants. Such debts are

only relevant to the assessment of whether Mr Sharma has breached the fiduciary duties that he owed to VSAL.

Alternative proof of liabilities

[45] If my assessment of the issue estoppel is wrong, the evidence in this proceeding establishes that at all relevant times, Mr Sharma knew:

(a) Unless Treasury could persuade the Commissioner of Inland Revenue that the sale of the development from Treasury to VSAL should be zero-rated for GST purposes, VSAL would have to pay the GST component of the sale price to Treasury;

(b) If Treasury was successful in establishing that the sale of the development from Treasury to VSAL should be zero-rated for GST purposes, that VSAL would then have to repay to the Commissioner of Inland Revenue the GST refund of $800,299.75 that VSAL had claimed and been paid; and

(c) Otis had advanced $400,000 to VSAL.

GST debt owed to Treasury

[46] Mr Sharma was a signatory on VSAL's behalf as purchaser in the sale and purchase agreement for the sale of the development of the Victoria Street property into residential units. The sale and purchase agreement is dated 14 March 2003. The purchase price was GST exclusive. The agreement originally provided that the price was $6.4M plus GST (if any). The date for payment of GST was the default date provided in the agreement, which was also the possession date. Thus, from the time the sale and purchase agreement was executed, Mr Sharma would have known VSAL had a contingent liability to pay GST on the price of the development.

[47] The variation to the agreement was also executed by Mr Sharma. Though the copy produced in evidence did not have his signature, there was no dispute that he had executed the variation. The copy that was produced in evidence was not dated,

but it appears that it was signed some time in 2004. The variation increased the purchase price to $6.7M and altered the terms of payment. The variation resulted from difficulties VSAL had encountered in arranging finance to complete the purchase. Under the terms of the variation, unit titles for the proposed residential units were to be issued in Treasury's name but held on behalf of VSAL. Once each unit was ready for sale and a purchaser had been found, there was to be a simultaneous sale from Treasury to VSAL and from VSAL to the third party purchaser. On the sale of each unit, the net proceeds were to be applied to reduce the purchase price payable to Treasury for the overall development. Clauses 4 and 5 covered the payment of the purchase price from VSAL to Treasury as follows:

(a) VSAL was to be the vendor in the sale and purchase of the units to third parties;

(b) When a unit fell due for sale to a third party, Treasury was to release and transfer to VSAL the title to that unit;

(c) VSAL was to settle the sale to the third party;

(d) A nominated law firm (Mulholland Rickit Law) was to act for VSAL and Treasury to complete the sale on behalf of both parties, and the sale proceeds received from the third party were to be applied as follows:

   (i) Legal costs and other related expenses were to be deducted from the sale price;

   (ii) The balance of the sale price received by VSAL was to be paid simultaneously by VSAL to Treasury, who was to apply the proceeds to reduce the sale price under the agreement it had with VSAL and to apply those funds to reduce the amount it owed under a first mortgage security with the National Bank of New Zealand Limited in one contemporaneous settlement; and

(iii) Each unit sale was to proceed in this way until the total purchase price of $6.7M, plus GST had been paid by VSAL to Treasury, whereupon Treasury would transfer all remaining unit titles to VSAL;

(e) Clause 5 of the variation provided that if for any reason the full purchase price plus GST had not been paid to Treasury in the manner set out in the variation, then Treasury could require the balance of the purchase price plus GST then outstanding to be paid by notice in writing to VSAL.

[48] As Treasury was challenging the payment of GST, no invoices for the GST components of the sale were issued by Treasury as per clause 5 of the variation. The sale of the units to third parties commenced in March 2004. As the sales proceeded, VSAL (and therefore Mr Sharma) would have known that as the sales grew, so did VSAL's contingent liability to pay GST under the terms of the agreement with Treasury. By 20 October 2004, all but two units were sold; therefore, by this time, the contingent liability for GST would have been fairly close to the eventual debt. There were grounds for arguing that one of the units was being sold as a going concern (a unit tenanted by an entity known as Tiddly Pom). Nonetheless, even if allowance was made for this, the overall sale price of $6.7M, the rate of GST at 12.5 per cent, and the limited business VSAL carried out would have informed Mr Sharma that if Treasury's challenge was unsuccessful, the GST that VSAL would have to pay Treasury under the agreement would have been in excess of $0.5M.

[49] In his evidence to the Court, Mr Sharma admitted that he knew what a contingent liability was. Nonetheless, he denied knowing that VSAL was under an obligation to pay GST on the purchase from Treasury. Despite this denial, I consider that from the time he signed the sale and purchase agreement and later its variation, Mr Sharma knew that payment of GST to Treasury on the sale of the development was a contingent liability that VSAL might have to meet. The terms of the original agreement and the variation make this clear. Whilst Mr Sharma may have hoped that Treasury's challenge to the GST rating of the sale had some chance of success, there was nothing to override the language of the agreement and the variation. VSAL as a

signatory to those agreements had bound itself to pay GST if the Commissioner found it was payable. Not to see this as creating a contingent liability flies in the face of reason.

[50] Apart from the terms of the sale, on 12 September 2005, Ganda and Associates (who appear to have acted for VSAL and Treasury) issued a tax invoice referring to the GST as being zero-rated as a going concern; but with the proviso that if the sale was not treated as being of a going concern, the purchaser, VSAL, was liable to pay GST as per clause 12 of the original sale and purchase agreement. There is no correspondence between Treasury and VSAL to indicate any variation here.

[51] Mr Sharma's explanation in support of his denial of liability to pay GST was that he did not believe Treasury was registered for GST. He gave no explanation for holding this belief, which was required.

[52] The sale and purchase agreement between Treasury and VSAL stated that Treasury was registered for GST. Mr Sharma knew that Treasury was in the business of developing the units at Victoria Street, which would suggest to anyone familiar with GST that Treasury would be registered for GST. His association with Mr Watt had begun when Mr Sharma was employed as the financial controller of companies connected with Mr Watt. In addition, Mr Sharma is associated with companies and trading trusts of members of his family. I consider, therefore, that he would have reasonable knowledge of how GST works. Furthermore, Mr Sharma knew of Treasury's challenge to the GST rating of the agreement. If Treasury had been unregistered for GST, there would have been no reason for it to challenge the GST rating of the sale to VSAL. The only purpose in arguing that the sale should be zero-rated for GST purposes would be that Treasury would otherwise have to pay GST. Thus, there was plenty to inform Mr Sharma that Treasury was registered for GST.

[53] I gained the impression that Mr Sharma is an astute businessman. I do not accept that he could be so blind to the consequences of the terms of the sale and purchase agreement and its variation that he failed to see VSAL was contingently liable for GST under those agreements. His evidence is so at odds with the other,

verifiable, evidence on this topic that I do not believe him. Nor do I attribute his evidence to that of an honest, but mistaken witness. I consider that he has attempted to provide the Court with dishonest, self-serving explanations in his defence.

[54] Between 2004 and 2006, VSAL claimed GST refunds totalling $800,299.75. Since its business was limited to purchasing the entire development from Treasury and on-selling the individual units to third parties, a large part of the refund would have been based on the $6.7M purchase from Treasury. By claiming a GST refund for the purchase of the development from Treasury, VSAL could have undermined Treasury's argument with the Commissioner of Inland Revenue that the sale should be zero-rated for GST purposes.

[55] Furthermore, Mr Sharma would also have known that had Treasury succeeded with its argument regarding the zero-rating of the sale of the development by it to VSAL, then VSAL would have been obliged to repay the GST refunds it had received from the Commissioner of Inland Revenue. VSAL could not expect to keep the refunds if the sale of the development was zero-rated for GST purposes. The cashbook for VSAL reveals that by 7 February 2005, VSAL had received and disbursed approximately $750,000 of the GST refunds it had received. Thus, by then Mr Sharma would have known that VSAL would have to pay in excess of $0.5M either to Treasury or to the Commissioner.

[56] Mr Sharma disputes the notion that VSAL would have had to repay the GST refund, had Treasury succeeded in having the transaction between it and VSAL zero-rated for GST purposes. He contends that irrespective of the GST rating of the transaction, VSAL was entitled to claim GST on a second-hand goods basis and that the arbitral award accepted this. The explanation was provided at my request by counsel's memorandum following the hearing, after I invited counsel to address this topic. I have considered the memoranda filed by counsel. I have also considered the arbitral award.

[57] I note that at [73], the arbitrator described VSAL's claim for a GST refund in this way: "VSAL claimed input tax on the basis of the second hand goods principle knowing that GST might still be payable by Treasury Trust on its sale to VSAL".

My interpretation of this comment is that the arbitrator viewed VSAL's GST claim for a refund as something that was premised on VSAL's anticipating that Treasury might not succeed with its challenge. As the sale price was GST exclusive, if the transaction was found to be rateable for GST, VSAL as purchaser would have to pay the GST portion of the sale to Treasury.

[58] The arbitrator's comment does not support Mr Sharma's argument that VSAL could claim a GST refund and avoid paying GST under the sale and purchase agreement. Indeed, the comment is generous to VSAL and Mr Sharma. Unless VSAL's actions are viewed as being based on the anticipation that the transaction would be subject to GST, the act of claiming a GST refund, when Treasury was arguing that no GST was payable, was an outright fraud on the Commissioner of Inland Revenue. As the purchaser to a GST exclusive transaction (if any was payable), VSAL's entitlement to claim a GST refund hinged on the Commissioner finding that GST was so payable.

[59] I do not accept Mr Sharma's explanation. It does not make sense. His inability to provide a plausible explanation causes me to conclude that he has none to give and that he must have known at the relevant time that either VSAL had to pay the GST to Treasury or return the GST refunds to the Commissioner. I also consider that no honest, reasonable company director who understood his or her fiduciary duties could have failed to realise these contingencies.

The Otis debt

[60] Contemporaneous documentary evidence points to the $400,000 payment to VSAL being an advance from Otis. First, the payment was made by a cheque issued by Otis on or about 2 October 2003. Otis' bank account shows the cheque being drawn and the cheque butt is made out to VSAL. There was no suggestion in the cross-examination of Robert McKay, who is one of the trustees of Otis and who filled out the cheque butt, that the record on the cheque butt was made at some later time and is not what it purports to be. Secondly, on 31 October 2003, Otis sent a letter by fax to VSAL's fax number (09 3667036) addressed to Mr Sharma. The letter said:

> Dear Suren
>
> As per our discussion. We hereby call back $50,000 of our loan to you which was for originally $400,000. Please make payment to the following account.
>
> Otis Trust
> Westpac Trust
> Ponsonby
> 031512 0042540 00

The fax was sent from Otis' fax number. Following this, the cashbook, which was prepared by Mr Sharma, records at 31 October 2003 the payment of $50,000 to Otis. Mr Sharma must have caused this payment to Otis to have been made. This evidence is prima facie proof that Mr Sharma knew the $400,000 was an advance from Otis, and that the advance was liable to be repaid on demand from Otis.

[61] Despite this, Mr Sharma denies any knowledge of the $400,000 being a debt to Otis. He says that he believed the $400,000 had come indirectly from Point of Difference Limited and that the funds were to be made available to Mr Watt as and when he required them. He supports this account by saying that in the past, he and Mr Watt had used other companies in which they held interests to act as a treasury for their various ventures. In this way, whichever company happened to have funds available was used as the treasury for other companies.

[62] Mr Sharma denies that he received the faxed letter of 31 October 2003 from Otis. He says that Mr Watt used the same premises and so he could have received the fax without Mr Sharma knowing of this. Mr Sharma says that had he seen the letter of 31 October 2003, he would have questioned Mr McKay about the "supposed loan". Mr Sharma's explanation for making the payment of the $50,000 is that he did so at the request of Mr Watt.

[63] I find I cannot accept Mr Sharma's evidence. I cannot see why Mr McKay would have sent the faxed letter of 31 October 2003 and couched it in the clear terms that he used if the letter was not a genuine request for repayment of part of an existing $400,000 loan from Otis to VSAL, of which Mr Sharma was already aware. There is nothing about the language that suggests the writer was seeking to inform the named recipient of the existence of the loan.

[64] In October 2003, Mr McKay, Mr Sharma and Mr Watt appear to have been working happily together on their respective projects. There is no evidence that their relations had fractured in the way that they now have. Thus, there is nothing to explain why, in October 2003, Mr McKay would have gone out of his way to construct a false scenario that misrepresented how VSAL had come to receive the payment of $400,000. Yet if Mr Sharma is to be believed, this is what Mr McKay has done. Mr Sharma acknowledges as much when in his evidence he refers to the "supposed loan". Yet he can point to nothing to substantiate why, in October 2003, Mr McKay would have wrongly asserted that there was any such loan.

[65] Mr McKay struck me as a credible witness. He did not strike me as someone who would knowingly assert a false state of affairs in a letter to a business associate, as Mr Sharma then was. There is no plausible explanation for Mr McKay doing so.

[66] As matters now stand, Mr Sharma seeks to deny that there is a debt owed by VSAL to Otis. In these circumstances, it is in his interests to deny knowledge of the letter of 31 October 2003.

[67] I consider that the simpler and more believable explanation is that the letter of 31 October 2003 is a truthful account of an on demand loan from Otis to VSAL, with Otis requiring repayment of $50,000. I also consider that the letter was addressed to Mr Sharma because Mr McKay expected Mr Sharma to action the request for payment. It follows that I am satisfied that the payment of $400,000 was a loan from Otis to VSAL and that at the time the letter was sent, Mr Sharma was aware of the true nature of the $400,000 payment. I consider the explanation he now offers is an untruthful account designed to undermine the plaintiffs' claim against him and allow VSAL to avoid the debt that it owes to Otis.

Mistake and change of position

[68] Alternatively, Mr Sharma seeks to raise a defence of money paid under mistake, coupled with a change of position. This relies on the Court accepting that he acted with the honest belief that the $400,000 was the property of Point of Difference Limited and the GST refunds were lawfully claimed and disbursed; and,

therefore, the defendants have altered their position in reliance on that view of events. I do not believe Mr Sharma could have had any such belief. There is no basis for it. I regret to say that, yet again, I find he has given untruthful, self-serving evidence. There is an emerging pattern of him doing so.

Credibility

[69] The evidence shows that Mr Sharma has been prepared to falsify events on other occasions. For example, he has made a false claim for GST, which he must have known was false at the time he made the claim. Having earlier made a claim for GST and received a GST refund totalling $800,299.75, he sought to make a similar GST claim of $777,877.85 (based on the same costs) shortly before VSAL went into liquidation. There was no basis for doing so. His explanation was that there were questions regarding whether the 10 per cent rating he had claimed for the earlier GST claim (which resulted in the refund of $800,299.75) that was based on the transaction involving second-hand goods (which are rateable at 10 per cent) was correct. Accordingly, he filed a second claim, dated 5 October 2009, based on the same transaction but with the usual rating of 12.5 per cent, instead of 10 per cent. Whilst he gave evidence that this claim included fresh transactions, the claim form shows that the refund sought is based on a figure of $6,958,125 for VSAL's purchase of the Victoria Street property, and $42,775.68 being costs of the arbitration that resulted in the arbitral award against VSAL in favour of Treasury. Thus, the bulk of the claim was for a transaction on which a GST refund had already been paid. There is nothing on the claim form to indicate this to the Inland Revenue Department. Mr Sharma sought to explain his actions by saying they were a means of testing the correctness of the percentage rating of the original refund, and that his action was at the behest of the Inland Revenue Department.

[70] I find it impossible to accept that the Inland Revenue Department would approach the clarification of whether a GST claim should have been calculated at the rate for second-hand goods or the standard rate by requesting the claim to be made again in the ordinary way in which such claims are made and without reference to any earlier refund payment. If in fact Mr Sharma thought that the original rating was incorrect, I would have expected full details of the earlier claim and the difference

between a claim based on a 10 per cent rating and one based on a 12.5 per cent rating to have been laid out to the Department.

[71] The logical and probable inference to be drawn from this conduct is that Mr Sharma was hoping that the Department would process the claim in the ordinary way and pay the refund. Had this occurred, VSAL would have received a cash injection at a time when VSAL had incurred costs associated with the arbitration, and Treasury was pressing for payment of the arbitral award in its favour. What in fact occurred was that shortly after the refund was sought, VSAL was placed in liquidation. Once the liquidator realised that VSAL had claimed twice for a GST refund, he contacted the Inland Revenue Department and ensured that no further refund was made.

[72] The liquidator's evidence (which was in written form, as initially he was unavailable to give evidence and then towards the end of the trial he died) was that accounting records for VSAL were not maintained or completed. Thus, the liquidator approached VSAL's banks to obtain copies of cheques. He noted that when he did so, he often found that the entity to which a cheque was drawn was different from that shown on the cheque stub, or the schedules prepared by Mr Sharma. He also found that the differences were created for the benefit of Mr Sharma or entities associated with him. The evidence I have seen supports this. It shows that on eight occasions, Mr Sharma made payments to entities with which he is associated and described the payments on the cheque butts as going to other persons.

[73] Regarding freezing orders presently in place, Mr Sharma filed affidavits in which he referred to $160,000 from Kiwibank being paid towards a Sharma Family Trust Westpac loan. In fact, the relevant documents, when produced under a notice to produce, showed that $100,000 of the funds had been paid to a company associated with Mr Sharma and $60,000 was used to pay off credit card expenses. Thus, the funds were clearly not used in the way Mr Sharma had first described in the affidavit.

[74] I have mentioned the occasions on which Mr Sharma has falsely represented the position because it reveals a dishonest tendency to misrepresent matters to best serve his interests. This tendency confirms my view that his evidence disputing knowledge of the Otis and Treasury debts is untrue and nothing but an attempt to bolster his defence. It also confirms my view that his evidence that he dealt with the funds from Otis, and the GST receipts in an honest but mistaken way is false.

Has Mr Sharma breached the fiduciary duty he owed to VSAL?

Relevant principles

[75] Company directors must act in the interests of their company. This requirement is found within the fiduciary duties of loyalty and good faith that they owe to their companies. Courts are reluctant to second-guess the commercial decisions of directors; therefore, they tend to presume that the directors have acted in good faith unless the acts done are acts which no director with an understanding of fiduciary duties could have taken: see *Australian Growth Resources Corp Pty Ltd v Van Reesma* (1988) 13 ACLR 261. Where a director acts in a way in which no director with an understanding of fiduciary duties would act, the director's subjective belief that his actions are in the company's interests will not preclude a finding of breach of duty: see *Shuttleworth v Cox Bros & Co* [1927] 2 KB 9 at 18.

[76] Like other fiduciaries, company directors cannot participate in self-dealing or otherwise act where there is a conflict of interest: see *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378.

[77] Company directors must apply company property, including funds, for the company's purposes. To apply it otherwise is a breach of trust: see *Selangor United Rubber Estates Ltd v Cradock (No. 3)* [1968] 2 All ER 1073, [1968] 1 WLR 1555 at 1577. This was referred to by Henry J in *Springfield Acres Ltd v Abacus (HK) Ltd* [1994] 3 NZLR 502 at 509:

> The principle is that a director is regarded as a trustee of the funds of the company which come under control or into the hands of the director. Such funds are to be held for the purposes of the company (*Selangor United Rubber Estates Ltd v Cradock (No. 3)* ...

[78] But nevertheless, it is possible for the shareholders of a company to dispense with requiring a director's compliance with these duties. Thus, with a company like VSAL for which Mr Sharma was the sole director and shareholder, if he breached his director's fiduciary duties of loyalty and good faith by engaging in self-dealing, or breached his trustee's duties by misapplying VSAL's funds, such breaches could be cured by him, as VSAL's sole shareholder, voting to ratify such conduct.

[79] However, matters change if a self-dealing transfer of assets or breach of trust occurs when the company is insolvent or the transfer has that effect on the company. At that point, in his role as a director, Mr Sharma was obliged to consider the interests of VSAL's creditors and whether or not his self-dealing, improper conduct would be harmful to their interests. He could not, as a shareholder, dispense with this duty: see *Sojourner v Robb* (CA) at [27]:

> It is helpful to look first at how the present situation falls in terms of the usual equitable principles associated with self-dealing. Mr and Mrs Robb [as the directors] owed a fiduciary duty to Aeromarine 1. They could not, as shareholders, dispense with that duty given the company's insolvency (for the reasons given in [25]). They were therefore not entitled to deal with the assets of Aeromarine 1 in circumstances in which there was a conflict of interest.

[80] Whilst *Sojourner v Robb* was about directors selling the assets of one company (Aeromarine 1) to another company with whom they had an association (Aeromarine 2), the principles applied in the case have a wider application and extend to other circumstances where directors act in a conflict of interest by transferring or using their company's assets, including funds, to benefit a third party with whom the directors are personally associated. I also consider that the approach taken in *Sojourner v Robb* applies to circumstances where a director has acted in breach of trust by misapplying company funds.

[81] *Sojourner v Robb* establishes that a company director will breach the fiduciary duties of loyalty and good faith that he owes and will be accountable to the company when:

(a) He transfers company assets at less than fair value;

(b) To persons with whom he has an association, in his personal capacity; and

(c) The transfer is either made a time when the company cannot otherwise meet its obligations to its creditors, both current and contingent, or the transfer leads to this outcome.

[82] These underlying principles are drawn from both the strictures equity imposes on self-dealing fiduciaries (as tempered by the provisions of s 141(2) of the Companies Act 1993, discussed below) and the well-settled requirement that when a company's solvency is doubtful or marginal, the directors must have regard to the interests of its creditors: see *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242 at 249 per Cooke J:

> The duties of directors are owed to the company. On the facts of particular cases this may require the directors to consider inter alia the interests of creditors. For instance creditors are entitled to consideration, in my opinion, if the company is insolvent, or near-insolvent, or of doubtful solvency, or if a contemplated payment or other course of action would jeopardise its solvency

I also note that Somers J doubted that the directors' failure to consider the interests of creditors in this circumstance could later be ratified by creditors (at 235).

[83] The same was said by Gummow J in *Re New World Alliance Pty Ltd v Baseler (No 2)* (1994) 51 FCR 425 at 444-445:

> It is clear that the duty to take into account the interests of creditors is merely a restriction on the right of shareholders to ratify breaches of the duty owed to the company. The restriction is similar to that found in cases involving fraud on the minority. Where a company is insolvent or nearing insolvency, the creditors are to be seen as having a direct interest in the company and that interest cannot be overridden by the shareholders. This restriction does not, in the absence of any conferral of such a right by statute, confer upon creditors any general law right against former directors of the company to recover losses suffered by those creditors the result is that there is a duty of imperfect obligation owed to creditors, one which the creditors cannot enforce save to the extent that the company acts on its own motion or through a liquidator.

[84] In *Nicholson v Permakraft (NZ) Ltd*, Cooke J said at 250 that the test for when a company's solvency could give rise to this duty to creditors was an objective one (*emphasis added*):

> I would respectfully adopt the approach of Cumming-Bruce and Templeman LJJ in *Re Horsley & Weight Ltd* [1982] Ch 442, 454-456. Both Lord Justices favoured an *objective test: whether at the time of the payment in question the directors "should have appreciated" or "ought to have known" that it was likely to cause loss to creditors or threatened the continued existence of the company.* In my opinion, a payment made to the prejudice of current or continuing creditors when a likelihood of loss to them ought to have been known is capable of constituting misfeasance by the directors; and they may be made liable for it in an action of the present kind. Alternatively an application may be made under s 321 of the Companies Act, which in the substituted form enacted in 1980 extends to "any negligence, default, or breach of duty or trust in relation to the company".

[85] In *Sojourner v Robb* [2006] 3 NZLR 808 at 102 (HC), Fogarty J said:

> If a director believes that the duty to act in the best interests of the company is a duty always to act in the best interests of the shareholders, and never in the interests of the creditors, in a situation of doubt as to the solvency of [the] company, the director cannot be said to be acting in good faith. Creditors are persons to whom the company has ongoing obligations. The best interests of the company include the obligation to discharge those obligations before rewarding the shareholders.

[86] It is the equitable character of a claim against directors for breach of fiduciary duties that sets it apart from other company law claims; this applies whether the claim is brought by the company for breach of fiduciary duty or under s 301 by a creditor or liquidator of the company (see *Sojourner v Robb* (CA) at 75):

> [There is] the equitable overlay to the claim against Mr and Mrs Robb. They were self-dealing. Because they (via Aeromarine 2) acquired the assets in Aeromarine 1 at less than fair value, they necessarily made a gain at the expense of Aeromarine 1 in circumstances where s 141(2) of the Act provided no immunity. As we have noted, there is nothing in the language of s 301 to suggest that the relief available is solely compensatory. On the basis of the findings of the Judge, Mr and Mrs Robb had an obligation to account to Aeromarine 1 for their gains, including of necessity the difference between what they (via Aeromarine 2) paid for the assets of Aeromarine 1 and the fair value of those assets together with any other profits which they derived from that acquisition.

[87] However, I also note that the tempering effect of s 141(2) on the equitable prohibition against a fiduciary's self-dealing means that if the company receives fair

value for its asset/s, creditors or other interested persons cannot complain about self-dealing by the directors.

[88] Essentially, s 141(2) protects third parties who have paid fair value for a company's assets from any later attempt by that company to unravel the transfer of its assets on the ground of improper conduct on the part of its officers. The presence of this provision caused the Court of Appeal in *Sojourner v Robb* to conclude that if a third party could rely on the payment of fair value to protect a transaction that would otherwise be set aside, it would be anomalous to deny the same protection to the directors, despite the transaction resulting from their breaching their fiduciary duties to the company: see *Sojourner v Robb* at [30]:

> But if s 141(2) has the consequence in this case that the [self dealing/breach of trust] transaction could not be avoided, it would be anomalous to allow a related claim to be advanced against [the directors] for an account of profits. This is because there is a sense in which an account of profits is the other side of the coin to an actual or notional rescission of the relevant contract; cf *Chirnside v Fay* at para [16] per Elias CJ.

[89] Thus, provided the self-dealing transaction resulted in the company receiving fair value, the breach of fiduciary duty would have no consequences for the directors: see *Sojourner v Robb* at [31]:

> We propose to proceed on the basis that the liability of [the directors] depends upon whether the sale to Aeromarine 2 [the company with whom the directors were associated] was for fair value ...

[90] But because the duties lie in equity, the reverse onus which equity imposes on defaulting fiduciaries will apply: see *Sojourner v Robb* (HC) at [154]:

> This concept of a reverse onus is ancient. It is usefully captured in two dicta. In *Thomson v Eastwood* (1877) 2 App Cas 215, Lord Cairns LC said:
>
> "Equity will examine into it [the sale], will ascertain the value that was paid by the trustee, and will throw upon the trustee the onus of proving that he gave full value. (at 236)"
>
> Second, Lord Penzance in *Erlinger v New Sombrero Phosphates Co*, (1877-1878) LR (1878) 3 App Cas 1218. (HC) ... Lord Penzance said in his speech at pp 1229-1230:

> "… The principles of equity to which I refer have been illustrated in a variety of relations, none of them perhaps precisely similar to that of the present parties, but all resting on the same basis, and one which is strictly applicable to the present case. The relations of principal and agent, trustee and *cestui que trust*, parent and child, guardian and ward, priest and penitent, all furnish instances in which the Courts of Equity have given protection and relief against the pressure of unfair advantage resulting from the relation and mutual position of the parties, whether in matters of contract or gift; and this relation and position of unfair advantage once made apparent, the Courts have always cast upon him who holds that position, *the burden of showing that he has not used it to his own benefit.* (at 1229.30) (Emphasis added)".

[91] The Court of Appeal in *Sojourner v Robb* rejected the appellant's arguments that the High Court had wrongly applied a reverse onus of proof; though in its view the onus of proof was more relevant to establishing liability than to quantifying loss (at [76] to [77]).

VSAL's solvency

[92] The first step in deciding if Mr Sharma has breached fiduciary duties of good faith and loyalty is to determine VSAL's solvency at the time Mr Sharma made the payments to the other defendants. I have already found that Mr Sharma knew of the Otis and Treasury debts. I consider that he knew of the Otis advance from the time the funds were received, and certainly he would have done so by 31 October 2003 when Otis sent its letter requesting repayment of $50,000. I consider that he would have known of VSAL's contingent liability to pay GST on the sale price of initially $6.4M (later varied to $6.7M) from the time VSAL entered into those agreements in 2003. Once VSAL claimed and received a GST refund of approximately $800,000 for the purchase of the Victoria Street property from Treasury, Mr Sharma would have been aware that if Treasury's challenge over the GST rating of this transaction was successful that VSAL would have to repay the GST refund it had received. Against this background, it is necessary to look at VSAL's financial circumstances between 2003 and 2006.

[93] Section 4(1) of the Companies Act provides:

> For the purposes of this Act, a company satisfies the solvency test if—
>
> (a) the company is able to pay its debts as they become due in the normal course of business; and

> (b) the value of the company's assets is greater than the value of its liabilities, including contingent liabilities.

Under s 4(4), when considering the value of a contingent liability, a director may take account of the likelihood of its occurrence:

> In determining, for the purposes of this section, the value of a contingent liability, account may be taken of—
>
> (a) the likelihood of the contingency occurring; and
>
> (b) any claim the company is entitled to make and can reasonably expect to be met to reduce or extinguish the contingent liability.

[94] VSAL and Treasury did not adduce any independent accountancy evidence to the Court on questions relating to VSAL's solvency. I consider that such evidence would have made the Court's task easier. Nonetheless, for the reasons set out below, I consider that the evidence of VSAL's inability to meet its obligations to Otis and Treasury as a result of making the suspect payments to Mr Sharma and the other defendants is so stark that the absence of expert evidence on this topic is not fatal to the plaintiffs' case.

[95] The debt of $350,000 that was owed to Otis was the balance of an on demand advance; thus, until Otis demanded payment, it was a future debt. The GST debt to Treasury was a contingent liability until the determination of Treasury's challenge over payment of GST with the Commissioner of Inland Revenue. Once the units at Victoria Street were sold, VSAL had no ongoing business or prospects of receiving further funds. In such circumstances, VSAL needed to make some provision for paying these debts if it was also going to make substantial payments to Mr Sharma and the other defendants. As it happened, VSAL made no such provision; nor did its circumstances allow for it to do so. The payments Mr Sharma made to himself and the other defendants left VSAL in the position where it had no funds to meet these debts.

[96] The evidence before the Court includes a cashbook prepared by Mr Sharma. The cashbook sets out VSAL's position from 11 April 2003 to 6 November 2006. There is also a draft profit and loss account prepared by Mr Sharma, which reflects

the position as shown in the cashbook. This account shows that for the financial years 2004, 2005 and 2006 (ending 31 March 2006), VSAL's position was as follows:

(a) In 2004, VSAL made a $198,568.55 loss;

(b) In 2005, VSAL made a profit of $148,366.51; and

(c) In 2006, VSAL made a profit of $270,623.60.

[97] VSAL has no accounts recording the GST on the sale price to Treasury as a contingent liability, or the balance of the Otis advance (being $350,000) as a future/contingent liability. No provision was made for how it would meet those liabilities. Arrangements were made to hold the GST component of the sales of the individual units to third parties in the trust account of Mulholland Rickit, the solicitor for both Treasury and VSAL. Had those funds been retained, they could have been used to meet any GST debt VSAL owed to Treasury. However, the funds were applied by VSAL for other purposes.

[98] The profit and loss account prepared by Mr Sharma (which omits reference to the Treasury and Otis debts) shows that for 2004, VSAL made a loss. So any improper payments it made during that year could not be ratified by the shareholder.

[99] By 31 March 2005, all but two of the sales of the units were completed; so the bulk of the GST debt to Treasury had formed. Moreover, by 31 March 2005, VSAL had received all but $51,338.27 of the $800,299.75 GST refund. Therefore, if Treasury had successfully challenged its liability to pay GST on the sale to VSAL, VSAL would have been required to repay the GST refunds it had received insofar as they related to the purchase from Treasury. However the GST issue was viewed, VSAL was going to have to make substantial payments of somewhere between $750,000 and $800,000, either to Treasury or to the Commissioner of Inland Revenue. There was also the $350,000 balance of the debt to Otis. The recorded profit of $148,366.51 omits any reference to GST liability or to the Otis debt. Had these liabilities been included in the profit and loss account for the 2005

financial year, VSAL would have shown a significant loss. In such circumstances, any improper payments VSAL made during this year could not be ratified by the shareholder. The same applies for the 2006 year, when the recorded profit was $270,623.60. However, this omits any reference to the GST liability or the Otis debt. Once these are added to the mix, VSAL shows a significant loss. Furthermore, by 2005 and 2006, as VSAL's business (selling the units) was largely completed, there was little prospect of it earning sufficient additional funds to allow it to clear the Treasury and Otis liabilities. And since the GST funds from the sales to the third parties had been disbursed, those funds were not available.

[100] Viewed objectively, I am satisfied that from 31 March 2005 onwards, VSAL's financial circumstances were such that Mr Sharma could not use company funds for his own ends or those of others and later ratify this conduct. Any such payments would have left VSAL with no prospect of paying either the GST (to Treasury, or return of refund to Inland Revenue) or Otis liabilities. The next question is whether improper payments were made.

The suspect payments

[101] There are numerous alleged improper payments, some of which have gone to Mr Sharma personally; some of which he is responsible for directing to other defendants; and some of which resulted in a benefit to him or the other defendants, through VSAL's funds being used to pay the creditors of Mr Sharma or the other defendants.

[102] The plaintiffs have listed the suspect payments under the causes of action brought against each defendant. They seek recovery of specific amounts against each defendant, as well as recovery against Mr Sharma of restitutionary compensation/damages at an amount which will repay the Otis and Treasury debts.

[103] Mr Sharma contends that at the time he made the suspect payments, he had no reason to believe that VSAL had any creditors. He gave evidence that between 2003 and 2009, he applied VSAL's funds as if he was the sole owner of the company, save for the funds he thought belonged to Mr Watt. He accepted that he had applied

some funds by paying deposits on behalf of the fifth defendant, Mutual Trust Properties Limited, of which he is the sole director and shareholder. He says that other funds were paid to an account operated by Mr Watt during his bankruptcy.

[104] Mr Sharma described the early dealings between him, Mr Watt, Mr McKay and the various corporate and trust entities with which they were associated. Mr Sharma contends that he allowed VSAL to be a conduit for funds that were payable to Mr Watt. This explanation is in regard to the $400,000 advance from Otis, which Mr Sharma has always contended was in fact an advance from a company (Point of Difference Limited) channelled through Otis to VSAL for Mr Watt's use. I have already rejected that characterisation of this payment. Many of the payments itemised in the first cause of action and some of those itemised in other causes of action are also said by Mr Sharma to have been made at the direction of Mr Watt.

[105] The general impression I have gained of Mr Sharma's evidence, given on behalf of all the defendants, is that he does not dispute that the suspect payments were not in VSAL's interests. He has not sought to argue that such payments were made either because VSAL was under an obligation to make them, or that it was going to obtain a benefit from doing so. Instead, Mr Sharma argues that the payments were either for Mr Watt's benefit, or, insofar as they were for Mr Sharma's benefit or any entity associated with him, the payments' subsequent transfer into directors' fees by directors' resolutions of 2004, 2005 and 2006 validate their disposition, by providing a reciprocal fair value.

[106] The third party claim against Mr Watt was heard separately on 5 September 2011. For this reason, I do not propose to make findings regarding whether or not some of the suspect payments Mr Sharma made were for the benefit of Mr Watt, which may affect Mr Sharma's entitlement to recover from Mr Watt, if the plaintiffs can recover those payments. Rather, I propose to look at the suspect payments simply from the perspective of whether they were payments properly made on behalf of VSAL. For the purpose of VSAL's claim against the defendants, all that it needs to prove is first, that the suspect payments were made; secondly, that such payments were not for VSAL's benefit and were made by Mr Sharma in breach of his fiduciary

duties to VSAL; and thirdly, that the persons from whom VSAL seeks recovery are obliged to restore or repay VSAL its funds. Insofar as I find any payments improper, whether they were in fact made for Mr Watt's benefit and whether this would permit Mr Sharma to obtain recovery from Mr Watt is a separate issue to be decided in the third party claim.

[107] I propose to consider the suspect payments under the headings of the cause of action, the financial year to which they relate, and the identity of the beneficial recipient. However, before doing so, I consider that I need to address the defendants' complaint about the statement of claim. The defendants contend that the allegations in the statement of claim are: first, too general; and secondly, the pleas that advances were made without consideration should be read to allege payments by way of loan, and that it is not, therefore, open to VSAL to contend that, in some cases, the benefit of the loans went to other parties. For the second and third causes of action, VSAL alleges that payments made to named persons were for the benefit of the defendants in those causes of action.

[108] I accept that the statement of claim is broadly pleaded and that it would have benefited from more particularity. However, the defendants did not seek particulars. They were content to proceed to trial on the basis of the claim as pleaded by the plaintiffs. Whilst the current pleading is the third amended statement of claim, the general nature of the pleading has been apparent from the outset. It has always been open to the defendants to seek particulars if they were embarrassed by the pleading.

[109] The requirements of a statement of claim are set out in r 5.26 of the High Court Rules. The statement of claim must, inter alia, show the general nature of the plaintiff's claim to the relief sought and give sufficient particulars of time, place, amounts, names of persons, nature and dates of instruments and other circumstances to inform the Court and the party or parties against whom relief is sought of the plaintiff's cause of action (see r 5.26(a) and (b)).

[110] A statement of claim is required to plead allegations of fact which, if proved, are then relied on to found the legal basis of the claim. It is not necessary to plead the legal principles upon which the claim is based. I consider in the present case the

plaintiffs have provided enough to satisfy the requirements of r 5.26(a) and (b). The information contained in the statement of claim conveys to the reader the crux of this case, which is that Mr Sharma as director of VSAL breached his fiduciary duties to VSAL by making the various suspect payments directly to himself, to the other named defendants, or to other persons at the direction of those defendants in circumstances where they were the beneficiary of that action.

[111] In circumstances where a fiduciary breaches the duty of loyalty by paying funds either to advance his own interest or the interests of others with whom he has an association, it seems to me to matter little whether the payments are made by way of loans or simply appropriated by the errant fiduciary in some other fashion such as gifted to himself or his associates. It is not the form by which the misappropriation of the funds is characterised that is critical; it is the fact that the funds have been misapplied by the fiduciary which founds this type of claim.

[112] I do not consider, therefore, that anything turns on the complaints the defendants have made about the lack of particularity in the statement of claim. Furthermore, I consider that having failed to pursue their complaints earlier, it is now too late for them to complain that the claim lacks particularity.

First cause of action: against Mr Sharma as director of VSAL

[113] The first cause of action alleges that over the course of the financial years ending 31 March 2004 to 31 March 2006, Mr Sharma misapplied $190,406 of VSAL's funds by making advances to himself, which he is obliged to repay. Alternatively, the advances are alleged to be self-dealing advances made in breach of his fiduciary duties as a director of VSAL. In addition, he is alleged to have misapplied $233,135.98 of VSAL's funds by making advances to other persons from VSAL's funds in circumstances where the advances were not for the purposes of VSAL, were of no benefit to VSAL, and were in breach of his fiduciary duties of good faith and loyalty. The total amount of payments for which recovery is sought in the first cause of action comes to $423,541.98.

[114] Mr Sharma has not sought to offset these advances against directors' fees or salary entitlement that he might have claimed as a director of VSAL. The advances made to others were not recorded elsewhere as loans from VSAL; they were made free of interest and without security. For the first cause of action, his pleaded defences for the most part rely on the Limitation Act, and allege that the advances were made at the direction of Mr Watt.

Payments during the financial year ending 31 March 2004 that Mr Sharma made to or for himself

[115] In the financial year ending 31 March 2004, Mr Sharma made a number of payments that totalled $160,706 from VSAL funds to himself or to others for his benefit.

[116] On 3 October 2003, Mr Sharma repaid a mortgage of $147,500 to the National Bank of New Zealand (National Bank) that was registered against land at 4/26 Alfriston Road, Manurewa. In his evidence, he described this land as his. The mortgage was to secure indebtedness of a company, Carpark 80 Limited, to the National Bank. This company, its indebtedness to the National Bank, and Mr Sharma's liability to the National Bank as mortgagor had nothing to do with VSAL. On 15 October 2003, Mr Sharma repaid $3,206 on his Westpac credit card. He contends that these payments are either out of time or made at the direction of Mr Watt.

[117] On 7 October 2003, Mr Sharma paid $10,000 to himself. He contends that this payment was made as reimbursement for expenses incurred for travel to Wellington and other expenses in connection with the apartment development at Victoria Street. However, he provided no receipts or invoices to confirm that he had incurred such expenses and was therefore entitled to such reimbursement.

Payments during the financial year ending 31 March 2004 that Mr Sharma made for the benefit of persons other than VSAL

[118] On 2 October 2003, Mr Sharma issued a VSAL cheque for $50,000 to Pannive Nominees Limited (Pannive). Mr Sharma recorded the payment on the cheque butt as an advance to Pannive. The advance was not recorded elsewhere as a loan to Pannive, it was made free of interest and without security. Mr Sharma recorded it in the cashbook as an advance for the benefit of Mr Watt. The same treatment was accorded to a payment of $50,000 on that day to Mathison Holdings Limited (Mathison). Both advances were of no benefit to VSAL. In his defence, Mr Sharma contends that any claim regarding these advances is time-barred and that the advances were made at the direction of and for Mr Watt's benefit.

[119] On 3 October 2003, Mr Sharma wrote out a cheque for $50,000 from VSAL funds to "DTZ trust account". VSAL owed no debt payable to any party known as DTZ. The payment is recorded by Mr Sharma on the cheque butt as being a deposit for a property at 148 Quay Street, followed by the words "now Quay Street Apartments Ltd" (the fourth defendant). The payment is not recorded elsewhere as having been made for the fourth defendant's benefit. There is no loan agreement between VSAL and the fourth defendant. VSAL received no benefit in return. The cashbook records this payment as being for Mr Watt's benefit. Mr Sharma admits that the payment was by way of a deposit for the purchase of premises at 148 Quay Street by Quay Street Apartments Limited. VSAL had no interest in the property or in Quay Street Apartments Limited. However, Mr Sharma contends that any claims regarding this advance are time-barred.

[120] On 3 November 2003, Mr Sharma wrote out a cheque for $2,812.50 from VSAL funds to Terra Firma Limited. The cheque butt records this as a consultancy fee. There is no invoice or other evidence showing that VSAL owed this debt. Mr Sharma contends that the payment was for consultancy fees for property advice. He also contends that a claim regarding this payment is time-barred.

[121] On 27 November 2003, Mr Sharma wrote out a cheque for $7,500 from VSAL funds to John Weymouth, barrister. There is no evidence that this was a debt owed by VSAL. The plaintiffs contend the payment relates to another company, Beresford Street Apartments Limited. There is no evidence that this payment was for VSAL's benefit. Mr Sharma contends that recovery of the claim is time-barred. He also contends that the payment was made at the direction of Mr Watt for legal fees incurred by him.

[122] On 28 November 2003, Mr Sharma wrote out a cheque for $10,000 from VSAL funds to Colliers International Limited for a deposit for car parks. The cheque butt completed by Mr Sharma records the payment as an advance to Quay Street Apartments Limited. There is no loan agreement recording an advance, interest to be paid or security between VSAL and Quay Street Apartments Limited. VSAL received no benefit in return for this payment. This payment does not appear to be recorded in the cashbook. Mr Sharma contends that recovery based on this claim is now time-barred.

Payments during the financial year ending 31 March 2005 that Mr Sharma made to or for himself

[123] In the financial year ending 31 March 2005, Mr Sharma made a total of $19,700 payments that were not for the purpose of VSAL and which were, instead, of benefit to him.

[124] On 20 October 2004, Mr Sharma used VSAL funds to pay McLean Law $5,000 for services it provided defending him in an application to have him banned as a director. This application was brought as a result of him being a director of a number of other companies, associated with Mr Watt, which were placed in liquidation. VSAL contends that the payment was of no benefit to it. Mr Sharma contends that the payment was of benefit to VSAL as it allowed him to continue as a director of VSAL. He also contends that the payment was made at the direction of Mr Watt.

[125] On 5 February 2005, Mr Sharma advanced $1,500 to himself. He says that he made this payment at the direction of Mr Watt, because Mr Watt could not operate a bank account during his bankruptcy.

[126] On 8 February 2005, Mr Sharma advanced $8,200 to himself. He says this was for his personal drawings. This is not how the payment is recorded in VSAL's accounts. No tax is paid on it; and it is not offset against salary or director's fees.

[127] On 7 March 2005, Mr Sharma used $5,000 of VSAL's funds to pay a debt he owed to the Inland Revenue. VSAL alleges it received no benefit. Mr Sharma contends that the payment was for tax properly payable by VSAL.

Payments during the financial year ending 31 March 2005 that Mr Sharma made for the benefit of persons other than VSAL

[128] On 22 June 2004, Mr Sharma issued a cheque for $6,700 from VSAL funds to Warehouse Financial Services. On the cheque butt he recorded the payment as being made for another company in which he had an interest, namely Australasian Investments Pty Limited, and that the payment was for travel to Wellington. Mr Sharma now says that the payment covered travel and business costs, including those of Mr Watt.

[129] On 28 July 2004, Mr Sharma issued a VSAL cheque for $8,000 from VSAL payable to a Warehouse credit card service. On the cheque butt he recorded the payment as being for legal costs owed to Colin Pidgeon, QC. These costs related to a legal dispute that did not involve VSAL. Mr Sharma contends that neither he nor any other defendant received the benefit of this payment. He now says that the payment went to cover travel expenses incurred by Mr Watt.

[130] On 19 August 2004, VSAL paid $25,000 to Pannive. Mr Sharma described the payment on the cheque butt as an advance for rent. The advance was not recorded elsewhere as a loan to Pannive, it was made free of interest and without security. Mr Sharma recorded it in the cashbook as an advance for the benefit of

Mr Watt. Mr Sharma contends that the payment was made at the direction of Mr Watt.

[131] On 11 November 2004, Mr Sharma wrote out a cheque for $5,000 from VSAL funds to Quay Street Apartments Limited. The advance was made by way of a cheque payment. The advance is not recorded in the cashbook. The advance is not documented in VSAL's records as a loan to Quay Street Apartments Limited. Nor is there anything to record a benefit of any nature being received by VSAL. Mr Sharma contends that this advance was made at the direction of Mr Watt.

[132] On 31 December 2004, VSAL paid $6,404 to Cairns Lockie. Mr Sharma recorded on the cheque butt that the payment was to meet Mr Watt's mortgage. Mr Sharma contends that this payment was made at the direction of Mr Watt.

[133] On 25 February 2005, VSAL paid $5,569.48 to Aon New Zealand Limited. The cheque butt describes the payment as an insurance premium. There is no invoice addressed to VSAL supporting this debt. The cashbook describes the payment as for the benefit of "Mathieson/Watt". Mr Sharma contends that the payment was partly for VSAL's benefit and partly for Quay Street Apartments Limited's benefit, as it covered insurance for premises occupied by those companies.

Payments during the financial year ending 31 March 2006 that Mr Sharma made to or for himself

[134] On 16 September 2005, Mr Sharma paid $10,000 from VSAL's funds to himself. Apart from the record in the bank statement and the cashbook, there is nothing to support this payment or to suggest it was by way of salary or director's fee. Mr Sharma has not pleaded to this allegation.

Payments during the financial year ending 31 March 2006 that Mr Sharma made for the benefit of persons other than VSAL

[135] On 14 December 2005, Mr Sharma wrote a VSAL cheque for $2,948 to Sovereign Assurance Limited. There is no invoice addressed to VSAL to support this payment. The cheque butt records a payment on 27 September 2005 to Aon Insurance Limited for $2,948. The cashbook records the payment as being made on 14 December 2004 for the benefit of Mr Watt and the fourth defendant. Mr Sharma now contends that the payment was for insurance policies to support personal guarantees and other risks he undertook.

[136] On 3 March 2006, Mr Sharma wrote a VSAL cheque for $3,202 payable to Sovereign Assurance Ltd. This is incorrectly pleaded as having occurred on 15 March 2006 in the statement of claim. There is no invoice addressed to VSAL to support this payment. The cheque butt that Mr Sharma filled out records the payment as a mortgage payment to Cairns Lockie for Mr Watt. In the cashbook the payment is recorded as being for the benefit of Mr Watt. Mr Sharma now contends that this payment was also for insurance policies to support personal guarantees and other risks he undertook.

Defences raised by Mr Sharma

[137] I do not consider that any of the suspect payments are time-barred. My reasons for this are set out later in the judgment: see [210]-[226].

[138] Mr Sharma has also sought to convince the Court that he made these payments under the direction of Mr Watt. Mr Watt did not participate in this part of the trial. However, I do not consider it necessary to determine whether or not Mr Watt gave such directions as I do not accept that payments made under the direction of Mr Watt relieve Mr Sharma of liability resulting from his breaches of fiduciary duties as a company director. As VSAL's director, Mr Sharma owed fiduciary duties to VSAL. Any payments he made from that company's funds that

were contrary to those duties are in breach of them and, therefore, are recoverable from Mr Sharma.

[139] Mr Sharma has said in evidence that he saw no problem with using VSAL's funds to assist other companies in which either he or Mr Watt had an interest. He has also said that for part of the time, Mr Watt was bankrupt and so Mr Sharma assumed directorships of companies and trusts in which Mr Watt had some interest, and made funds available from wherever possible, to keep these companies operational. Whilst this may explain what occurred, it overlooks the separate distinct legal personality of VSAL from Mr Sharma and the other companies. In the absence of ratification from the shareholder, Mr Sharma's compliance with Mr Watt's directions was unlawful and improper. There is no evidence that ratification did occur. Even if the actions were ratified, given the state of VSAL's solvency, I do not consider that ratification could have absolved Mr Sharma's breaches of fiduciary duty. It follows that I find that this defence fails.

[140] I have found that each of Mr Sharma's defences has failed. He cannot rely on the Limitation Act or on the defence that he was acting under the direction of Mr Watt. The payments itemised in the first cause of action were never made for the purposes or benefit of VSAL. It follows that all those payments are either made in breach of trust (as per *Selangor United Rubber Estates Ltd*), or in breach of the duties of good faith and loyalty (as per *Sojourner v Robb*). I find, therefore, that VSAL is entitled to recover the total amount of those payments from Mr Sharma.

Second cause of action: against the second defendant, the trustee of the Sharma Family Trust No. 2

[141] The second cause of action alleges that the Sharma Family Trust No. 2 has benefited from payments Mr Sharma made to it from VSAL's funds. The trustees are Mr Sharma and Paul Richardson. Mr Richardson is a professional person, whose liability as a trustee is limited. VSAL has, therefore, released Mr Richardson from any liability arising from the second cause of action. Thus, the claim is focused solely on the actions of Mr Sharma, both in his role as a director of VSAL and as a trustee of the Sharma Family Trust No. 2. Whilst legally the transactions and events

that form the focus of the claim are based on Mr Sharma acting either as a director of VSAL or as a trustee of the Sharma Family Trust No. 2, to distinguish his actions in one capacity from those in his other capacity, I will refer to the Sharma Family Trust No. 2 when dealing with actions and events involving Mr Sharma acting as a trustee of that trust.

[142] Under Mr Sharma's direction, VSAL is alleged to have paid a total of $754,674 either to the Sharma Family Trust No. 2 or to third parties on behalf of that trust. The evidence shows, and at the hearing Mr Sharma did not dispute, that VSAL made the payments to the alleged recipients. The dispute between the parties focused on whether the payments were made as advances without consideration and whether they were made on behalf of the Sharma Family Trust No. 2. VSAL contends that it received no consideration for, or in any way otherwise benefited from, having made the payments. This is denied, as is the allegation that the payments were made on behalf of the Sharma Family Trust No. 2.

Did VSAL receive fair value from the Sharma Family Trust No. 2?

[143] Dealing first with the question of consideration, I am satisfied that VSAL never received fair value in return for the payments that are alleged to have been made either to, or on behalf of the Sharma family Trust No. 2. None of the payments benefited VSAL.

[144] In a resolution dated 8 June 2004, VSAL resolved that in consideration for cross-collateral guarantees that the Sharma Family Trust No. 2 had given to VSAL, the company would make advances to the Sharma Family Trust No. 2. However, Mr Sharma has produced no evidence to show that the cross-collateral guarantees were fair value for the $754,674 payments or any part thereof that VSAL contends Mr Sharma made from its funds on behalf of the Sharma Family Trust No. 2. Since Mr Sharma was both sole director of VSAL and a trustee of the Sharma Family Trust No. 2, he had a conflict of interest when it came to this transaction. In accordance with well-settled principles on a fiduciary's self-dealing, it was for Mr Sharma to show that the cross-collateral guarantees referred to in the resolution amounted to fair value for the advances which VSAL was to make: see *Sojourner v Robb* (CA).

He has provided no evidence to this effect. Hence, I find that the cross-collateral guarantees were not fair value in return for advances made by VSAL under the resolution of 8 June 2004.

Directors' fees offset against payments to Sharma Family Trust No. 2 with balance being for benefit of third party

[145] In his statement of defence, Mr Sharma alleges that $470,000 of the $754,674 payments was paid in satisfaction of directors' fees that VSAL owed to him and that the balance of the payments was not made on behalf of, or for the benefit of the Sharma Family Trust No. 2. He alleges that instead, the balance was paid for the benefit of and at the request of the third party, Mr Watt. Mr Sharma gave evidence to this effect. He described the payments in this way:

> ... funds that [VSAL] had in its capacity to be able to pay me a directors' fee and there was an advance made which subsequently was treated as a directors' fee.

And later: "... those fundings came on [VSAL] for the benefit of myself which has been treated as the directors' fee".

[146] However, the idea that $470,000 of the payments VSAL made to the Sharma Family Trust No. 2 was paid in satisfaction of directors' fees owed to Mr Sharma is untenable. There are a number of factors that tell against it.

[147] Of the $754,674, only $2,035 was paid directly to the Sharma Family Trust No. 2. The rest was paid to other parties. Any outstanding directors' fees would be owed to Mr Sharma personally. To effect payment of directors' fees by paying third parties for the benefit of the Sharma Family Trust No. 2 is circuitous and complex. If payment were made that way, some record would be required. It would need to be recorded in VSAL's accounts so that VSAL could later account to Mr Sharma for having made payment of directors' fees. Such a payment would require careful treatment for the purpose of accounting for the income tax payable on the directors' fees. There is no evidence of this having been done. Furthermore, the Sharma Family Trust No. 2 would need to record how it received the payment from VSAL, since its receipt of money that was due to Mr Sharma in his personal capacity (as

payment of directors' fees) would create obligations between the Sharma Family Trust No. 2 and Mr Sharma. There are no such records. All of this weighs against the payments VSAL has made on behalf of the Sharma Family Trust No. 2 being offset against directors' fees owed to Mr Sharma.

[148] Secondly, the only resolutions recording the payment of directors' fees are couched in language that makes the payment of those fees contingent on VSAL having sufficient funds to pay them, and on the shareholder being required to pass a special resolution approving their payment. Furthermore, these four resolutions appear to be directed at offsetting advances VSAL had made to Mr Sharma, rather than payments VSAL had made to others on behalf of the Sharma Family Trust No. 2. I consider that it is helpful to pay regard to the resolutions. All four of them have the same form, the only difference being the quantum of the fees and the year in which the resolution purports to have been made. The relevant generic parts read as follows:

> **Resolved**
>
> 1. The shareholders advances be transferred to the Directors Fee account and accordingly declare $[...] as Directors Fee payable for the year ending [...]. Payment to be made as and when funds are available.
>
> 4. That the Company having determined that the Transactions Constitute a "major transaction" for the purposes of section 129 of the Companies Act 1993 all resolutions contained are subject to the shareholder passing a special resolution approving the transaction.

[149] The first resolution, dated 31 March 2004, declared directors' fees of $110,000; the second, dated 25 February 2005, declared directors' fees of $120,000; the third, dated 31 January 2006, declared directors' fees of $120,000; and the fourth, dated 9 October 2006, declared directors' fees of $100,000. The total amount as approved by the resolution comes to $450,000. Thus, the resolution approved amounts that are $20,000 less than the fees alleged in the statement of defence.

[150] In his evidence, Mr Sharma said that the resolutions to pay directors' fees had extinguished the advances to him as a shareholder of VSAL. However, whilst that may have been his intention at the time the resolutions were passed, I do not understand the resolutions to have that effect. The language of the resolutions makes

it clear that the approved directors' fees were to be paid "as and when funds [became] available". At no time during the financial years covered by the resolutions was VSAL in a position to pay directors' fees.

[151] During the relevant financial years, VSAL had liabilities approximating $1M (being the Otis loan and the mirror liabilities relating to GST). The evidence points to the resolutions to pay directors' fees not being perfected as the resolutions are the only evidence of a decision to pay directors' fees.

[152] The resolutions refer to them being "major transactions" in terms of s 129 of the Companies Act, which require the shareholder to pass a special resolution approving of the transaction. There is no evidence that a shareholder's resolution was passed. This supports the view that implementation of the resolutions to pay directors' fees was suspended until further steps were completed. This would mean that their payment was conditional and so they could not be understood to extinguish advances made to Mr Sharma either personally, or as trustee of the Sharma Family Trust No. 2.

[153] VSAL has no records supporting the directors' fees being more than conditionally approved. Nothing is said about them in VSAL's accounting records. There is no record of income tax having been paid on them.

[154] VSAL's cashbook, which was prepared by Mr Sharma, records him being credited with $513,000. However, I do not consider that this can be read as equating to payment of the $450,000 directors' fees contained in the resolutions. When the actual cheques and other banking transactions are examined, it can be seen that the bulk of payments attributed to Mr Sharma in the cashbook were in fact made to other persons associated with him. The only payments to Mr Sharma recorded in the cashbook that actually went to him are a salary of $45,000, which was paid on 31 December 2005, and fees of $18,000 paid on 31 January 2006. For these reasons alone, the directors' fees in the resolutions cannot be treated as offsetting any liabilities that either Mr Sharma or the Sharma Family Trust No. 2 owed to VSAL. There is nothing that shows the directors' fees actually were offset against the advances that were made to Mr Sharma.

[155] Further, the language of the resolutions is not consistent with the directors' fees being used to extinguish payments that VSAL had made to third parties in order to benefit the Sharma Family Trust No. 2. The resolutions refer to "shareholders advances" being transferred to the "Directors Fee account". This suggests that the directors' fees were intended to be offset against advances that Mr Sharma had made to himself.

[156] It follows that there is nothing to support Mr Sharma's contention in the statement of defence and his evidence that the intention of the four resolutions to pay directors' fees (totalling $450,000) was to effect payment through the fees being offset against the payments itemised in the second cause of action.

[157] Finally, the entire appearance of the four director's resolutions suggests that they were completed well after the dates shown on them. I consider that they are likely to be Mr Sharma's attempts to adjust the company's accounts by attempting to extinguish some of the payments made from VSAL's funds that were of no benefit to VSAL.

[158] Payment of remuneration and other benefits to directors is governed by s 161 of the Companies Act. Whilst directors are free to approve payments to themselves for past years, I consider that such payments must be approached bearing in mind the conditions that applied when the decision was made to approve the payments. The process is set out in s 161. Under s 161(4), directors who vote in favour of authorising a payment must sign a certificate stating that in their opinion, the making of the payment is fair to the company, as well as the grounds for that opinion. Under s 161(5), if this is not done (which is the case here), the director is personally liable to the company for the amount of the payment unless he or she can prove that the payment was fair to the company at the time it was made.

[159] At neither the times dated on the resolutions, nor at any other time, was the actual payment of directors' fees (either the specified amounts for each particular financial year or the total amount of $450,000) fair to VSAL. At all relevant times VSAL was in a state where it had present and contingent liabilities approximating $1M that it could not meet. The advances itemised in the second cause of action

were debts; and provided the debtor had the ability to repay them, these debts were assets of VSAL. The set-off which Mr Sharma contends occurred would mean that VSAL exchanged assets of some value in the form of debts for payment of its liability under the resolution to pay directors' fees to Mr Sharma. I consider that, given VSAL's financial circumstances, any such set-off would be improper; in breach of the fiduciary duties that Mr Sharma owed to VSAL to act loyally, in good faith and in the interests of the company; and contrary to s 161.

[160] I consider, therefore, that any retrospective attempt by Mr Sharma to ameliorate his misapplication of VSAL's money for the benefit of the Sharma Family Trust No. 2 by later declaring directors' fees totalling $450,000 is itself a wrongful, improper self-dealing that is in breach of the fiduciary duties that he owed to the company and, by then, to its creditors.

Did VSAL make payments on behalf of the Sharma Family Trust No. 2?

[161] Having found that the payments of $754,674 in the second cause of action were made without consideration and that they cannot be offset by directors' fees as resolved in the resolutions purportedly dated 27 March 2004, 25 February 2005, 31 January 2006 and 9 October 2006, I turn now to consider if the itemised payments in the second cause of action were actually made on behalf of, or for the benefit of the Sharma Family Trust No. 2. This is relevant if recovery of these funds is to be from the Sharma Family Trust No. 2, rather than from Mr Sharma personally.

[162] On 1 December 2003, Mr Sharma drew a VSAL cheque for $2,305 and paid it to the Sharma Family Trust No.2. He now contends that the payment was to cover costs on his Visa credit card account regarding travel to Wellington for the business of VSAL, which is how he described the payment on the cheque butt. If this was the basis of the payment, it could be expected to result in the cheque being made out to a travel agency or Visa card operator. However, the evidence shows that the cheque was made payable to the Sharma Family Trust No. 2 and the proceeds deposited into its bank account. In such circumstances, before Mr Sharma's explanation can be accepted, there would need to be evidence to show that the payment was for the purpose of reimbursing the Sharma Family Trust No. 2 for a payment it had made to

cover travel expenses that Mr Sharma had incurred on behalf of VSAL. No such evidence is available. I am not prepared to accept an unsubstantiated oral account from Mr Sharma. I find, therefore, that he has improperly paid $2,305 of VSAL's funds to the Sharma Family Trust No. 2 and that VSAL is entitled to recover those funds from the Sharma Family Trust No. 2.

[163] Apart from the payment of $2,305, all the payments itemised in the second cause of action are alleged to have been paid to others on behalf of the Sharma Family Trust No. 2. The payments are grouped below according to the alleged recipient.

Mutual Trust Properties Limited

[164] Mr Sharma is the sole director and sole shareholder of Mutual Trust Properties Limited. This company received total payments of $380,000 from VSAL's funds at the behest of Mr Sharma.

[165] On 28 July 2004, a VSAL cheque of $50,000 was paid to Mutual Trust Properties Limited. On 15 October 2004, a VSAL cheque for $200,000 was paid to Chapman Tripp as a deposit on a property in George Street, Thorndon, to be purchased by Mutual Trust Properties Limited. On 9 November 2004, a VSAL cheque of $20,000 was paid to Mutual Trust Properties Limited. On 2 February 2005, a VSAL cheque of $100,000 was paid to Capital Commercial as a deposit on a property at Tawa Junction to be purchased by Mutual Trust Properties Limited. And on 6 November 2006, a bank transfer from a VSAL account for the sum of $10,000 was paid in into Mutual Trust Properties Limited's account.

Payments to Quay Street Apartments Limited

[166] Mr Sharma is the sole director and sole shareholder of Quay Street Apartments Limited. This company received a total of $246,800 from VSAL's funds at the behest of Mr Sharma.

[167] On 8 June 2004, there was an account transfer of $100,000 from VSAL to Ganda and Associates. Then on 14 June 2004, in the same way, $60,000 was transferred to Ganda and Associates. Ganda and Associates are solicitors for Mr Sharma. A settlement statement prepared by Ganda and Associates, dated 17 June 2004, records VSAL as having advanced a total of $160,000 to assist Quay Street Apartments Limited to acquire a property at 23 Airdrie Road, Swanson.

[168] On 22 October 2004, via a fax authority, $30,000 was paid from a VSAL bank account to Quay Street Apartments Limited. On 11 November 2004, a VSAL cheque of $5,000 was paid to Quay Street Apartments Limited. On 23 November 2004, $20,000 was transferred from a VSAL account to a bank account of Quay Street Apartments Limited. On 2 December 2004, a VSAL cheque of $25,000 was paid to Quay Street Apartments Limited. On 16 September 2005, $6,800 was transferred from a VSAL bank account to an account of Quay Street Apartments Limited.

Payments to other entities

[169] On 22 February 2004, a VSAL cheque of $5,569 was paid to Aon New Zealand for Mathieson Holdings Limited. Mr Sharma was a director of Mathieson Holdings Limited. He says that the shareholder was one of Mr Watt's family trusts. No one has disputed this.

[170] On 19 August 2004, a VSAL cheque of $25,000 was paid to Pannive Nominees Limited. On 27 September 2004, a VSAL cheque of $30,000 was paid to Pannive Nominees Limited. Mr Sharma was a director of Pannive Nominees Limited. Mr Sharma says that the shareholder was one of Mr Watt's family trusts. No one has disputed this evidence.

[171] VSAL's bank records show that on 20 December 2004, a VSAL cheque of $10,000 was paid to Kellands Reality for a deposit on a property at Durham Street. Mr Sharma said in evidence that this property was purchased by the Sharma Family Trust No. 2. He said it was later sold but that the $10,000 was not repaid to VSAL.

His explanation for this was that the $10,000 was treated as payment of part of the directors' fees that were owing to him.

[172] The statement of claim also alleges that on 20 December 2004, VSAL paid $10,000 to DTZ as a deposit on property at Durham Street. However, I have been unable to find any evidence of this amount being paid to DTZ on that date. There is evidence of a payment to DTZ on 3 October 2003 for $50,000. This payment is recorded on a cheque butt as a deposit on 148 Quay Street. This property was purchased by Quay Street Apartments Limited. No allegation that the Sharma Family Trust No. 2 benefited from this payment is pleaded in the second cause of action. Recovery of the payment has been pleaded in the first and fourth causes of action. The omission to include this payment in the second cause of action may be an oversight. Whether this is so and, if so, how to deal with it can be addressed later when the parties are heard on the relief to be awarded.

Basis on which payments were made

[173] To prove that it made the payments itemised in the second cause of action on behalf of the Sharma Family Trust No. 2, VSAL relies on a number of statements by Mr Sharma, as well as inferences to be drawn from banking and accounting records showing where money has gone.

[174] First, the itemised payments in the second cause of action post-date 8 June 2004. This fits with a resolution Mr Sharma made as a director of VSAL dated 8 June 2004. The resolution states:

> 1. That a proposal received from Sharma Family Trust No. 2 be considered for temporary advances to be made by the company.
>
> 2. That having given due consideration for cross-collateral guarantees given by Sharma Family Trust No. 2 to the company for the benefit of the company, the company agrees to make advances to Sharma Family Trust No. 2 for Sharma Family Trust No. 2 to meets its obligations to Mutual Trust Properties Limited [the fifth defendant] or other third parties.
>
> 3. That the sole director be authorised to make the advances from the company as and when funds are available.

[175] VSAL contends that following the making of that resolution, the itemised payments in the second cause of action were advanced to the identified recipients in accordance with the resolution and were, therefore, advances that VSAL made to the recipients on behalf of the Sharma Family Trust No. 2. This means that the trust is obliged to repay those funds to VSAL.

[176] The payments described in [164] and [165] herein follow the resolution of 8 June 2004. The payments benefited Mutual Trust Properties Limited as the payments either went directly to that company or to relieve that company of liabilities it owed to others through payment of those liabilities. VSAL received no benefit or fair value in return for making the payments.

[177] There is no evidence to establish whether or not, at the time the payments were made, the Sharma Family Trust No. 2 owed obligations to Mutual Trust Properties Limited. However, the payment of funds from VSAL to assist Mutual Trust Properties Limited is consistent with the purpose of the resolution. The resolution contemplates VSAL advancing funds to the Sharma Family Trust No. 2 so that it can make payments to Mutual Trust Properties Limited. As Mr Sharma was at all relevant times the sole director of VSAL and Mutual Trust Properties Limited, and one of two trustees of the Sharma Family Trust No. 2, it can be properly inferred that he made the advances because he was satisfied that the conditions in the resolution of 8 June 2004 were present.

[178] Confirmation that this is a correct view of what occurred can be seen from a note Mr Sharma wrote in which he stated that: "Any payments made from [VSAL] to any entities are to be treated as advanced from Sharma Family Trust No. 2". In such circumstances, VSAL can be viewed as acting under the direction of the Sharma Family Trust No. 2 to pay advances authorised under the 8 June 2004 resolution to persons whom the Sharma Family Trust No. 2 wanted to see paid. It would necessarily follow that on every occasion such advances were made, a debt would arise as between VSAL and the Sharma Family Trust No. 2.

[179] Further confirmation can be seen from a letter written by Mr Sharma's counsel, David Smyth, to Brendan Lyne of Grant Thornton. Mr Lyne is an

accountant and a Court-appointed expert who was appointed in a separate proceeding in this Court involving Mr Sharma and Mr Watt (*Watt v Sharma & Ors* HC Auckland CIV 2006-404-2975 15 December 2008, Courtney J). Mr Lyne has prepared a report that follows and traces the flow of payments involving the defendants and the third party in this proceeding. Mr Smyth sent a letter dated 27 August 2008 to Mr Lyne on behalf of Mr Sharma. At this time, Mr Sharma was still the sole director of VSAL. The letter provided explanations from Mr Sharma regarding the flow of payments. In a draft report, Mr Lyne had recorded that to assist in Mutual Trust Properties Limited's acquisition of the property at George Street, Thorndon, VSAL had advanced $200,000. This is probably because the payment was made by a VSAL cheque issued by Mr Sharma. However, Mr Smyth wrote to Mr Lyne contradicting this account of events. Earlier in the letter he defined the letters SFT as being his reference to the Sharma Family Trust No. 2. The letter reads as follows:

> 4. MTP [Mutual Trust Properties Ltd] had no funds of its own when it sought to purchase properties in 2004. SFT was its source of funds to complete purchases. VSAL agreed to advance funds as and when needed by SFT to enable MTP to enter into agreements to purchase properties. Attached is a resolution by VSAL to that effect passed on 8 June 2004 just prior to MTP's first purchase.
>
> 5. Accordingly, the assumption made in 5.3 of the draft report is incorrect. VSAL agreed to advance to SFT but was paid direct to MTP at SFT's direction and was in fact an advance by SFT secured by the mortgage. Therefore both advances by SFT via VSAL of $100,000 are secured by the mortgage to SFT and bear interest. The total amount borrowed by MTP from SFT in relation to the Thorndon purchase was $754,000.

[180] As a result of receiving this letter, Mr Lyne amended his report and attributed the $200,000 advance from VSAL to having been advanced from the Sharma Family Trust No. 2. Thus, in terms of any recovery of funds in that litigation, the Court-appointed expert relied on information provided by Mr Sharma, and identified the advance of $200,000 in the financial accounts prepared for the Court as being owed by Mutual Trust Properties Limited to the Sharma Family Trust No. 2.

[181] Mr Sharma gave this explanation for the advance of the $200,000 to Mr Lyne, which at the time worked for the benefit of the Sharma Family Trust No. 2. Whilst the explanation is neither helpful to Mr Sharma, nor the Sharma Family Trust

No. 2 in this proceeding, it cannot be resiled from now. It necessarily follows that if Mutual Trust Properties Limited received the $200,000 from VSAL at the direction of the Sharma Family Trust No. 2, then VSAL can recover the $200,000 from the Sharma Family Trust No. 2.

[182] Mr Sharma's attempt to offset payments itemised in the second cause of action against the directors' fees he contends he is owed under the four resolutions declaring total fees of $450,000 is consistent with the notion that VSAL's funds were being advanced through the Sharma Family Trust No. 2. Whilst I have rejected the availability of an offset on the basis that the directors' fees were conditional and never reached the stage of being able to be paid out, I note that Mr Sharma has said that: "... funds were provided by [VSAL] for my benefit which was then paid out to the Sharma Family Trust". It is for this reason that he contends that the directors' fees can be offset against the payments that form the basis of the second cause of action, which is against the Sharma Family Trust No. 2, rather than the payments in the first cause of action, which is against him personally. Thus, in this way, he has acknowledged that VSAL has paid out funds in circumstances where the Sharma Family Trust No. 2 may be seen as the beneficial recipient. Since in fact very little money was ever paid directly to the Sharma Family Trust No. 2, the attempt to offset $450,000 in directors' fees must be understood to encompass indirect payments that Mr Sharma knew to have been made from VSAL funds on behalf of the Sharma Family Trust No. 2.

[183] If the advances to Mutual Properties Limited are not seen as advances under the resolution of 8 June 2004, there is no other basis supporting VSAL making the payments identified in [164] and [165] herein. VSAL had no lending arrangements with Mutual Trust Properties Limited. Thus, the advances are either self-dealing advances, not made for fair value, but authorised by the resolution of 8 June 2004, or they have been made without any authority, not for VSAL's purposes, and in breach of trust in terms of the principle in *Selangor United Rubber Estates*. I consider that, on the balance of probabilities, the evidence supports the inference that the advances were made under the 8 June 2004 resolution. I am satisfied, therefore, that the $380,00 which Mutual Life Properties Limited received from VSAL (either directly or indirectly) can be treated as an advance by VSAL under the directors' resolution

of 8 June 2004 to the Sharma Family Trust No. 2. It follows that the $380,000 can be recovered from that trust.

[184] Much the same reasoning applies for the payments identified in[166]-[168] that VSAL made either directly to Quay Street Properties Limited, or indirectly by discharging obligations that Quay Street Properties Limited owed to others. The payments post-date the 8 June 2004 resolution. Other than being made in accordance with that resolution, there is no basis for VSAL making these payments. VSAL had no lending arrangements with Quay Street Apartments Limited. VSAL received no benefit from Quay Street Apartments Limited for making the payments.

[185] Once again, there is no evidence to establish whether at the time these payments were made, the Sharma Family Trust No. 2 owed obligations to Quay Street Apartments Limited. However, there is no other basis for the payments being advanced from VSAL to either Quay Street Apartments Limited or to other persons to whom Quay Street Apartments Limited owed obligations. As with Mutual Trust Properties Limited, Mr Sharma is the sole director and shareholder of Quay Street Apartments Limited. His trusteeship of the Sharma Family Trust No. 2, directorship of VSAL, and his decision to advance VSAL funds in this way are all consistent with him being satisfied that the conditions of the 8 June 2004 resolution were present. The payment of funds from VSAL to assist Quay Street Apartments Limited is consistent with the purpose of the 8 June 2004 resolution. On the other hand, to see the advance as falling outside the resolution entails seeing it as having been made without any specific authorisation and without any proper purpose in terms of VSAL's interests. As with the payments to Mutual Trust Properties Limited, I consider the better view is that these are advances made under the 8 June 2004 resolution.

[186] Further confirmation that the payments identified in [166]-[168] were made in accordance with the resolution of 8 June 2004 can be seen from statements Mr Sharma made in an affidavit in a separate proceeding. In an affidavit dated 27 August 2007, in the 15 December 2008 proceedings between Mr Watt and others and Mr Sharma and others (CIV-2006-404-2975), Mr Sharma describes the acquisition of a property at Airdrie Road. Mr Sharma says that he and

Mr Richardson, as trustees of the Sharma Family Trust, agreed to advance funds to enable Quay Street Apartments Limited to complete this purchase. He refers to VSAL agreeing to advance monies and says: "That company had agreed to advance funds as and when needed by the Sharma Family Trust to assist in purchasing properties". He goes on to say that there was a resolution by VSAL to that effect passed on 8 June 2004, just prior to Quay Street Apartments Limited's purchase of 23 Airdrie Road. He says:

> I directed VSAL to advance $160,000 for the benefit of Quay Street by depositing funds with Ganda and Associates. I intended to secure all advances that the Sharma Family Trust had procured to enable Quay Street to settle the purchase of 23 Airdrie Road as soon as the trust was able to register a second mortgage. The Marac loan contained a clause which prevented a second mortgage being registered.

[187] He then refers to exhibits E and F, being copies of directions given by him to Westpac Bank to advance $160,000 from VSAL's account to the trust account of Ganda and Associates. He described this as "the advance that had been procured by Sharma Family Trust and which was to be secured under its mortgage". The affidavit that has been included in the bundle of documents does not appear to contain all the relevant exhibits, for example, exhibits E and F, being copies of directions given by Mr Sharma to Westpac Bank to advance the $160,000 from VSAL's account, do not appear to be in the bundle. However, the resolution by VSAL to advance money to the Sharma Family Trust No. 2 is present.

[188] Earlier in the affidavit, Mr Sharma distinguishes the Sharma Family Trust from the Sharma Family Trust No. 2. Although he makes clear the existence of the two separate trusts in the affidavit, he later simply refers to the Sharma Family Trust as being the party who was advancing funds to Quay Street Apartments Limited to procure 23 Airdrie Road. This might suggest that he did not mean the Sharma Family Trust No. 2. However, having used the term the "Sharma Family Trust" in this way, he then refers to the resolution of 8 June 2004 as the authority for VSAL to make these payments. The resolution is directed at and names the Sharma Family Trust No. 2, rather than the Sharma Family Trust. The only way to read paragraph 10 consistently with paragraph 9 of the affidavit and to make sense of Mr Sharma's account is to read his reference to the "Sharma Family Trust" as being a shorthand reference to the Sharma Family Trust No. 2.

[189] Mr Sharma made handwritten notes of the debts that VSAL, Quay Street Properties Limited and Mutual trust Properties Limited owed to the Sharma Family Trust No. 2. In the note Mr Sharma used the initials "SFT", which I take to be a shorthand reference to the Sharma Family Trust No 2. Again, this is the only way to make sense of the various debts, all of which clearly appear in other parts of the evidence to be debts owed to that trust. In these handwritten notes, VSAL is recorded as being a creditor for advances of $100,000 for the purchase of the Tawa property; $200,000 for the purchase of the Thorndon property; and $160,000 for the purchase of the property at Airdrie Road. This is consistent with VSAL's arguments that these amounts, whilst going directly to other persons, were made under the direction of the Sharma Family Trust No. 2 to allow Quay Street Apartments Limited and Mutual Trust Properties Limited to acquire those properties.

[190] I am satisfied, therefore, that as in the case of the payments identified in [164] and [165] herein, the payments that were made either to, or for the benefit of Quay Street Apartments Limited (identified in [166] and [168] herein) were treated as advances under the resolution of 8 June 2004 from VSAL to the Sharma Family Trust No. 2. Regarding the payments made to other parties to discharge the obligations of Quay Street Apartments Limited, I consider that the advances from VSAL direct to those persons can be seen as VSAL acting under the direction of the Sharma Family Trust No. 2 by directing the advances it was to make to that trust to the persons the trust wished to see paid. This necessarily creates a debtor/creditor relationship between VSAL and the Sharma Family Trust No. 2. It follows that VSAL is also entitled to recover $246,800 from the Sharma Family Trust No. 2.

[191] Regarding the payment of a $10,000 deposit by VSAL to Kellands Real Estate for a property purchased by the Sharma Family Trust No. 2, since I have found that the resolutions to pay directors' fees cannot be offset against any of the funds itemised in the second cause of action, it follows that there is no consideration to support this payment. The Sharma Family Trust No. 2 has enjoyed the benefit of those funds. It can be treated as an advance under the VSAL resolution dated 8 June 2004 and, accordingly, VSAL can recover the advance from the Sharma Family Trust No. 2.

[192] The two remaining entities that received payments from VSAL that are subject to the second cause of action are payments that VSAL made that were to the benefit of Mathison Holdings Limited and Pannive Nominees Limited. Those payments are identified in [169] and [170] herein. The payments were made to companies, or on behalf of the company in circumstances where Mr Sharma was the sole director of the companies. However, the shareholding was owned by one of Mr Watts' family trusts. There is no evidence to show whether the companies that enjoyed the benefit of the payments, namely Mathison Holdings Limited and Pannive Nominees Limited, ever sought to repay these payments to the Sharma Family Trust No. 2. There is no evidence to show that once the payments from VSAL went to these companies that Mr Sharma, as sole director of the companies, then withdrew money from the companies for the benefit of himself or the Sharma Family Trust No. 2.

[193] The payment to Aon New Zealand, alleged to be for the benefit of Mathison Holdings Limited, was made on 22 February 2004 and consequently predates the 8 June 2004 resolution. I can see no basis in the evidence for attributing the payment VSAL made for Mathison Holding Limited's benefit to the Sharma Family Trust No. 2 Limited. I consider that the claim in the second cause of action for this payment and the recovery of the payment from the Sharma Family Trust Limited must fail.

[194] Payments of $25,000 and $30,000 were made to Pannive Nominees Limited after the resolution of 8 June 2004. They are advances that have been made after the 8 June 2004 resolution to a third party. But whereas there was a connection between Mutual Trust Properties Limited and Quay Street Apartments Limited and the Sharma Family Trust No. 2, which supported the inference that the Sharma Family Trust No. 2 owed obligations to those companies, here the only connection between the Sharma Family Trust No. 2 and Pannive Nominees Limited is the fact that at the relevant times, Mr Sharma was the sole director of Pannive Nominees Limited. The connection between the Sharma Family Trust No. 2 Limited, Quay Street Apartments Limited and Mutual Trust Properties Limited is sufficient to support an inference that, on the balance of probabilities, at the time VSAL made the advances, there were obligations existing between the Sharma Family Trust No. 2 and those companies.

However, it is difficult to infer there could be any such obligations regarding Pannive Nominees Limited. I consider the evidence here is insufficient for me to conclude that the payments by VSAL to Pannive Nominees Limited were payments made in accordance with the resolution of 8 June 2004 and, accordingly, such payments could be recovered from the Sharma Family Trust No. 2.

Third cause of action: against the third defendant, Mr Sharma as the trustee of the Sharma Family Trust

[195] With this cause of action, Mr Sharma is sued in his capacity as trustee for the Sharma Family Trust. As in the case of the claim against the trustee of the Sharma Family Trust No. 2, I shall refer to the "Sharma Family Trust" in order to distinguish the trust and its conduct from Mr Sharma acting in his other capacities. VSAL contends that Mr Sharma made payments totalling $138,039.00 from its funds either to the Sharma Family Trust, or to others on behalf of that trust.

Payments to the Sharma Family Trust

[196] On 23 November 2005, VSAL made an automatic payment of $100,000 to the Sharma Family Trust, and on 14 December 2005, VSAL made a further such automatic payment of $125,000. VSAL owed nothing to the Sharma Family Trust and received nothing in return for the payments. As the director responsible for making the payments from VSAL and as a trustee of the Sharma Family Trust, Mr Sharma was in a conflict of interest. I consider, therefore, that these payments were made by Mr Sharma in breach of his fiduciary duty to VSAL. They are improper payments and VSAL is entitled to recover them from the Sharma Family Trust.

Payments to other persons on behalf of the Sharma Family Trust

[197] On 3 June 2004, a payment of $3,500 was made by a VSAL cheque issued to the Ministry of Justice for the Sharma Family Trust's litigation regarding a company by the name of Metropolis Carparking Limited. A similar payment was made on 18 October 2004 for an amount of $2,200. On 10 December 2004, $7,339.20 was

paid by VSAL cheque to a barrister named of Ted Werry, for the same litigation. VSAL contends that the Sharma Family Trust has enjoyed the benefit of the payments through being released from obligations that it owed to the Ministry of Justice and to Ted Werry.

[198] The evidence shows that the Sharma Family Trust was involved in litigation regarding Metropolis Carparking Limited. The payments VSAL made relating to this litigation were of no benefit and not in the interests of VSAL. VSAL was under no legal obligation to make these payments. It is a well-settled principle of equity that payment of another person's creditor can lead to the party making the payment being subrogated to the rights of the paid creditor: see Andrew Burrows *The Law of Restitution* (3rd ed, Oxford, 2011) at 150-155, and Lionel D. Smith *The Law of Tracing* (Oxford, 1997) at 129-130, 152-154, and the authorities cited therein. In *Banque Financiere de la Cite v Parc (Battersea) Ltd* [1999] AC 221 at 234, Lord Hoffman described the elements of the principle in this way:

> [O]ne is here concerned with a restitutionary remedy and that the appropriate questions are therefore, first, whether the defendant would be enriched at the plaintiff's expense; secondly, whether such enrichment would be unjust and thirdly, whether there are nevertheless reasons of policy for denying a remedy.

[199] I consider that subrogation is applicable here. The payments that Mr Sharma caused to be made from VSAL's funds are self-dealing payments. As a director of VSAL and a trustee of the Sharma Family Trust, Mr Sharma had a conflict of interest. VSAL never received fair value for the payments, whilst the Sharma Family Trust has benefited, both directly and indirectly, from the payments. Thus, it has been enriched at VSAL's expense. In such circumstances, it would unjust and unconscionable for the Sharma Family Trust to avoid payment to VSAL. There are no policy reasons for denying a remedy. Indeed, the position is the reverse. Someone who is both director and trustee should not be permitted to enrich the trust of which he is a trustee at the expense of the company and its creditors. It follows that having paid the debts of the Sharma Family Trust identified in [196] and [197] herein, VSAL is entitled to recover those amounts from the Sharma Family Trust. In addition, it can be inferred from the circumstances that VSAL made the payments to creditors of the Sharma Family Trust under the direction of Mr Sharma, acting both

as a director of VSAL and a trustee of the Sharma Family Trust. In such circumstances, following the principles of subrogation, a debtor/creditor relationship between VSAL and the Sharma Family Trust would arise.

Fourth cause of action: against the fourth defendants, Quay Street Apartments Limited

[200] The payments which form the basis of this cause of action fall into two groups: those that were directly made from VSAL to Quay Street Apartments Limited; and those that were made to other persons on behalf of Quay Street Apartments Limited to relieve that company of its obligations to those persons. I will deal with each group separately. Payments made after 8 June 2004 that feature in this claim also feature in the claim against the Sharma Family Trust No. 2.

Payments made to Quay Street Apartments Limited

[201] On 21 October 2003, VSAL, by cheque, made a payment of $50,000 to Quay Street Apartments Limited. The purpose of the payment was to allow Quay Street Apartments Limited to pay a deposit on the purchase of a property at 148 Quay Street. On 22 October 2004, via a faxed authority, VSAL advanced $30,000 to Quay Street Apartments Limited. Then on 11 November 2004, by cheque, VSAL paid $5,000 to Quay Street Apartments Limited. Again on 23 November 2004, by a bank transfer, VSAL advanced $20,000 to Quay Street Apartments Limited. On 2 December 2004, by cheque, VSAL paid $25,000 to Quay Street Apartments Limited. On 16 September 2005, VSAL, by bank transfer, advanced $6,800 to Quay Street Apartments Limited.

[202] Such advances were of no benefit to VSAL, which received nothing from Quay Street Apartments Limited. Quay Street Apartments Limited received clear benefits. The advances were not recorded in writing, no interest was provided for the advance; nor was any security provided by Quay Street Apartments Limited. The fact that such advances occurred is only ascertainable from the bank documents and other company records by which the advances were actually effected. Mr Sharma

was the sole director of Quay Street Apartments Limited. The position here is the same as with the payments that VSAL made to the Sharma Family Trust. The payments are improper in that they result from a breach of the fiduciary duty which Mr Sharma owed to VSAL. VSAL is entitled to recover these payments from Quay Street Apartments Limited.

Payments made to others on behalf of Quay Street Apartments Limited

[203] On 3 November 2003, by cheque, VSAL paid an entity known as Terra Firma for work on a property at Ambrico Place that was associated with Quay Street Apartments Limited. On 29 November 2003, VSAL, by cheque, paid $10,000 as a deposit for carparking for the benefit of Quay Street Apartments Limited. On 8 June 2004, $60,000 was paid by a trust account transfer via fax to Ganda and Associates, being a deposit on a property at Airdrie Road that Quay Street Apartments Limited was buying. On 14 December 2005, VSAL paid $2,948 by cheque to Sovereign Insurance on behalf of Quay Street Apartments Limited. On 31 January 2006, by bank transfer, VSAL paid $18,000, which VSAL documented as a fee payable to Quay Street for the services of Mr Watt. On 15 March 2006, VSAL, by cheque, paid $3,202 to Sovereign Insurance on behalf of Quay Street Apartments Limited.

[204] VSAL received nothing in return for making these payments. For the same reasons as are expressed earlier on, recovery of these payments, when considering the second cause of action, I am satisfied that VSAL is also entitled to recover these payments from Quay Street Apartments Limited.

[205] The fourth cause of action also pleads that on 25 February 2005, by cheque, VSAL paid $5,569 as an insurance payment to Aon on behalf of Quay Street Apartments Limited. However, this must be an error. In the second cause of action, the same payment is alleged to have been made on behalf of Mathison Holdings Limited. This is consistent with the cheque butt record. There is no evidence that I am aware of that would connect the payment of $5,569 to Aon Insurance with Quay Street Apartments Limited. Accordingly, the claim fails on these factors.

Fifth cause of action: against the fifth defendant, Mutual Trust Properties Limited

[206] The payments which form this cause of action also fall into two groups: those that were directly made from VSAL to Mutual Trust Properties Limited; and those that were made to other persons on behalf of Mutual Trust Properties Limited to relieve that company of its obligations to those persons. Each group is dealt with separately. These payments also feature in the claim against the Sharma Family Trust No. 2.

Payments made to Mutual Trust Properties Limited

[207] On 28 July 2004, by cheque, VSAL advanced $50,000 to Mutual Trust Properties Limited. On 9 November 2004, by cheque, VSAL advanced $20,000 to Mutual Trust Properties Limited. And on 6 November 2006, VSAL, by bank transfer, advanced $10,000 to Mutual Trust Properties Limited. As with the payments to Quay Street Apartments Limited, VSAL never received fair value in return for these payments, whereas Mutual Trust Properties Limited benefited from receipt of these funds. The payments were made in circumstances where Mr Sharma was both a director of VSAL and Mutual Trust Properties Limited. I consider, therefore, that for the same reasons as are given earlier when considering recovery of these payments under the second cause of action, I am satisfied that VSAL is also entitled to recover these payments from Mutual Trust Properties Limited.

Payments made to others on behalf of Mutual Trust Properties Limited

[208] On 15 October 2004, by cheque, VSAL paid $200,000 to Chapman Tripp Solicitors, being a deposit on a property at George Street, Thorndon, which was being purchased by Mutual Trust Properties Limited. On 2 February 2005, by cheque, VSAL paid $100,000 to capital Commercial Reality, being a deposit on a property at Tawa Junction that was being acquired by Mutual Trust Properties Limited. Again I consider, for the same reasons as I found when considering recovery of these payments under the second cause of action, that VSAL

is also entitled to recover from Mutual Trust Properties Limited the payments that VSAL made to others on behalf of Mutual Trust Properties Limited.

Sixth cause of action: against Mr Sharma as a director of VSAL

[209] The sixth cause of action is brought against Mr Sharma by the second plaintiff, Treasury Technology Distribution Limited (Treasury) pursuant to s 301 of the Companies Act. This section allows a creditor of a company in liquidation to bring proceedings against a director of that company when he or she has misapplied, or retained, or become liable or accountable for, money or property of the company; or been guilty of negligence, default, or breach of duty or trust in relation to the company. In such circumstances, s 301 authorises the Court to inquire into the conduct of the director and order that person to repay or restore the money or property or any part of it with interest at a rate the Court thinks just, or to pay compensation to the company, or to order the payment or transfer of money or property to the creditor with interest.

[210] Treasury relies on the same allegations as are pleaded against Mr Sharma in the first cause of action. Namely, that he has breached his duties of good faith and loyalty. Here, Treasury seeks to frame this claim as a misapplication of funds, or breach of duty of trust in terms of s 301. In *Sojourner v Robb* at [53], the Court of Appeal recognised that s 301 can extend to claims that directors have misapplied, become liable to account for money or property of a company, or are otherwise liable for a breach of duty or trust. The provision was further accepted to cover restitutionary claims, which in that case included an account of profits. I have already found the first cause of action proved against Mr Sharma. I consider that the same reasoning that was applied to VSAL's claim can be applied to Treasury's as well. Here, as in *Sojourner v Robb*, there is an equitable overlap to the s 301 claim. The same reasons that led me to find that Mr Sharma had breached his fiduciary duties of loyalty and good faith to VSAL as regards the first cause of action apply to the s 301 claim as well. Thus, Treasury has proved its claim against Mr Sharma.

Limitation Act 1950

[211] Some of the payments that VSAL and Treasury seek to recover fall just outside the six year timeframe in the Limitation Act 1950. Nine such payments were made between 3 October 2003 and 28 November 2003. VSAL and Treasury seek to recover those payments from Mr Sharma in the first and sixth causes of action respectively (at [11] and [26] of the statement of claim) and Quay Street Apartments Limited for one of the payments (at [19] of the statement of claim). Mr Sharma and Quay Street Apartments Limited contend that the recovery of the payments is out of time and consequently barred by s 4 of the Limitation Act 1950.

[212] Whilst the Limitation Act 1950 has now been repealed, s 2A provides that despite its repeal, it continues to apply to actions based on acts and omissions before 1 January 2011. Section 4 states, relevantly, as follows (*emphasis added*):

> **4 Limitation of actions of contract and tort, and certain other actions**
>
> (1) Except as otherwise provided in this Act ... the following actions shall not be brought after the expiration of *6 years from the date on which the cause of action accrued, that is to say,—*
>
> ...
>
> (d) Actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.
>
> (2) An action for an account shall not be brought in respect of any matter which arose more than 6 years before the commencement of the action.
>
> ...
>
> (9) This section *shall not apply to any claim for ... other equitable relief, except in so far as any provision thereof may be applied by the Court by analogy in like manner* as the corresponding enactment repealed or amended by this Act, or ceasing to have effect by virtue of this Act, has heretofore been applied.

[213] The relationship between the Limitation Act and claims relating to breach of fiduciary duty turns on whether there is an overlap between the legal claims referred

to in s 4 and equitable claims. If there is a substantial overlap, by analogy, the time bar for the legal claims will be applied to the equitable claims.

[214] In *Maruha Corporation v Amaltal Corporation* HC Auckland CIV-2003-404-001773, 19 October 2004, Priestley J discussed the overlap in the context of the relationship between duties in tort and equity and noted the general approach to fiduciary claims. However, as s 28 applied, he did not conclude on that point. His obiter comments are as follows (*emphasis added*):

> [329] Maruha's claim for breach of fiduciary obligation is a claim based in equity. The tort of deceit, prima facie barred after six years by s 4(1), obviously has riding with it elements of fraud and deception.
>
> [330] In general terms, the Limitation Act bar will not apply to equitable causes of action except by analogy. (s 4(9); see generally *FAI (NZ) General Insurance Co Limited v Blundell and Brown Limited* [1994] 1 NZLR 11 (CA)).
>
> [331] As Tipping J observed in *Johns v Johns* (CA 108/03, 31 March 2004) a fiduciary claim will always *prima facie survive the statute barring of an allied common law or equitable claim.*

[215] In *Johns v Johns* CA 108/03, 31 March 2004, the Court of Appeal noted the approach taken in *S v G* [1995] 3 NZLR 681. *S v G* involved different legal claims, some of which were barred by the Limitation Act. The Court of Appeal held that the fiduciary claim was barred by analogy, because it was essentially an alternative claim in respect of the same conduct. In *Johns v Johns*, Tipping J rejected the approach taken in *S v G* and stated as follows:

> [80] That way of putting the matter, understandable as it was in the particular context, tends with respect, to look at the issue from the wrong end. The fiduciary claim will always prima facie survive the statutory barring of an allied common law or indeed equitable claim. There will be a bar by analogy only when the fiduciary claim parallels the statute barred claim so closely that it would be inequitable to allow the statutory bar to be outflanked by the fiduciary claim. In order to determine how close the parallel is the Court must examine not only the underlying facts but also the nature of the relationship between the parties and the policy and purpose of the different causes of action. If there is a sufficient difference in any material respect, the suggested parallel is unlikely to be close enough to make it appropriate in equity to apply an analogous bar.

[216] Regardless of the nature of the cause of action, under s 4(9), so long as the relief sought is equitable, limitation periods do not apply. Therefore, a claim for

equitable relief arising out of a breach of fiduciary duty may not be subject to any limitation period. However, again there is an exception where the claim is analogous to a claim based in statute or tort.

[217] In Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [38.1.3], it is suggested that limitation by analogy should only apply where there is an overlap between the purposes of the different causes of action. For example, this exception has been applied in claims for breach of fiduciary duties in contexts where an analogy could be made to a breach of a tortious duty of care (*Matai Industries Ltd v Jensen* [1989] 1 NZLR 525 and *S v G* [1995] 3 NZLR 681).

[218] In *Mahura* at [328], citing *Matai Industries*, *S v G*, *Johns v Johns*, and *M v H* (1999) 13 PRNZ 459, Priestley J said:

> The bar by way of analogy which s 4(9) of the Limitation Act offers to the Court and a defendant is a discretionary defence. It seems to have an underlying policy that if an equitable claim is sufficiently close in kind to a legal claim, equity should follow the law. It would be unjust not to apply the bar by an analogy, and would be inequitable to allow a statutory bar to be outflanked by a fiduciary claim.

[219] I do not propose to embark on an analysis of whether the breach of fiduciary duty claims in this case parallel any allied claim for recovery by virtue of the common law or any enactment. Resolving this issue would require in-depth analysis. I do not consider it necessary to proceed with such analysis. This is because any time bar that might be imposed by s 4 is removed by s 28 of the Act (see s 3, which makes s 4 subject to s 28). I propose, therefore, to consider the allegedly time-barred claims against Mr Sharma in the light of s 28.

[220] Section 28 excludes fraud from s 4 where certain conditions are met. Section 28 provides:

> **28 Postponement of limitation period in case of fraud or mistake**
>
> Where, in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) *The action is based upon the fraud of the defendant* or his agent or of any person through whom he claims or his agent; or

(b) *The right of action is concealed by the fraud* of any such person as aforesaid; or

(c) The action is for relief from the consequences of a mistake,—

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it ...

[221] Fraud in s 28 includes equitable fraud, which encompasses a breach of fiduciary duty: see *Official Assignee v Creighton* [1993] 2 NZLR 534 at 538; *Inca Ltd v Autoscript (NZ) Ltd* [1979] 2 NZLR 700. Unlike common law fraud, an actual intention to cheat is not a necessary ingredient of equitable fraud. Fiduciaries who act in ignorance of the requirements of their duties, or under the mistaken belief that they are acting properly will, if they are found to have breached those duties by their actions, be labelled with equitable fraud: see *Avondale Printers v Haggie* [1979] 2 NZLR 124 at 159. In *Nocton v Lord Ashburton* [1914] AC 932 at 953, Viscount Haldane LC said:

> In Chancery the term 'fraud' thus came to be used to describe what fell short of deceit, but imported breach of a duty to which equity had attached its sanction."

And later at 954 (*emphasis added*):

> But when fraud is referred to in the wider sense in which the books are full of the expression, used in Chancery in describing cases which were within its exclusive jurisdiction, *it is a mistake to suppose that an actual intention to cheat must always be proved. A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent, even in such a case as a technical fraud on a power.* It was thus that the expression 'constructive fraud' came into existence. The trustee who purchases the trust estate, the solicitor who makes a bargain with his client that cannot stand, have all for several centuries run the risk of the word fraudulent being applied to them. What it really means in this connection is, not moral fraud in the ordinary sense, but breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience.

[222] The present claims are based on the equitable fraud of Mr Sharma. In this case, Mr Sharma was the sole director of VSAL until it was placed in liquidation on 9 October 2009. The company commenced these proceedings on 17 December 2009. Accordingly, the proceedings were commenced just over three months after Mr Sharma lost control of VSAL. It was not until a liquidator was appointed that the breaches of fiduciary duty became known by persons other than Mr Sharma and thus actionable by them.

[223] Thus, for s 28 to apply in this case, a distinction must be drawn between Mr Sharma's knowledge of what has occurred and VSAL's knowledge of those events. Since he was the directing mind of VSAL, if his knowledge were to be attributed to VSAL, it would mean the company always knew of the actionable conduct, though for as long as he was sole director, VSAL was helpless to act against him. I note that this may reveal a difference in the way I have earlier characterised Mr Sharma, i.e. as VSAL's "alter ego", with no such distinction being drawn. I consider that this issue can be resolved by reference to the fundamental principles of the rules of attribution.

[224] Because a company can only act through natural persons, it is necessary to attribute the acts and knowledge of natural persons to the company. Here, when it came to the misuse of VSAL's funds, it was logically necessary to attribute Mr Sharma's knowledge and actions to VSAL because VSAL could only express its stance on the liabilities alleged against the defendants through Mr Sharma's actions.

[225] However, in the context of ascertaining VSAL's discovery of Mr Sharma's breaches of fiduciary duty and hence discovery of equitable fraud, the underlying logic of the rules of attribution is displaced. This is because here the company is alleging that it was defrauded by the very person who was its directing mind and will. In this context, the relationship between Mr Sharma and VSAL is a key issue and there is no "community or mutuality of interest" between them. Thus, the normal rules of corporate personality apply. But since a company can only act through its officers, it was not until Mr Sharma was removed from office that VSAL could effectively take notice of the breaches of fiduciary duty that it had suffered and seek to prosecute claims based on such breaches. Once it was in this position, VSAL

acted promptly against Mr Sharma and the other defendants. I am satisfied, therefore, that none of the claims against Mr Sharma for breach of his fiduciary duties are time-barred.

[226] Regarding the one claim against Quay Street Apartments Limited, this relates to the payment of $50,000 by VSAL to that company on 21 October 2003. The payment allowed Quay Street Apartments Limited to pay a deposit on a property it was purchasing. If the claim is viewed simply as VSAL seeking to recover money lent to that company, then it would be a claim based in debt, and it would be out of time. However, if the claim is seen as VSAL seeking to follow and to recover a payment which results from a breach of the fiduciary duties of loyalty and good faith, then the claim is not out of time. Recovery of moneys paid to third parties by way of loan or otherwise as a result of equitable fraud is not time-barred. The factual allegations in the statement of claim support recovery based on the latter view. Thus, I do not consider that recovery of this payment is time-barred.

[227] Furthermore, in this case, given that Mr Sharma was also the sole director of Quay Street Apartments Limited, the evidence is sufficient to establish that Quay Street Apartments Limited received this payment from Mr Sharma knowing it was paid in breach of fiduciary duties that he owed to VSAL (see discussion on attribution of knowledge at [229]. The degree of knowledge to establish knowing receipt includes knowledge of facts that would cause an honest company director to realise the money was being paid in breach of fiduciary duty: see *Westpac v Savin* [1985] 2 NZLR 41 at 52. I consider that at the very least in this case, an honest reasonable company director of Quay Street Apartments Limited having Mr Sharma's knowledge would have realised that the payment from VSAL on 21 October 2003 was made in breach of the fiduciary duty that Mr Sharma owed to VSAL. Thus, Mr Sharma's evidence that he believed he could use VSAL's money in this way may not shield Quay Street Apartments Limited from being a knowing receiver.

Defence of money paid under mistake and change of position

[228] Mr Sharma has also raised affirmative defences based on ss 94A and 94B of the Judicature Act 1908 and the common law defence of change of position. However, I do not consider that these defences can be of assistance to him. These defences rely on findings that Mr Sharma honestly believed the money from Otis and the funds that should have been used to pay GST on the purchase of the development from Treasury were lawfully claimed and dispensed, that the suspect payments were able to be ratified and that the defendants altered their position in reliance of this state of affairs. For the reasons already expressed, these defences must fail. They are not available to persons who have acted in bad faith in the sense described in *Saba Yachts Limited v Fish Pacific Ltd* (2006) 3 NZCCLR 963 at [50]. The defendants fall into this category.

[229] The findings I have made against Mr Sharma establish breach of fiduciary duty and, therefore, equitable fraud. Further, Mr Sharma was at all relevant times the controlling mind and will of Quay Street Apartments Limited and Mutual Properties Limited, as well as being one of the two trustees of the family trusts that are the subject of the second and third causes of action. Thus, his knowledge can be attributed to the other defendants: see *El Anjou v Dollar Holdings Plc* [1994] 2 All ER 685 at 696-698 and 705-706. In such circumstances, all defendants lack the necessary character of good faith to satisfy these affirmative defences.

[230] Furthermore, no evidence was adduced to demonstrate a change of position. All the evidence shows is that payments were made and, as could be expected, the defendants benefited from them. This does not amount to a change of position that would entitle them to resist recovery of benefits that VSAL has lost to them.

[231] In addition, I have difficulty understanding how this defence applies here at all. A claim for money paid under a mistake and the defence of change of position usually applies to the circumstance where party A mistakenly but honestly pays money to party B, and B resists returning the money on the ground that B has detrimentally altered his or her position in reliance of being entitled to use this

money. In the present case, the money in question belongs to VSAL, and its fiduciary, Mr Sharma has applied it for his own or others' purposes in circumstances where VSAL received no fair value in return. It is no answer to a claim of this nature to contend that the relevant payments were mistaken and that those who have benefited from the payments and who knew of the surrounding circumstances can now resist their return.

Outcome

[232] In their closing addresses, the plaintiffs suggested that the quantification of the monetary claims against the defendants could be dealt with separately. I consider that this is a sensible approach. The disposition of the liability claims has been complex and there are loose ends which require fixing.

[233] The statement of claim pleads facts that may also, particularly with some tidying by amendment, support claims for knowing receipt against the second to fifth defendants. Whether amendment is permitted at this late stage turns on the interests of justice.

[234] Where the payments went to bona fide creditors of the other defendants, I consider that the payments of these creditors may constitute a substitute benefit which the other defendants knowingly received: see *Snells Equity* (32nd ed Sweet & Maxwell Ltd, UK, 2010) at 30-069 where it is said that property received in the context of a knowing receipt includes "the original trust property or *its traceable proceeds*" (*emphasis added*). On this approach, the ability to claim against defendants other than Mr Sharma when it comes to payments that were not directly made to them would be based on such payments having been made on their behalf and them having benefited from the payments. Since Mr Sharma was involved in the provision and receipt of the funds, his knowledge attaches to both. For example, when VSAL's funds were used to pay a deposit to the vendor of a property being purchased by Mutual Trust Properties Limited, that company obtained a benefit from the misapplication of VSAL's funds that is traceable to Mutual Trust Properties Limited. I consider, therefore, that it may be open to say that the other defendants received VSAL's funds knowing the payments were made in breach of fiduciary

duty. This would allow the plaintiffs to claim an account of profits as well as recovery of VSAL's funds. The principles regarding knowing receipt are set out in *Westpac v Savin*.

[235] Moreover, in circumstances where a party receives property as a volunteer, that is without paying valuable consideration, and such property has been removed in breach of trust or breach of a fiduciary duty, when it comes to recovering the value of the lost trust property, equity treats the recipient as being in no better position than the wrongdoer. This is so even when the recipient is innocent of any wrongdoing: see *Foskett v McKeown* [2001] 1 AC 102 at 131. In such circumstances, where trust funds have been applied in breach of trust/fiduciary duty, and either they or their substitute have passed to a volunteer recipient, he or she either holds them on trust for the wronged beneficiary, or they become subject to an equitable lien to secure the beneficiary's claim for return of the lost trust funds: see *Foskett v McKeown* at 131; also see discussion in Smith *The Law of Tracing*. Thus, irrespective of the other defendants' knowledge that they have benefited from funds paid in breach of fiduciary duty, VSAL could trace funds which Mr Sharma has misapplied to funds that are now held by other defendants, either to claim the defendants hold such funds on trust for VSAL, or to claim an equitable lien on such funds.

[236] The necessary evidence to establish these equitable remedies is already before the Court. I propose to leave open the opportunity for the plaintiffs to raise these issues in the context of their arguments on available relief. Whether and, if so, to what extent other equitable remedies can be pursued at this time will turn on the arguments I hear from the plaintiffs and the defendants.

[237] So far, VSAL and Treasury have sought to recover the misapplied funds from the defendants. Given the equitable nature of the claim against the defendants, an account of profits may also be available.

[238] Whether Mr Sharma is entitled to an allowance for his services as a director, to be deducted from the recovered funds, is something that can be advanced at the hearing on relief.

Result

[239] The plaintiffs have been successful in proving that Mr Sharma and the other defendants are liable for the claims made against them in the statement of claim.

[240] Leave is reserved to the parties to file further argument and, if they require it, a further hearing to determine the nature and quantification of the remedies available to them.

[241] Resolution of other issues such as awards of interest and costs is also deferred.

J

Duffy J