IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-002003
[2016] NZHC 462

BETWEEN	ANNIK INVESTMENTS LIMITED (IN LIQUIDATION) First Plaintiff
AND	ROBIN LESLIE EDWARDS, MARY CHRISTINA FORBES-EDWARDS AND G&A LAW TRUSTEES LIMITED Defendants

CIV-2015-404-002005

BETWEEN	OTIS TRUSTEE LIMITED Plaintiff
AND	ROBIN LESLIE-EDWARDS AND MARY CHRISTINA FORBES-EDWARDS Defendants

CIV-2015-404-002160

BETWEEN	KYOTO TRUSTEE LIMITED Plaintiff
AND	ROBIN LESLIE EDWARDS, MARY CHRISTINA FORBES-EDWARDS AND G&A LAW TRUSTEES LIMITED Defendants

CIV-2015-404-002645

BETWEEN	MARY CHRISTINA FORBES-EDWARDS AND G&A LAW TRUSTEES LIMITED First Plaintiff
	ROBIN LESLIE EDWARDS Second Plaintiff

AND | ANNIK INVESTMENTS LIMITED (IN LIQUIDATION)
First Defendant

SCOTT WILLIAM GREER AS LIQUIDATOR OF ANNIK INVESTMENTS LIMITED (IN LIQUIDATION)
Second Defendant

OTIS TRUSTEE LIMITED
Third Defendant

Hearing: 3-4 March 2016

Appearances: D W Grove for Plaintiffs in proceedings CIV-2015-404-2003, 2005 and 2160. For Defendants in proceedings CIV-2015-404-2645
D G Collecutt for Defendants in proceedings CIV-2015-404-2003, 2005 and 2160. For Plaintiffs in proceeding CIV-2015-404-2645

Judgment: 16 March 2016

RESERVED JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
On 16 March 2016 at 4.00pm
pursuant to r 11.5 of the High Court Rules
Registrar/Deputy Registrar

Date:……………………………….

Solicitors/counsel:
Foy & Halse/D Grove, Auckland
Skeates Law/G Collecutt, Auckland

Introduction

[1] There are multiple proceedings before the Court between various companies associated with a Mr Ian McKay on the one hand, and a Mr Robin Edwards and his wife, Mrs Mary Forbes-Edwards, (jointly "the Edwards"), various companies associated with them, and their family trust – the Edwards/Forbes Family Trust ("The Trust") – on the other hand.

[2] There are a number of interlocutory applications outstanding:

(a) In proceeding CIV-2015-404-2003, Annik Investments Limited (In Liquidation) ("AIL") seeks a freezing order over a property situated in MacWhinney Drive, Drury owned by Mrs Forbes-Edwards and G&A Law Trustees Limited as trustees of the Trust;

(b) In proceeding CIV-2015-404-2005, Otis Trustee Limited ("Otis"), as first mortgagee of the MacWhinney Drive property, seeks an order for possession of the property so that it can endeavour to sell the same pursuant to an expired and unremedied notice given under s 119 of the Property Law Act 2007;

(c) In proceeding CIV-2015-404-2160, Kyoto Trustee Limited ("Kyoto") also seeks a freezing order over the MacWhinney Drive property;

(d) In proceeding CIV-2015-404-2645, the Edwards and the Trust seek interim orders to:

(i) stop the sale of a property known as Middlemore Lodge in Mangere Road, Auckland, by Otis as first mortgagee on terms that are less favourable to Otis than those contained in an offer they have made to Otis;

(ii) require Otis to transfer the first mortgages over the Middlemore Lodge property and the MacWhinney Drive property to a third party, Performance Trustees Limited ("Performance") on payment of the mortgage debt; and

(iii) appoint a receiver of the rental from Middlemore Lodge and to hold the same pending further order of the Court.

[3] There was a dispute between counsel as to whether the application noted in [2(c)] was before the Court for hearing. Mr Grove, for the various entities associated with Mr McKay, did ask for it to be called along with the other applications. He did not however formalise that request and the Registry did not expressly set the application down for hearing. Mr Collecutt for the Edwards and the various entities associated with them resisted any suggestion that this application was ready for hearing.

[4] It did not prove necessary for me to resolve this impasse. Mr Grove accepted that, if the application by AIL noted in [2(a)] above is to be determined by the Court in AIL's favour, he did not need to proceed with the application by Kyoto for a freezing order over the same property.

[5] It transpired in the course of the hearing that the primary application for the Court's determination was that detailed in [2(d)(ii)] above – the application by the Edwards and the Trust for a mandatory interim order requiring Otis to transfer the mortgages it holds to Performance.

[6] By way of housekeeping, I note that a number of further papers and additional affidavits were filed and/or produced by the parties either immediately prior to, or during the course of, the hearing. In part these additional papers updated matters. There could be and there was no objection to this. However in part they also dealt with substantive matters that were important to the resolution of the issues raised in the course of the hearing and that should have been covered in the affidavits filed when the applications/notices in opposition were filed. The party/parties affected were given the opportunity to advise whether there was any objection to the late filing of this material and/or to file anything in reply. In the event no objection was taken and no additional papers were filed. It was accepted by both counsel that the Court could consider all of the material belatedly put before it.

Relevant Factual Background

[7] There is no comprehensive affidavit filed in any of the four proceedings which draws together all of the relevant background material. What follows is my attempt to put the applications the Court was required to consider in context. Regrettably the background is convoluted and the following is necessarily a potted summary.

Past proceedings – steps taken

[8] Until it was placed in liquidation in March 2015 AIL was controlled by the Edwards. They were the sole directors of the company. They each owned 50 per cent of its shares. It was their principal trading entity.

[9] In 2012 AIL entered into an agreement to purchase a commercial property in New Plymouth. It borrowed to pay the deposit and it was having difficulty in funding the balance of the purchase price. Through a mortgage broker, it approached Mr McKay. He introduced Kyoto, an entity controlled by him, into the discussions. AIL, the Edwards and Kyoto entered into an agreement whereby Kyoto was to advance monies both to repay the funder who had advanced the deposit, and to complete the purchase. It agreed to lease the property for a period of one year and it gave an option to another Edwards' company, Annik New Plymouth Limited ("ANPL"), so that it could then buy the property back at the original purchase price negotiated by AIL with the vendor, plus a fee to reimburse Kyoto for funding the completion of the agreement. Kyoto was to provide vendor finance to ANPL to enable it to complete the purchase back. A joint venture agreement between the Edwards and Kyoto was then to come into effect.

[10] In the event the Edwards and ANPL breached the agreement in place between the parties. In 2013 Kyoto issued proceedings against the Edwards, AIL and ANPL. In July 2014, it obtained judgment against the Edwards for $1,133,500, together with interest and costs. It also obtained judgment against ANPL for $176,000, together with interest and costs.[1]

[11] The judgments have not been satisfied, either by the Edwards or by ANPL.

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[1] *Kyoto Trustee Ltd v Annik New Plymouth Ltd* HC Auckland CIV-2013-404-1196, 7 July 2014.

[12] Kyoto then undertook a number of steps in an endeavour to enforce the judgments. In particular it:

(a) placed ANPL in liquidation;

(b) served bankruptcy notices on both Mr Edwards and Mrs Forbes-Edwards;

(c) applied for a charging order over the Edwards' shares in AIL; and

(d) required the Edwards to be cross-examined in this Court as to their ability to satisfy the judgments.

[13] Kyoto also funded the liquidators of ANPL to enable them to pursue a claim against AIL. The liquidators issued proceedings against AIL. They initially obtained a freezing order. They subsequently obtained judgment by default against AIL in the sum of $398,569.82, together with interest and costs.[2] This judgment has not been satisfied either.

[14] Kyoto also obtained an interim charging order over the shares in AIL owned by both Mr Edwards and Mrs Forbes-Edwards.

[15] The Edwards' affairs were subject to investigation by the Inland Revenue Department and in April 2015, Mr Edwards was adjudicated bankrupt following an application by the Commissioner of Inland Revenue. Following Mr Edwards' bankruptcy, the interim charging order over the shares in AIL was made final. By this stage Mr Edwards' shares were vested in the Official Assignee. However an order for the sale of Mrs Forbes-Edwards shares by the Registrar was made.[3] Her shares in AIL were bought by Kyoto at a public auction held on 23 July 2015.

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[2] *Annik New Plymouth Ltd v Annik Investments Ltd* HC Auckland CIV-2014-404-3309, 26 February 2015.

[3] *Kyoto Trustee Ltd v Annik New Plymouth Ltd & Ors* HC Auckland CIV-2013-404-1196, 1 April 2015.

The Trust

[16] The Trust was settled on 7 November 2003. The initial trustees were Mr Edwards and Mrs Forbes-Edwards. They were also the settlors. The primary beneficiaries of any Trust income are Mr and Mrs Edwards and/or their children. The capital of the Trust fund is to be held for the benefit of the Edwards, or their children. There is provision for more remote interests to receive income and/or capital if prior trusts fail. The power to appoint new trustees is vested in Mr and Mrs Edwards.

[17] At some point after Mr Edwards' bankruptcy, G&A Law Trustees Limited was appointed as a trustee in his stead. The trustees of the Trust are now Mrs Forbes-Edwards and G&A Law Trustees Limited.

The properties

[18] There are two properties relevant to the present proceedings – the property in MacWhinney Drive and the property known as Middlemore Lodge in Mangere Road. I deal with each in turn.

(i) MacWhinney Drive

[19] The MacWhinney Drive property was purchased by AIL in February 2003. The price paid was $525,000. An entity known as Prospective Investments Limited ("Prospective") lodged a caveat against the title and, on 22 September 2004, AIL transferred the property to Prospective.

[20] The Edwards were the sole directors of Prospective. They were also the sole shareholders as trustees of the Trust.

[21] Initially it was suspected by a Mr Greer, the liquidator of AIL, that Prospective had not made any payment to AIL for the property. The liquidator sought and obtained a freezing order over the property. Belatedly the relevant conveyancing file was made available by the Edwards. Mr Greer promptly accepted that Prospective had in fact paid AIL some $750,000 for the property and the freezing order was discharged.

[22] On 13 October 2004 – some three weeks after it took a transfer of the property from AIL – Prospective transferred the property to the Edwards as the then trustees of the Trust. Mr Greer has deposed that no evidence has been provided, despite requests, to demonstrate that the trustees paid Prospective for the transfer of the MacWhinney Drive property.

[23] Prospective was struck off the Companies Register on 21 December 2011, because it failed to file returns. Mr Greer believes that there was a significant debt owed by Prospective to AIL before it was struck off. Prospective has now been reinstated to the Register and AIL has issued liquidation proceedings against it. Those proceedings are scheduled for hearing on 18 April 2016.

[24] Mr Greer has deposed that, if an order is made liquidating Prospective, a claim is likely to be made by the liquidator appointed against the trustees of the Trust in relation to the transfer, on the basis that it was made without consideration.

[25] The property comprises a large and relatively palatial home. It has been extensively renovated and furnished to a high standard. The house sits in extensive landscaped grounds. The property was the subject of an article in the NZ House & Garden magazine – February 2010 edition. It appears from photos forming part of the article that the house, at least then, was full of expensive furniture and art work. The house has been, and continues to be, occupied as a residence by the Edwards.

(ii) Middlemore Lodge

[26] The Lodge was purchased by AIL in 2010 for $3 million. AIL then had net assets of only $340,000. It required funding to enable it to complete the purchase. The Edwards, as trustees of the Trust, refinanced various loans they, or entities associated with them, had with Kiwibank Limited and they borrowed additional funds. The earlier loans were repaid and the trustees then on lent the balance of the monies to AIL to enable it to complete the purchase.

[27] The Lodge has traded as a boarding house. It is still being run as a boarding house by Mr Greer as liquidator of AIL. In the period 29 July 2015 (the date of Mr Greer's appointment as liquidator) to 29 February 2016, it generated gross income of

$217,562.72 against expenses of $88,530.74 (including a management fee payable to Mr Greer of $29,168.82).

The Mortgages

[28] The borrowers were Mr Edwards and Mrs Forbes-Edwards as trustees of the Trust. The advance was guaranteed by Mr Edwards, Mrs Forbes-Edwards and AIL.

[29] In June 2013, the Edwards, as trustees of the Trust signed a memorandum recording that the loan was not for the Trust, but rather for AIL. On the same day, the Edwards, as directors of AIL, signed a resolution recording that AIL acknowledged that the loan was in fact for it, and not for the Trust, and agreeing that it would fully indemnify the Trust against any claims that might arise in respect of the loan. It also agreed to allow Middlemore Lodge (and another property then owned by it) to be used as security.

[30] As a result the Kiwibank Limited advance to the trustees of the Trust was secured by a first mortgage over the MacWhinney Drive property and a first mortgage over Middlemore Lodge.

[31] The total advance was $2,860,000. The balance, after repayment of the earlier loans, was advanced by the trustees to AIL to enable it to complete the purchase of Middlemore Lodge.

[32] It is asserted by the Edwards that the Trust charged AIL a fee for the provision of this financial assistance. They claim that a loan agreement was entered into in June 2013 in this regard, recording an advance of $286,000 said to be the agreed fee for the provision of the financial assistance. Mr Greer has questioned whether this amount was in fact advanced to AIL. He has also queried when the loan agreement was signed, and suggested that the arrangement may be a voidable preference.

[33] Pursuant to the loan agreement, AIL gave an all obligations mortgage to the trustees to secure the monies said to have been advanced. The mortgage is expressed to have a priority sum of $5 million. It was registered as a second mortgage over the

title to Middlemore Lodge in August 2014, a month after Kyoto obtained judgment against the Edwards and ANPL – see above at para [10].

[34] By March 2015 AIL was in financial difficulty. It became insolvent and it was put into liquidation by the Edwards. A Mr Farrelly was initially appointed as the liquidator. Mr Farrelly was replaced as liquidator by Mr Greer on 29 July 2015.

[35] On 11 May 2015 Kiwibank Limited made demand upon the Edwards as trustees and as principle debtors for immediate payment of the arrears then owing under the two mortgages it held. At the same time it made demand upon AIL and the Edwards personally as guarantors.

[36] These demands were not met.

[37] On 15 June 2015 Kiwibank Limited gave notice under s 119 of the Property Law Act to the then liquidator of AIL, requiring AIL to remedy the defaults under the mortgages. A similar notice was given to the Edwards, both as principle debtors and as guarantors.

[38] The defaults recorded in these notices were not remedied.

[39] On 14 August 2015, Otis, a company associated with Mr McKay, paid Kiwibank Limited the full amount then outstanding – $2,927,377.83 – and took a transfer of the mortgages. Otis then became the registered first mortgagee of both the MacWhinney Drive property and Middlemore Lodge.

Positions taken by the parties

[40] Mr McKay, and the various interests associated with him, want both MacWhinney Drive and Middlemore Lodge sold. They want to use the proceeds to repay the amount owing to Otis pursuant to the mortgages, and then place the balance in a solicitor's trust account pending the resolution of the various proceedings which have been issued.

[41] As I set out shortly, the Edwards have arranged alternative finance. They want Otis to transfer the mortgages to the new financier – Performance. They also

want the properties sold. However they want to sell the MacWhinney Drive property first. They anticipate that it will sell for approximately $2 million. They want to use this money to reduce the amount owing under the mortgages, take a transfer of Middlemore Lodge, take over the running of the Lodge and use its trading profits to meet the ongoing commitments.

Attempts to sell the properties

(i) MacWhinney Drive

[42] MacWhinney Drive has not been sold. The trustees attempted to sell the property by auction held on 1 March 2016. It was passed in. Mrs Forbes-Edwards has deposed that it is likely that the trustees will shortly obtain an offer.

(ii) Middlemore Lodge

[43] By late August/early September 2015, the trustees of the Trust had negotiated the provision of further finance from Performance. It is prepared to make an advance of up to $3,450,000 on the security of the existing first mortgages over the MacWhinney Drive property and Middlemore Lodge. It was envisaged that notice would be given to Otis under s 102 of the Property Law Act requiring it to transfer the mortgages to Performance.

[44] A loan offer and acceptance was signed on 3 September 2015. The loan was initially for a term of six months from 11 September 2015, or such other date of advance that the lender might notify in writing up to 5 November 2015. Interest commenced to run from the date of the advance, regardless of whether or not the funds had been drawn down by the trustees. Various conditions were required to be met before the funds would be advanced. Monies were to be deducted from the advance by the lender's solicitor; there was a brokerage fee – $25,000, a loan establishment fee – $300,000, and legal fees – $5,750.

[45] A Mr Dowsett, on behalf of Performance, has confirmed that the funding is in place and still available.

[46] As anticipated in the loan offer, on 4 September 2015 the Trust's solicitors gave notice to Otis pursuant to s 102 of the Property Law Act, requesting it, as first mortgagee, to transfer both mortgages to Performance. The letter recorded that Performance had agreed to pay the necessary funds required to be paid pursuant to s 103.

[47] Otis did not respond to this notice.

[48] On 17 September 2015, the Trust offered to purchase Middlemore Lodge from AIL for $2.9 million and to pay the balance owed pursuant to the first mortgages. This offer was subject to various conditions.

[49] Mr Greer as liquidator of AIL took the view that it was only the Middlemore Lodge property which was mortgaged to Otis, and that Otis had no interest in the boarding house business. Otis did not dispute this and it and Mr Greer agreed that the value of both the property and the business would be maximised if both assets were sold together. Mr Greer had obtained a valuation of Middlemore Lodge. The property was valued at $3 million. Over a period of some three months, he endeavoured to sell the property at that sum. He was unable to do so. He obtained feedback from the various real estate agents he had been working with, and he concluded that a price of $2.9 million would be a fairer price for the property and the business.

[50] Nevertheless Mr Greer had reservations about the offer submitted by the Trust.

(a) The Trust was offering $2,880,000 for the Lodge property and $20,000 for the business. Mr Greer considered that that split was incorrect, and that, if it were accepted, it would prejudice unsecured creditors in the liquidation. He was reinforced in his view because he had received offers from third parties which had placed a value on the business of between $300,000 and $350,000.

(b) Mr Greer also had concerns about AIL's rights of subrogation. He noted that the Trust's offer was predicated on the assumption that all

of the proceeds from the sale of the property would be applied towards repayment of the first mortgage in favour of Otis. He noted that AIL is not the principle debtor under that mortgage. Rather it is a guarantor. Mr Greer considered that, prima facia, it was the trustees' responsibility to repay the mortgage. He noted that the Trust asserts that it owns the MacWhinney Drive property and the chattels in the house. He expressed the view that they should be sold first to reduce the Otis mortgage, with any shortfall being met by AIL as guarantor. He considered that, if AIL's property was to be sold to the trustees before the property and chattels at MacWhinney Drive were sold, AIL's rights of subrogation in respect of the MacWhinney Drive property would need to be protected.

[51] Mr Greer did make a counter offer on 1 October 2015. The counter offer was left open for five days because Mr Greer then had another offer from a third party. The Trust did not accept the counter offer.

[52] By letter dated 8 October 2015, Mr Greer advised the Trust that a conditional agreement had been entered into to sell Middlemore Lodge to the third party, for a price equivalent to the Trust's offer - $2.9 million. Mr Greer stated that the offer from the third party was more attractive, as it allocated $350,000 to the business. He also recorded that Otis as first mortgagee had advised that it would, if necessary, adopt the agreement. Adoption by Otis would mean that the property could be sold by it as mortgagee, thus clearing the Trust's second mortgage. If the property were to be sold by the liquidator, then the second mortgage would pose an impediment, because the trustees have indicated that they will not consent to Mr Greer selling the property – at least at what they consider to be an undervalue. They consider that the sum of $350,000 said to be the value of the business is excessive, and that if a sale were to be concluded on that basis, they would be prejudiced because the amount owing under the first mortgage would not be reduced by as much as it should be.

[53] In the event the Middlemore Lodge was not sold to the third party purchaser because the agreement did not become unconditional.

[54] Middlemore Lodge was then put up for tender. The tender period closed on 1 March 2016. There were three tenders received:

(a) A tender of $1,800,000. It was subject to finance. Mr Greer rejected it;

(b) A tender from the Edwards and the Trust. The price offered for the property and business was $2.9 million. No deposit was to be payable. The offer was conditional upon the liquidator and the other parties to the proceedings consenting to the transfer of the mortgages to Performance;

(c) A tender from a third party. It was also for $2.9 million. It was unconditional, although there is a requirement that the Court approve the sale. Mr Greer has deposed that that requirement was necessary, because of the Edwards' and the Trust's interlocutory applications to the Court.

[55] Mr Greer has accepted the third offer.

The Present Proceedings

[56] AIL has issued proceeding CIV-2015-404-2003 against the trustees of the Trust. It alleges that the Edwards, as directors of AIL, owed it fiduciary duties of utmost good faith, and to act in its best interests. It asserts that the Edwards breached these duties by allowing AIL's funds to be used to purchase various chattels, artworks, furniture, vehicles and machinery, which the Edwards have asserted are now owned by the Trust, and for payment of all outgoings and improvements undertaken by the Edwards on the MacWhinney Drive property. It seeks damages. It also says that the chattels, artworks, furniture, vehicles and machinery are, and always have been, owned by it, and that they are held by the trustees of the Trust as constructive trustee for it. It seeks an order that the chattels, artworks, furniture, vehicles and machinery be delivered up to it. It seeks an enquiry as to further damages, namely the profits made by the trustees arising from their breach of fiduciary duties. As a separate cause of action, it alleges that the Trust is a sham, and that the defendants have operated the Trust as an alter ego for AIL. It

seeks an order that the title to MacWhinney Drive be transferred to it. It also alleges unjust enrichment, claiming that it contributed the sum of not less than $800,852.38 to the purchase of Middlemore Lodge, that its liquidator is selling Middlemore Lodge, that the funds received will be used to repay the mortgage to Otis, and that as a result the defendants will be unjustly enriched by the sum of not less than $800,000.

[57] In proceeding CIV-2015-404-2005, Otis has filed an originating application seeking possession of the property at MacWhinney Drive. It does so as first mortgagee, asserting that exclusive possession of the property is required by it so that a mortgagee's sale can be undertaken by it.

[58] In proceeding CIV-2015-404-2160, Kyoto alleges that the Edwards misrepresented their and AIL's assets and liabilities when they sought Kyoto's assistance in funding the purchase of the property in New Plymouth by ANPL. They assert that values stated in a statement of assets and liabilities provided by the Edwards were overstated, and that Kyoto has suffered loss as a result of entering into the transaction with AIL, ANPL and the Edwards. Damages in the sum of $1,132,500 are sought against the Edwards personally, and also against AIL.

[59] The claims made by AIL, Otis and Kyoto are resisted by the Edwards and the trustees of the Trust. In proceeding CIV-2015-404-2645, they have asserted that Otis, in breach of s 102 of the Property Law Act, failed to transfer the mortgages held by it to Performance. They say that they have suffered damages as a consequence. They also allege that Otis has failed to require Mr Greer, as liquidator of AIL, to account to it for the income received in respect of Middlemore Lodge, and that Otis has incurred wasted interest costs. They seek a declaration that they are entitled to set off these sums against the mortgage debt. They also allege that the liquidator and Otis have endeavoured and are proposing to sell Middlemore Lodge at an undervalue and they seek an injunction preventing Otis from entering into an agreement, either directly or by way of adoption, to sell Middlemore Lodge, or from providing a discharge of its first mortgage over the Lodge property to facilitate its sale. They also allege that Mr Greer has continued to operate the boarding house business from the Middlemore Lodge property, that he has failed to account to the mortgagee, and that he is in breach of various duties said to be owed by him. They

seek an order appointing a receiver of the rental of the Lodge property, and an account of the profits generated from its operation.

Interlocutory Applications made by the Edwards and the Trust

[60] I have detailed each of the interlocutory applications made by the Edwards and the Trust above at para [2(d)]. I deal with each – starting with the application detailed in para [2(d)(ii)]. I start with that application because it was pivotal to the arguments advanced by Mr Collecutt.

(i) Application requiring Otis to transfer the mortgages

[61] The Edwards and the Trust are seeking an interim injunction, requiring Otis to transfer the mortgages over the MacWhinney Drive property and Middlemore Lodge to Performance upon payment of the amount that would be payable if the discharge of the mortgages had been sought under ss 97 to 101 of the Property Law Act.

[62] The order sought is a mandatory injunction, pending trial.

[63] The grant of any interim injunction is a temporary and discretionary remedy. Its purpose is to protect applicants against injury by violation of their rights for which they could not be adequately compensated in damages recoverable in the action, if the uncertainty is resolved in their favour at trial. An applicant's need for protection must be weighed against a respondent's need to be protected against injury resulting from being prevented from exercising legal rights for which the respondent could not be adequately compensated under the applicant's undertaking for damages, if the uncertainty is resolved in the respondent's favour at trial. The Court must weigh one need against the other. The Court must ask itself whether there is a serious question to be tried in the proceeding, and where the balance of convenience lies.[4] These factors are not exhaustive.[5]

[64] Here I am not persuaded that there is a serious question to be tried.

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[4] *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL) at 405-406; *Eng Mee Yong v Letchumanan* [1980] AC 331 (PC); and see generally Andrew Beck and other *McGechan on Procedure* (looseleaf ed, Brookers) at [HR7.53].

[5] *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) at 142.

[65] The relief sought both in the substantive proceedings and by way of mandatory interim relief, assumes that the request made by the Edwards and the Trust on 4 September 2015 (see para [46] above) was the only request made to Otis pursuant to s 102 of the Property Law Act. That is not the case.

[66] At 1.51pm on 18 December 2015 Mr Greer sent an email to Otis requesting that the mortgages should be transferred to Kyoto. At 2.06pm, on the same day, Otis responded acknowledging Mr Greer's email, and advising that it had just finished preparing a request for possession of Middlemore Lodge. Mr McKay signed a letter addressed to Mr Greer advising that Otis as mortgagee was taking possession of the Lodge, and that it required that all profits from the business, after paying operating expenses and other costs, be paid to it. A copy of the letter requesting possession was attached to the email from Otis. Mr Greer responded at 2.12pm, acknowledging receipt of Otis' email and request. He proposed that he would account to Otis weekly, and make his first payment of the net income later that day. At 2.17pm Otis acknowledged receipt. A copy of Mr Greer's request under s 102 was sent to the Edwards'/Trust's solicitors at 6.43pm that evening.

[67] Also on 18 December 2015, a payment was made by Mr Greer to Otis of the available net funds generated from the Middlemore Lodge business. Over the period 18 December 2015 to 29 February 2016, Mr Greer paid to Otis the sum of $45,556.34, being the operating surplus generated by the Lodge business.

[68] As can be seen Otis faced two requests that it transfer the mortgages – the first dated 4 September 2015 by the Edwards and the Trust, and the other given at 1.51pm on 18 December 2015 by Mr Greer as liquidator. At neither time was Otis in possession of Middlemore Lodge or of the MacWhinney Drive property. It only asked to go into possession of Middlemore Lodge some 15 minutes after it received Mr Greer's request.

[69] Section 102 provides as follows:

> **102 Request to mortgagee to transfer mortgage**
>
> (1) The current mortgagor or any other person who is entitled to redeem the mortgaged property may, at any time (except a time when the mortgagee is in possession of the property), request the mortgagee to

> transfer the mortgage to a nominated person (except the current mortgagor).
>
> (2) A mortgagee under a subsequent mortgage or the holder of any other subsequent encumbrance may make a request under subsection (1) despite any intermediate interest.
>
> (3) A request made under subsection (1) by a person other than the current mortgagor prevails over a request made by the current mortgagor.
>
> (4) If 2 or more requests are made under subsection (1) by persons other than the current mortgagor, the request of the person whose interest has priority prevails.

[70] The effect of the section is to give the mortgagor and other persons entitled to redeem, the right to direct a transfer to another person.[6] This enables the mortgagor, or other persons entitled to redeem, to refinance without incurring the expense of a discharge and new mortgage.[7]

[71] Both the trustees of the Trust, as mortgagors, and AIL as guarantor, were persons entitled to redeem the mortgaged property and to request the mortgagee – Otis – to transfer the mortgages to a nominated person provided it is not in possession. The request made by the Edwards and the Trust states that it was made by Mr Edwards, as well as by Mrs Forbes-Edwards and G&A Law Trustees Limited. At the time Mr Edwards was still on the title to the properties as a trustee of the Trust, notwithstanding that he had ceased to hold that office after he was adjudicated bankrupt. Mr Grove did not take issue with this and he accepted that the request was properly made.[8] In my judgment this concession was appropriate. The fact that the request was also made in Mr Edwards' name does not invalidate it.

[72] What is in issue is the issue of priority as between the two requests. Pursuant to s 102(3), a request made by a person other than the current mortgagor prevails over a request made by the current mortgagor. It follows that the request made by Mr Greer as liquidator of AIL, the guarantor, prevails over the request made by the trustees of the Trust as mortgagors. It does not matter that there is a time lapse between the first request and the second request.

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6 *Cousins v Goldsmith* HC Christchurch, CP 38/00, 27 July 2000 at 9.

7 *Equiticorp Finance Group Ltd v Collett*HC Auckland CL 102/89, 9 July 1990 at 15.

8 Cf *Orange Builders Ltd v Joint Venture Partners Ltd* HC Christchurch CP 90/96, 19 November 1997.

[73] This is clear from the decision of the Court of Appeal in *McGaveston v NZPT Ltd.*[9] That case concerned competing requisitions under s 83 of the Property Law Act 1952, which together with s 82, was a predecessor to ss 102 and 103 and in all material respects to the same effect. The defendant, NZPT Ltd, was the first mortgagee. There was a request under s 83 by NZFM Mortgages Ltd – the second mortgagee – and a request by Mr McGaveston as mortgagor. Both requested NZPT to transfer the first mortgage to nominated entities. Mr McGaveston's request was first in time.[10] The request from NZFM Mortgages Ltd was made some three months later. Further NZFM Mortgages Ltd and NZPT Ltd were related companies. The Court nevertheless held that where there are competing requisitions from different charge holders, the requisition from the party with the superior charge prevails.[11] The Court found that NZFM Mortgages Ltd's request prevailed. The Court noted as proper an acceptance by counsel that, in the circumstances, Mr McGaveston's request was of no effect and that he had no foundation for an injunction stopping a threatened mortgagee's sale.[12]

[74] Applying this authority, as I am bound to do, it must follow that the request made by the Edwards as the trustees of the Trust and as mortgagors was of no effect once the request was made by Mr Greer on behalf of AIL as guarantor. They cannot succeed, and notwithstanding that their request was first in time.

[75] Accordingly, I cannot be satisfied that there is a serious question to be tried.

[76] Even if I am wrong in this regard, in my judgment damages would not be an adequate remedy for Otis, were the interim injunction to be granted.

[77] No undertaking as to damages was lodged when the application was filed. Belatedly, undertakings as to damages were provided by Mrs Forbes-Edwards, Mr Edwards and G&A Law Trustees Ltd. The undertakings however are worthless. Mr Edwards is bankrupt. Mrs Forbes-Edwards has given evidence on oath in this Court,

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9 *McGaveston v NZPT Ltd* CA 226/99, 18 October 1999.

10 It is clear from the High Court decision the subject of the appeal that Mr McGaveston gave his notice under s 83 of the Property Law Act 1952 on 19 April 1999, and that NZFM gave its notice on 23 July 1999; See *McGaveston v New Zealand Permanent Trustees Ltd* HC Wellington CP 147/99, 31 August 1999 at [4]-[5].

11 *McGaveston v NZPT Ltd*, above n 9, at [3].

12 At [6].

as recently as 11 February 2016, that she does not own any assets personally, and that neither she nor Mr Edwards ever filed a tax return because they did not earn any income and were not paid a wage. G&A Law Trustees Ltd's undertaking is given solely in its capacity as a trustee of the Trust and it is limited to the assets of the Trust. It was Mrs Forbes-Edwards evidence that the Trust has never earned any income, that there have never been any financial accounts for the Trust and that the Trust has never had a bank account. She nevertheless claims that the MacWhinney Drive property and all the chattels in the house are owned by the Trust. As I have noted, the ownership of the MacWhinney Drive property is at issue in the proceedings, as is the ownership of the chattels and other items in the house. I cannot be confident that such assets (if any) that the Trust has would be sufficient to meet any damages Otis might suffer were the interim injunction to be granted.

[78] In contrast, any damages that the trustees and/or the Edwards may have suffered as a result of Otis failing to transfer the mortgage promptly when first requested to do so, can, it would seem, be met by Otis. While there is no evidence before the Court as to its assets and liabilities, it is clear from the papers filed that it is owed approximately $3.1 million under the mortgages secured over the MacWhinney Drive property and Middlemore Lodge. If the agreement for sale and purchase which Mr Greer has accepted in respect of the Middlemore Lodge property proceeds, Otis will receive approximately $2.9 million in reduction of the mortgage debt. It will then be in funds. Further it will still hold a first mortgage over the MacWhinney Drive property for the balance owing to it. The property is estimated to be worth $2 million. The mortgage will have to be cleared when the property is ultimately sold.

[79] In my view the balance of convenience strongly favours Otis, and I decline to make the mandatory interim order sought by the Edwards and the trustees.

(ii) Application by the Edwards and the Trust for an interim injunction preventing Otis from entering into an agreement to sell Middlemore Lodge

[80] The Edwards and the Trust also seek a mandatory injunction preventing Otis from entering into an agreement to sell Middlemore Lodge or providing a discharge of its mortgage over the Lodge property to facilitate its sale, and whether directly or

indirectly, if the terms of any agreement are less favourable to Otis' position than the Trust's offer to purchase the Lodge property for $2.9 million made on 30 October 2015, and in particular on terms which would yield less than the net amount payable to Otis pursuant to that offer.

[81] There is an initial difficulty. There is nothing on the files that I have been able to find to suggest that any offer was made on 30 October 2015. In an affidavit filed in support of the application, Mrs Forbes-Edwards did not refer to any offer made on that date. She did however refer to an offer made on 17 September 2015. That offer was contained in a letter from the Trust's solicitors – Gander & Associates. The Trust offered to purchase the Lodge for $2.9 million, and pay the balance owing to Otis, on various conditions. Inter alia Otis was required to confirm in writing the amount owed to it, together with a daily rate of interest. The liquidator was to undertake to the Court to pay the net income from the Lodge to Otis pending settlement, and the parties were to jointly apply to the Court to lift an existing freezing order. Kyoto was also to undertake not to apply to the Court for a freezing order. It was proposed that, on settlement, title to the Lodge would be transferred to the Trust. Otis was to release its mortgages over both properties, including MacWhinney Drive, provided that the residual balance owed to it was paid.

[82] There was no proposed sale and purchase agreement attached to the latter; rather any resulting agreement was to be subject to the trustees' solicitor's approval as to form and substance.

[83] There are clearly difficulties with this offer. It was intended that Otis would be paid out in full. It was also proposed that Mr Greer as liquidator would immediately transfer Middlemore Lodge to the Trust, effectively for no consideration. It is not clear why the Trust expected that Mr Greer would agree to this. Were he to take this step he would prejudice AIL's unsecured creditors. Further Kyoto was to be required to agree not to apply for a freezing order. That would prejudice its claims against the Edwards and AIL. Moreover it has no interest in the mortgage or in Middlemore Lodge.

[84] The Trust also made an offer by way of tender for Middlemore Lodge dated 1 March 2016. It offered to purchase the property for $2.9 million – allocated as to

$2.86 million for the land and $40,000 for the business. No deposit was to be payable. The provisions for settlement were not clear. On the one hand it was proposed that settlement would occur 20 days after the day of acceptance of the offer; on the other it was said that settlement would be the date when title to the mortgages was transferred to Performance, or when the sale of MacWhinney Drive settled. The offer was conditional upon the mortgages being transferred to Performance, and the liquidator and other parties to the proceedings currently before the Court consenting to and cooperating with the transfer of the mortgages to Performance, and not otherwise directly or indirectly interfering with the sale of the Lodge to the Trust. Otherwise the offer was without prejudice to the litigation currently before the Court, or to the Trust's position as second mortgagee of the property. Draft sale and purchase agreements both for the land and for the business were provided.

[85] The offer from the third party was for $2.9 million. It provided for the payment of a deposit of $50,000. Settlement is due on 16 May 2016 or earlier by mutual agreement. There is provision for interest – at the rate of 14 per cent – if settlement is delayed. It seems that $2,860,000 has been allocated to the land and $40,000 to the business. As noted, Mr Greer has accepted this offer.

[86] The offer from the third party is clear and simple. It is a straightforward agreement for sale and purchase. The only condition is that the Court makes orders which enable the sale to proceed. The evidence is that this condition is necessary only because of the applications made by the Trust and the Edwards.

[87] There is no suggestion in the papers filed that the liquidator of AIL and/or Otis are not entitled to sell Middlemore Lodge. The only criticism made in the pleadings is that the value proposed to be allocated for the business is excessive, and that if Otis sells on the basis proposed, it will be in breach of its obligations under s 176 of the Property Law Act to obtain the best price reasonably obtainable.

[88] The liquidator is not selling as a mortgagee and he is not bound by s 176. However the Trust, as holder of the second mortgage over Middlemore Lodge, is refusing to release its mortgage. The liquidator cannot compel it to do so. Otis can adopt the agreement for sale and purchase which the liquidator has accepted, and

proceed to sell as first mortgagee. That will enable the purchaser to take clear title. Otis is bound by s 176.

[89] Nevertheless I cannot see that there is a serious question to be tried. I say this for the following reasons:

(a) Otis is the first mortgagee of Middlemore Lodge. Notice has been given under s 119 of the Property Law Act. The defaults specified in that notice have not been remedied. Otis is entitled to proceed to enforce its rights as mortgagee by selling the property;

(b) Otis is under no legal obligation to conduct its affairs simply to accommodate the Edwards' wishes. The Edwards want to sell MacWhinney Drive first. They have had every opportunity to try and sell that property. They have failed to do so. They cannot expect to dictate the sale process;

(c) The Edwards and the Trust seek to restrain Otis from selling the property as mortgagee. The validity of Otis' powers as mortgagee has not been impeached. The Edwards and the Trust have not paid into Court the secured debt;[13]

(d) The offer from the third party which Mr Greer has accepted is a better offer than that made by the Trust. Mr Collecutt from the bar did indicate that the Trust's offer could be improved to $2.95 million. There is however no affidavit to this effect. Even if that were to be the case, I suspect that any offer that the Trust might make would still be conditional, and would still be hedged with the difficulties I have noted above. In my judgment the cleanest and simplest option, for all parties, is to allow Mr Greer, and Otis by adoption if necessary, to complete the agreement with the third party purchaser;

(e) Both offers make the same split between the business and the land. It is impossible for the Trust and the Edwards to argue that they will be

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13 And see *Parry v Grace* [1981] 2 NZLR 273.

> materially disadvantaged if the third party offer is settled on this basis alone. They may, perhaps, be able to argue that the Trust is prepared to make a better offer. As I have indicated, Mr Collecutt from the bar did indicate that the Trust would be prepared to increase its offer. If Otis adopts the third party offer and sells as mortgagee, then it may be arguable that it has thereby breached the obligation it owes under s 176 of the Property Law Act. It would seem to me, however, for the reasons I have given, that such argument has limited prospects of success.

[90] I also note that to allow the Trust's application would mean that Performance would end up with a first mortgage over both the MacWhinney Drive property and Middlemore Lodge securing a total advance of some $3.4 million. The mortgage advance would include the fees and other costs which Performance requires comprise part of the mortgage advance but which will be taken by it by deduction when the advance is made. They total $330,750. The net result would be to disadvantage the Trust, as well as creditors and prospective creditors claiming against the Edwards, the Trust and AIL.

[91] The issue of the adequacy of the proffered undertaking as to damages also arises. For the reasons I have already discussed, the Edwards and G&A Law Trustee Limited cannot offer satisfactory undertakings as to damages. Damages would not be an adequate remedy for AIL and Otis were the application to be granted. Conversely, if the Edwards and the Trust can make out their claims against Otis, AIL and Mr Greer, then there are likely to be funds available to enable any damages award to be met. Damages would be an adequate remedy for the Edwards and the Trust.

[92] Again the balance of convenience strongly favours AIL and Otis. I decline the application to prevent Otis from facilitating the sale of Middlemore Lodge.

(iii) Application for appointment of a receiver

[93] Again, I am not satisfied that there is a serious question to be tried in this regard. The statement of claim asserts that Mr Greer has misapplied funds received by him following his appointment as liquidator. The statement of claim and the supporting affidavit from Mrs Forbes-Edwards are however based on speculation and speculative figures.

[94] Mr Greer has deposed that at all relevant times, there were no monies available to pay either Otis as first mortgagee, or the Trust as second mortgagee. Indeed, it appears from the affidavits that have been filed that Mr Greer has paid out the net surplus as soon as he was able to do so. On the face of it, Mr Greer is doing exactly what the Trust and the Edwards say a receiver should do.

[95] Further there is no financial justification for the appointment of a receiver. Any appointment would simply add an additional cost to an already parlous financial situation.

[96] Even if the Edwards and the Trust are correct, I am prepared to assume that Mr Greer, who is also a solicitor, would be in a position to pay any damages that might be awarded against him. Damages are an adequate alternative remedy if the Edwards and the Trust can make out their claim.

[97] Again, the balance of convenience favours AIL, Otis and Mr Greer. The application is declined.

Interlocutory Application made by AIL

[98] Mr Greer, as liquidator of AIL, is seeking a freezing order over the MacWhinney Drive property. He did not seek an order in respect of the chattels located in the house at MacWhinney Drive.

[99] A freezing order is available under r 32.2 of the High Court Rules. Such an order restrains a respondent from removing any assets located in or outside of New Zealand, or from disposing of, dealing with, or diminishing the value of the restrained assets.

[100] There are three requirements for a freezing order. First, there must be a good arguable case on the substantive claim. Secondly, there must be assets to which the order can apply and thirdly, there must be a real risk that the respondent will dissipate or dispose of those assets. It is necessary in any given case to consider the overall justice of the making of an order between the parties.[14]

[101] Here, I have already summarised AIL's claim above at para [56]. There are three causes of action raised in the statement of claim – simple debt/constructive trust, that the Trust is a sham, and that AIL is entitled to an equitable charge arising from unjust enrichment by the Trust.

[102] Comprehensive affidavits have been filed detailing the basis for the claims.

[103] I am satisfied that there is a good arguable case, in particular in relation to the debt/constructive trust claim which is capable of tenable argument, and which is supported by sufficient evidence. I am not persuaded on the limited materials available at this stage that the sham Trust cause of action is capable of tenable argument. There is little evidence available in relation to this cause of action. The cause of action alleging unjust enrichment appears rather stronger, and it is supported by the evidence.

[104] The available evidence in relation to the first cause of action suggests that:

(a) In May 2011 AIL's accountants queried why AIL's shareholder loan accounts had reduced from a credit sum of $522,351 in the 2005 year, to $528,955 overdrawn in the 2006 year. A Mr Alan Hawkins, who it seems was the Edwards previous accountant, responded that "… 2006 was the year when the development works were undertaken at MacWhinney and lots of the costs were charged to the company account".

(b) Further investigation by Mr Greer suggests that repairs and maintenance in the 2010 year totalling $49,231.30 were undertaken, supposedly on Middlemore Lodge. Mr Greer has spoken to the Lodge

[14] *Shaw v Narain* [1992] 2 NZLR 544 (CA).

managers, reviewed the available invoices and contacted several of the suppliers concerned. He suspects that a significant proportion of the claimed expenditure was not undertaken on Middlemore Lodge or on other properties owned by AIL. He has identified expenses totalling $20,244 plus GST that appear to relate to maintenance and improvements on the property at MacWhinney Drive.

(c) Mr Greer's review has also identified further expenditure totalling $198,999.77 incurred on MacWhinney Drive that has been put through AIL's accounts as deductible expenses and paid for by AIL over the four and a half year period April 2010 to 31 December 2014.

(d) Mr Greer has been unable to analyse the period from 2007 to 31 March 2009, as he does not have the source documents. It is his best estimate that, over the period 2006 to December 2014, the sum of approximately $1,301,243 has been spent on the MacWhinney Drive property, and paid for by AIL. If that is the case, then it would seem that there will be a simple debt owing by the Trust to AIL.

[105] Such evidence as is available from the Edwards – and in particular Mrs Forbes-Edwards – provides some support for Mr Greer's allegations. She has asserted that neither she nor Mr Edwards owns anything. She has asserted that the Trust has never earned any income, that it never had a bank account and that it has never filed a tax return. She states that no accounts have been prepared for the Trust. She has acknowledged that a lot of money was spent on doing up MacWhinney Drive and that the funds came from "AIL or other entities". She also accepted that AIL paid all rates on the MacWhinney Drive property.

[106] In the circumstances, I accept that the first cause of action raised by AIL – namely a cause of action based on debt leading to a constructive trust – is capable of tenable argument and that it is supported by sufficient evidence, at least at this early stage in the proceeding.

[107] Having reached this conclusion, I do not need to go on to discuss the other causes of action raised by AIL.

[108] There are assets to which any freezing order can apply. The defendants in the proceeding are the trustees of the Trust. They are the registered proprietors of the MacWhinney Drive property. A freezing order can be made against the property, or its net proceeds of sale in the event that it is sold.

[109] I now turn to consider where there is a real risk of dissipation. This requirement is central to the freezing order jurisdiction. Any suspicion or belief that a respondent might dissipate his or her assets must be supported by solid grounds justifying that belief. While affirmative proof of the likelihood of dissipation or of nefarious intent is not necessary,[15] an applicant must be able to point to circumstances from which a prudent, sensible, commercial person could properly infer a danger of default.[16]

[110] The affidavits filed do demonstrate that there is a real risk of dissipation.

[111] First, it seems clear that the Edwards have taken a cavalier attitude to their obligations owed to the Inland Revenue Department. AIL, which the Edwards controlled, did not pay tax on its property investments. The Edwards themselves have never filed tax returns, claiming that they have never earned any income. This begs the question of how they funded their lifestyle.

[112] Secondly, it appears from the affidavits that substantial sums of money have been transferred out of AIL so the Edwards could purchase substantial chattels for their personal use in the house at MacWhinney Drive. It also seems that money from AIL was also used to fund major development of the house and grounds.

[113] Thirdly, Mr Edwards is elderly. He is a bankrupt, and a super annuitant. He has asserted that he owns nothing, and that he cannot pay his creditors.

[114] Fourthly, Mrs Forbes-Edwards has been examined as to her means. When she was cross examined, she stated that she did not own any assets personally, that she had not received any income over the previous three year period, and that her living expenses came from the operation of Middlemore Lodge. She said that her

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[15] *Mogilin v Jo* HC Auckland CIV-2011-404-1584, 26 August 2011 at [34].

[16] *Raukura Moana Fisheries Ltd v The Ship "Irina Zharkikh"* [2001] 2 NZLR 801 (HC) at [122]-[124].

motor vehicle was owned by the Trust and held in AIL's name for the Trust, but accepted that AIL paid the insurance for the vehicle. Conversely she said that the Trust has never earned any income. She noted that Mr Edwards owned a Rolls Royce, but that a mortgage had been given over it and that the vehicle has been repossessed. She accepted that a large campervan has been sold. When she was asked about the list of assets provided to Kyoto as part of the application for finance in relation to the New Plymouth property, she accepted that the statement of assets was actually a combination of assets owned by the Trust, AIL and the Edwards personally. She seemed to think that it was routine to confuse the ownership of assets and to inflate their value. She said, "That's what most people do".

[115] Fifthly, it is a matter of concern that relevant financial documentation has been destroyed by Mr Edwards. Formal requests were made by the liquidator of Mr Edwards for the delivery of documentation pursuant to s 261 of the Companies Act 1993. Mr Edwards responded saying that he did not hold any files or records belonging to AIL. He said that in March 2015 he uplifted AIL's files from its solicitors. He said that he took this step because he was considering placing the company in liquidation and he wanted to have the company files on hand to answer any queries the liquidator might have. He claimed that he went through the files and noted that quite a few were over seven years old. He said that he did not have to keep those files and that he destroyed them by burning them in his garden incinerator. He asserted that more recent files were stored in his garage and that, in April/May 2015, the garage flooded because the roof leaked. He said that the file boxes and files were completely damaged and that he had no option thereafter but to destroy the same. Understandably the liquidator is suspicious as to these assertions, given the importance of the documents and given what the liquidator claims to have subsequently discovered.

[116] Sixthly, there is evidence that other assets have been sold, and the proceeds dissipated. It appears from the affidavits filed that AIL purchased a Range Rover for Mr Edwards. It was registered in Mr Edwards' name. It was sold in August 2014 for $37,500. Mr Edwards has spent those funds and he did not account to AIL for them. Mrs Forbes-Edwards had a Mercedes car. It was registered in AIL's name. It was said by the Edwards to be worth $50,000 in 2012. Mrs Forbes-Edwards' claimed

that the car was owned by the Trust and that AIL held it on behalf of the Trust. She has not explained how the Trust could have acquired the vehicle, given her assertions that the Trust never derived any income. The vehicle has also been sold and the funds taken by Mrs Forbes-Edwards.

[117] Finally, there are the circumstances in which the second mortgage was registered over Middlemore Lodge. As I have noted above, paras [32] – [33], that mortgage was registered in August 2014. Notwithstanding that the amount the Edwards alleged was advanced was only $286,000, the mortgage has a claimed priority sum of $5 million. It was registered after judgment had been obtained by Kyoto against the Edwards and APNL. There does not appear to be any evidence that $286,000 was advanced by AIL to the Trust at the time, and Mr McKay has deposed that it was only on 17 March 2015 that a request was made for that alleged debt to be entered into the accounts of AIL.

[118] In my judgment, taking all of these matters in the round, there is a risk of dissipation. The evidence suggests that the Edwards have repeatedly manipulated financial matters for their own advantage. A prudent and sensible man or woman in commerce would be concerned that the Edwards might seek to use the property at MacWhinney Drive, or the net proceeds of sale in the event that the property is sold, for their own advantage.

[119] AIL has given an undertaking as to damages. On the face of it, that undertaking is presently of little value, because AIL is in liquidation. However, it still owns Middlemore Lodge and the business operated from that property. It also has tenable claims against the Trust.

[120] Accordingly, I grant the application by AIL for a freezing order over MacWhinney Drive or its net proceeds of sale in the event that it is sold.

Application by Kyoto for a Freezing Order

[121] As I have noted above in paras [3] to [4], there was a dispute as to whether or not this application was for hearing. I have granted the application for a freezing order made by AIL. Mr Grove accepted that he did not need to proceed with the

application by Kyoto if AIL's application was granted. I take Kyoto's application no further.

Application for possession order by Otis

[122] Otis has sought an order for possession of the MacWhinney Drive property.

[123] Pursuant to s 137 of the Property Law Act, if a mortgagee becomes entitled under a mortgage to exercise a power to enter possession of the mortgage land, the mortgagee can exercise that power either by entering or taking physical possession, or by asserting management or control over the land, or by applying to the Court for possession of the land.

[124] It is not asserted by the Edwards or the Trust that Otis is not entitled under the mortgage to exercise a power to enter into possession of the property. There has been no challenge to the validity of the mortgage, or of the various notices which have been issued pursuant to it.

[125] The Trust has been given the opportunity to sell the MacWhinney Drive property privately. The Property Law Act notices expired on 17 July 2015, and all amounts secured by the mortgage then became due and payable. Kiwibank Limited called up the total mortgage debt by giving acceleration notices on 3 August 2015. At that time the total amount owing was $2,899,392.39. The trustees have known since at least that date that they would have to sell the property or that the mortgagee might do so.

[126] Otis was prepared to concede that any order for possession of the property should lie in Court for a period of two months from the date of this judgment, to give the trustees a final opportunity to sell the property privately. That concession, whilst strictly unnecessary, is not inappropriate.

[127] I can see no good reason why an order for possession should not be made in favour of Otis. Accordingly, I make an order granting Otis possession of the MacWhinney Drive property, such order to lie in Court, and not to be exercised by Otis, for a period of two months as from the date of release of this judgment.

Costs

[128] AIL and Otis are entitled to costs and reasonable disbursements in respect of their respective applications. They, together with Mr Greer, are entitled to costs and reasonable disbursements in relation to the unsuccessful applications made by the Edwards and G&A Law Trustees Limited.

[129] It is my preliminary view that costs should be awarded on a 2B basis. If that now is accepted, I suspect that counsel will be able to agree on costs. If they are unable to do so, I make the following directions:

(a) Any memorandum/memoranda seeking costs, is to be filed and served within 10 working days of the date of this judgment;

(b) Any memorandum/memoranda in reply is to be filed and served within a further 10 working day period;

(c) Memoranda are not to exceed 10 pages.

[130] I will then deal with the issue of costs on the papers unless I require the assistance of counsel.

General

[131] I record the Court's gratitude to Mr Collecutt. He was appearing pro bono. That is in the best traditions of the bar. I am grateful to him for the assistance he provided to the Court. He said all that could responsibly be said on behalf of his clients.

Wylie J