

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE**

**CIV-2021-404-1067
[2024] NZHC 828**

BETWEEN

A-WANG LIAO
First Plaintiff

TAN-KUEI LIAO LU
Second Plaintiff

AND

PEI-YA LIAO
Defendant

Hearing: 21, 22, 23, 24 and 25 August 2023

Appearances: S Jeffs and K Sun for the Plaintiffs
S McAnally and D Mitchell for the Defendant

Judgment: 17 April 2024

JUDGMENT OF WOOLFORD J

*This judgment was delivered by me on Wednesday, 17 April 2024 at 2:30 pm
pursuant to r 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Solicitors: Capstone Law Ltd (K Sun), Auckland
Croftfield Law (A Chong), Auckland

Counsel: S Jeffs, Bankside Chambers, Auckland
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Introduction

[1] The plaintiffs, A-Wang Liao and Tan-Kuei Liao Lu, are a married couple in their early seventies. The defendant is their daughter, Pei-Ya Liao (also known as Phoebe). The parties are native Mandarin speakers of Taiwanese descent, living in New Zealand. This proceeding primarily concerns two residential properties, but also a property development scheme and some payments out of bank accounts. The plaintiffs allege that the defendant breached fiduciary duties to them. They seek various declarations and orders.

Background

[2] The plaintiffs moved to New Zealand from Taiwan in 2001. Their three children, including the defendant, also moved to New Zealand around that period. The plaintiffs speak limited English and have difficulty using technology. Consequently, they relied upon English-speaking family and friends to assist them with financial transactions and continue to do so today.

[3] While in Taiwan, the plaintiffs established a successful construction supply business and owned three investment properties which they rented out. They were able to enter New Zealand by qualifying for investment visas. The plaintiffs frequently travelled to and from Taiwan to visit family over the years. In 2011, they considered moving back to care for their elderly parents. In preparation, they asked the defendant to manage their New Zealand bank accounts. The defendant agreed and was given access to their bank accounts. In 2013, the defendant was granted powers of attorney upon the request of her parents. This was to better facilitate her management of their finances. The plaintiffs did not end up moving back to Taiwan, but the defendant continued to manage their accounts until 2021, when they removed her authority.

[4] In 2013, the defendant married Yat Keung Lam (also known as Dennis) who is a builder, property investor and director-shareholder of construction company D & T Homes Ltd.

Pleadings

[5] The plaintiffs filed an amended statement of claim dated 9 December 2021 which sets out four causes of action. These are discussed in turn.

[6] The primary cause of action alleges breach of a resulting trust over two properties — 12 Leybourne Circle, Glen Innes (the Glen Innes property) and 4A Whites Way, Ellerslie (the Ellerslie property). The plaintiffs claim that they hold a beneficial interest in the two properties, arising from their payment towards the deposit and — particularly as regards the Ellerslie property— the purchase price of both properties. They rely on *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* and *Potter v Potter* to say that they intended to retain beneficial ownership of the properties once purchased, despite the defendant being the registered legal owner.¹ They seek declarations that the properties are held on resulting trust and orders that the defendant transfer the legal title to them. They additionally seek an account of the profits accrued from the Glen Innes property, which has been rented out since 2012.

[7] The plaintiffs also plead vindication of their property rights in the two properties on the basis that the defendant, while acting as trustee, misappropriated funds from the plaintiffs' accounts. Relying on *Foskett v McKeown*,² the plaintiffs claim that, in advancing funds for the properties, the defendant was acting as a trustee with respect to those funds. The defendant's acquisition of the properties for her own benefit was a misappropriation of trust funds giving rise to a traceable proprietary right for the plaintiffs, in proportion to their contribution towards the purchase price. This is pleaded in the alternative.

[8] The third cause of action alleges breach of fiduciary duties. The plaintiffs say that they placed their trust and confidence in the defendant to manage their financial affairs in their best interests. There was a fiduciary relationship. Under this cause of action, the plaintiffs claim that the defendant acted in breach of her fiduciary duties by:

¹ *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL); *Potter v Potter* [2003] 3 NZLR 145 (CA).

² *Foskett v McKeown* [2001] 1 AC 102 (HL).

- (a) becoming the registered owner of the two properties and refusing to transfer legal ownership when requested;
- (b) failing to provide clear and reliable financial statements to the plaintiffs regarding the return on their investment in the property development scheme offered to them by the defendant's husband; and
- (c) making nine unauthorised transactions from the plaintiffs' bank accounts between 2015 and 2017.

[9] The plaintiffs seek constructive trusts declared over the Glen Innes and Ellerslie properties, and orders that the properties be transferred to the plaintiffs. They also seek equitable compensation for the unauthorised transactions, plus interest.

[10] The fourth cause of action was pleaded under the s 339 of the Property Law Act 2007, in the event that the Court determined that the properties were co-owned by the parties. However, this cause of action was abandoned during the course of the proceeding.

Issues for determination

[11] The issues for determination are as follows:

- (a) Who is the beneficial owner of the Glen Innes property?
- (b) Who is the beneficial owner of the Ellerslie property?
- (c) Did the defendant breach her fiduciary duties with respect to the property development scheme and the transactions?

Legal principles: Resulting trusts

[12] The plaintiffs rely on Lord Browne-Wilkinson's description in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* of the circumstances in which a traditional resulting trust may arise:³

[...] where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions.

[13] On the position of resulting trusts, the authors of *Civil Remedies in New Zealand* helpfully state:⁴

The fundamental inquiry... is whether the transfer of property to B is intended by A, the transferor, to be beneficial to B. [I]t is presumed that A did not intend B to acquire a beneficial interest in the property. This presumption as to A's intention operates unless either the evidence establishes that A intended to make an outright gift to B or the alternative presumption of advancement is invoked (and is not itself overtaken by actual evidence to the contrary) effectively to trump the presumption as to A's intention. Thus, the question as to A's beneficial intent is answered, in the absence of evidence of actual intent (which would be conclusive), by a presumption.

All cases of resulting trusts, therefore, are properly regarded as arising as a consequence of the transferor's or settlor's intention. This is so, even though the intention has to be established not by the actual evidence but by appeal to presumptions supplied by the law.

[14] A resulting trust is not therefore a remedial response by the Court to protect against unconscionability, as a constructive trust does. Rather, recourse to fundamental principles in property law provide a path to finding the beneficial interest, in the absence of contemporaneous evidence of intent at the time of transfer which indicates an express or implied trust over the property.

[15] In *Crampton-Smith v Crampton-Smith*,⁵ the Court of Appeal considered the case of a brother who had paid the full purchase price for a piece of land as an

³ *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) at 708.

⁴ Peter Blanchard *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) at 439–440.

⁵ *Crampton-Smith v Crampton-Smith* [2011] NZCA 308, [2012] 1 NZLR 5.

investment. Being domiciled overseas, the brother left his sister to sign the purchase agreement and register the land in his name. He made the purchase funds available in a new bank account, to which the sister was given access. The sister made the purchase but registered the property in her own name. The brother made some enquiries as to when she would transfer the title to him but, due to illness within the family, he did not press the issue for several years. Upon return to New Zealand, the brother discovered that his sister had subdivided the land and constructed two townhouses, to which he had made no contribution, and which greatly increased the value of the initial investment when the sister later sold the properties.

[16] In their analysis, the Court considered that:

[45] The obvious starting point in the present case is the undisputed fact that the brother contributed the full purchase price of the land, the title to which was then registered in the sister's name. In our view, the presumption of a resulting trust immediately arose in the brother's favour and remained in his favour unless rebutted by contrary evidence.

[17] The Court went on to say:

[64] It has been suggested in a recent note in relation to the decision of the High Court under appeal that if a trust had been established, a proprietary right would have been created. That is undoubtedly so. It was further suggested that the sister would have been making unauthorised use of the brother's equitable property and that it would have been perfectly just for the brother to have recovered his property or its substitute, whatever its value.

[18] *Crampton-Smith* was unusual in that the sister did not attempt to rebut the presumption in favour of a resulting trust. Nor did she provide records of the expenses incurred through the construction of the townhouses. As a result, the Court ordered the full amount of the proceeds from the sale of the properties be paid to the brother by the sister as an account of profits. However, it was acknowledged that it would be open to the Court to make some allowance to recognise the sister's contribution to improving the value of the trust asset through "effort, skill and enterprise, as well as expenses incurred, even though he or she has made the profit in breach of fiduciary duty".⁶

⁶ At [65].

[19] With respect to compensating fiduciaries who have breached their obligations, the New Zealand position was outlined by Tipping J in *Chirnside v Fay*.⁷ The quantum allowed by the Court is determined with regard to equitable principles and may only be granted where it would be unjust not to do so. The Court must take account of the errant fiduciary's conduct as well as their activity and expenses related to the trust asset. The more "reprehensible" the conduct, the less likely the Court is to provide generous recompense.⁸ Crucially, the onus falls on the defendant fiduciary to satisfy the Court that an allowance should be made.⁹

Legal principles: Breach of fiduciary duties

[20] In *Chirnside*, Tipping J explained that a relationship may give rise to fiduciary duties in two situations:¹⁰

- (a) where there is an inherently fiduciary relationship between the parties;
or
- (b) when particular aspects of a relationship that is not inherently fiduciary nonetheless justify it being classified as such.

Tipping J further noted that fiduciary duties may be inferred where the relationship is one of assumed trust, confidence and loyalty. The hallmark of a fiduciary is the duty of loyalty. The party who is owed fiduciary duties is entitled to rely upon the fiduciary and will be in some way dependent on them to act in their best interests.

[21] Falling within the first category in *Chirnside*, there are recognised classes of relationships which are — based on the parties' positions — inherently fiduciary, such as between solicitor and client, trustee and beneficiary, and principal and agent. The second category where a fiduciary relationship is likely to be inferred was discussed by the Court in *Dold v Murphy*:¹¹

⁷ *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [122].

⁸ At [122].

⁹ At [131].

¹⁰ At [73] and [75].

¹¹ *Dold v Murphy* [2020] NZCA 313, [2021] 2 NZLR 834 at [55].

... when the legal relationship between parties involves: (1) the conferral of powers in favour of the alleged fiduciary, which may be used to affect the proprietary rights of the beneficiary; (2) the apparent assumption of a representative or protective responsibility by the alleged fiduciary for the beneficiary (for example, to promote the beneficiary's interests, or to prefer the interests of the beneficiary over those of third parties); and (3) the implied subordination (although, not necessarily, elimination) of the alleged fiduciary's own self-interest.

[22] A plaintiff who has established breach of fiduciary duty is entitled to an account of profits, where the fiduciary has profited.¹² Where there is no profit made but the plaintiff has suffered loss, the plaintiff may elect to seek equitable compensation.¹³

Who is the beneficial owner of the Glen Innes property?

Background

[23] In 2012, at the time that the Glen Innes property was purchased, the defendant was living at home with her parents and working full-time as a waitress, earning approximately \$600 per week. The defendant became interested in property investment at this time and purchased her first property, a home in East Tāmaki. The plaintiffs gifted the defendant the deposit for this property, and the defendant paid the balance of the purchase price by way of her own savings and a mortgage loan. She rented out the East Tāmaki property and still owns it. There is no dispute about the ownership of this property.

[24] Later in 2012, the Glen Innes property came onto the market. The parties differ in their views on the lead up to its purchase, but it is agreed that on 5 December 2012, the parties attended an auction for the property. The defendant bid on the property and won. On 7 December 2012, the defendant transferred \$52,050 from the plaintiffs' bank accounts to pay the deposit. The plaintiffs advised the defendant that \$20,000 of that amount was a loan from her brother, Ta-Chang Liao (known as Jimmy), that she would need to repay, which she did at a later stage. On 20 December 2012, the defendant settled the purchase of the Glen Innes property and secured a mortgage loan with the Bank of New Zealand (BNZ) over both the Glen Innes and East Tāmaki

¹² *Chirnside v Fay*, above n 7, at [20].

¹³ *Coleman v Myers* [1977] 2 NZLR 225 (CA).

properties, the latter of which she had refinanced. The defendant contributed \$53,762.91 of her own money in the process of gaining the BNZ mortgage.

[25] The Glen Innes property was also rented out. The defendant managed the rental arrangements entirely and continues to do so.

The plaintiffs' interpretation

[26] According to the plaintiffs, in 2012, they decided to invest in New Zealand real estate. They saw the Glen Innes property as a suitable investment and intended to purchase it without any debt finance, as they had done for their investment properties in Taiwan.

[27] When the plaintiffs told the defendant about their intention to purchase, she suggested that they pay the deposit and allow her to obtain a mortgage to pay the balance of the purchase price. The defendant said that this would help her to improve her credit rating and advised them that, in New Zealand, it was usual to take out financing on an investment property. The mortgage could then be repaid with rental income.

[28] The plaintiffs say that they accepted her proposal. They expected that they would be the registered owners of the Glen Innes property and the defendant would be liable for the mortgage, as a kind of guarantor. The plaintiffs said that they authorised the defendant to cover any shortfall between the rental income and mortgage repayments from their accounts.

[29] The plaintiffs say that when they attended the auction on 5 December 2012, they successfully bid on the property and the defendant assisted by acting as an agent and translator. When the defendant signed the memorandum of contract for the property, they believed that she did so on their behalf and that they became the legal and beneficial owners. The plaintiffs say that the defendant used a combination of their money and her own to pay the shortfall between rent and outgoings until 28 December 2016, after which there was a surplus.

[30] In February 2019, the plaintiffs say that the defendant told them that she was the registered owner of the Glen Innes property and explained that the mortgagor needed to be the registered owner under New Zealand law. The plaintiffs then asked her to transfer the property into their names. They say that she agreed, but never did so. The plaintiffs say that they kept asking her to transfer the title, and that as recently as 2021 she had told them that she was “working on it”.

The defendant's interpretation

[31] The defendant disputes the claim that she suggested taking on the mortgage for the Glen Innes property on the plaintiffs' behalf or as a guarantor. She says that, following her purchase of the East Tāmaki property, she hoped to further expand her investment portfolio and decided to purchase the Glen Innes property.

[32] The defendant asked her mother, Mrs Liao, whether she would give her \$52,050 for the deposit and she agreed to do so. The defendant says that this was a gift, less the \$20,000 loan from Jimmy which she settled with him directly in 2014.

[33] The defendant disputes that the plaintiffs believed they would be the registered owners of the Glen Innes property. She says that there was a Mandarin-speaking agent assisting them at auction and that a Mandarin-speaking solicitor acted on the conveyancing. Her mother was present at the auction and attended with the conveyancing solicitor. She says that her mother was aware that the defendant was purchasing the property and would become its legal owner. The defendant also notes that the plaintiffs had experience purchasing property, having bought a number of properties in Taiwan and the family home in New Zealand. In these circumstances, the defendant says that it is unreasonable for her mother to claim that she did not understand the conveyancing process.

Discussion

[34] To find a resulting trust over the Glen Innes property, I must determine whether the plaintiffs intended to retain a beneficial interest in the property when they transferred the \$52,050 to the defendant for payment of the deposit. The law on resulting trusts is clear — where monies are paid towards the purchase of property in

another's name, a presumption arises that the transferor intends to retain a beneficial interest. This presumption may be displaced where there is evidence that the transferor intended to make a gift, as the defendant says was the case here.

[35] The difficulty for the defendant on this point is that there is a paucity of contemporaneous evidence as to the intentions of the plaintiffs or herself around the time of purchasing the Glen Innes property. The defendant says that the plaintiffs failed to take positive steps in securing the title of the property, which she claims to indicate that they understood the property to be hers. However, that is not the relevant test. In *Lendich v Codilla*, the Court of Appeal said:¹⁴

[T]he essence of a resulting trust in this context is that a person providing or contributing to the purchase price of property conveyed into the name of another retains a beneficial interest in the property to the extent of his or her contribution if there is nothing to indicate that he or she intended to confer the beneficial interest on the legal transferee. Where no intention to dispose of his or her beneficial interest is expressed by the transferor, the law fills the vacuum and presumes an intention on the part of the transferor to retain the beneficial interest which they had never effectively alienated.

(footnotes omitted)

Therefore, it is clear that an omission to take positive steps is not enough to infer that the plaintiffs intended to dispose of their beneficial interest.

[36] The presumption of a resulting trust may also be displaced by the counter-presumption of advancement. The latter presumes that where a parent makes a transfer to their child, they do so intending to benefit them. However, the position of the presumption of advancement as regards adult children is not settled in New Zealand. The presumption must be weighed against the circumstances in which the transfer was made and does not merely apply wholesale between parents and children. In *Reid v Castleton-Reid*, the Court of Appeal said:¹⁵

It is difficult to see any rationale for the operation of the presumption of advancement where an adult child is well established in life... The presumption is based on the concept of a parental obligation to support children.

¹⁴ *Lendich v Codilla* [2023] NZCA 222, [2023] 24 NZCPR 374 at [82].

¹⁵ *Reid v Castleton-Reid* [2019] NZCA 372, [2019] NZAR 1655 at [85].

[37] At the relevant time, the defendant was living at home with the plaintiffs and working a hospitality job which brought in around \$600 per week. She had recently purchased an investment property in East Tāmaki, the deposit for which was gifted to her by the plaintiffs and about which there is no dispute. The plaintiffs at this time owned their family home in New Zealand, but also owned three investment properties in Taiwan. I do not consider it unreasonable that the plaintiffs may have sought to help their daughter achieve financial independence through property investment, as they had when gifting the deposit for the East Tāmaki property. The circumstances surrounding the purchase do not weigh against this assumption. The plaintiffs attended the auction for the Glen Innes property. The defendant and her mother gave evidence that she was with the defendant when the agreements for sale and purchase, and later settlement, were signed. While the plaintiffs say that they attended in their capacity as principal, with the defendant carrying out the transaction as their agent, they may equally have attended to support their daughter as she took steps to develop herself financially.

[38] I further consider the fact that the defendant refinanced her mortgage on the East Tāmaki property, so as to combine it with the Glen Innes mortgage loan, is consistent with the defendant's narrative that she had developed an interest in property investment and sought help from her parents. The defendant managed the rental properties from the time of purchase. Other than saying that the plaintiffs assisted in cleaning and sorting the Glen Innes property after purchase, there is no indication that the plaintiffs were involved with the property at all. Unlike the respondent in *Reid*, the defendant was not at this stage established financially, and nor was the presumed gift extensive. A gift of its kind had been given to the defendant only a few months prior to the transaction in question, and the evidence suggests that it was not uncommon for the plaintiffs to provide gifts and loans to their three children. Formal agreements were not entered into regarding the nature of those transactions or any obligations resulting from them.

[39] By a slim margin, therefore, I consider that the presumption of advancement has not been displaced with respect to the Glen Innes property and the monies transferred to the defendant for payment of the deposit was likely a gift. That amount was, as noted, \$32,050, being the amount of the deposit less the \$20,000 loan from

Jimmy. The beneficial interest in the property was vested in the defendant and no resulting trust arose from this transaction. The plaintiffs' claim to the Glen Innes property is dismissed.

Who is the beneficial owner of the Ellerslie property?

Background

[40] As with the purchase of the Glen Innes property, the details surrounding the acquisition of the Ellerslie property are disputed. It is agreed that in November 2019, Mr Lam (the defendant's husband) took the plaintiffs to view a property at 4A Whites Way, Ellerslie. The property was bare land. On 29 November 2019, a few days after the viewing, Mr Lam signed an agreement to purchase the property for \$778,000 and paid the deposit of \$77,800.

[41] The agreement for sale and purchase included a provision to nominate someone else as the purchaser. On 8 April 2020, Mr Lam nominated the defendant as the purchaser. Between 10 and 17 April 2020, the defendant transferred seven tranches of \$100,000 from the plaintiffs' accounts to her own. On 20 April 2020, the Ellerslie property was settled with the defendant paying the sum of \$701,904.94 to complete the purchase.

The plaintiffs' interpretation

[42] The plaintiffs say that, in 2019, they considered purchasing another investment property and attended the viewing of the Ellerslie property with a mind to purchase it. They say that a few days after the visit, Mr Lam told the plaintiffs that he had bought the property for them, and that he had paid the deposit (being \$77,800) out of monies that he would deduct from the return on their investment in his property development scheme. The plaintiffs then agreed to pay the full balance of the purchase price.

[43] According to the plaintiffs, the defendant had told them that, prior to settlement, the Ellerslie property would need to be registered in her name as the plaintiffs needed to be living in New Zealand for six months before purchasing residential property. The plaintiffs were frequently overseas in Taiwan and did not

qualify. The defendant then promised to transfer the title to them after six months had passed. The plaintiffs relied on the defendant's promise to them and authorised her to transfer the funds.

[44] After settlement, Mr Lam's construction company, D & T Homes Ltd, began building a residential house on the property which the plaintiffs intended to move into. Mr Lam updated his father-in-law, Mr Liao, on the build's progress via LINE, a messaging application. In August 2020, Mrs Liao asked the defendant to transfer the Ellerslie property to the plaintiffs and, a few months later, for her to transfer it to her brother Jimmy. The defendant later proposed trading another property to the plaintiffs for the Ellerslie property, which Mrs Liao refused due to a difference in value. In April 2021, the defendant asked to purchase the Ellerslie property from the plaintiffs and was offered the property for \$1 million, which she declined.

The defendant's interpretation

[45] The defendant asserts that the plaintiffs expressed no interest in purchasing more investment properties, and that while Mr Lam did show the property to her father, he did not like it. The defendant says that Mr Lam paid the \$77,800 deposit from his own funds, not out of the plaintiffs' investment in Mr Lam's property development scheme. While the balance of the purchase price for the Ellerslie property was paid with the \$700,000 transferred out of the plaintiffs' accounts, the defendant claims that the funds were a loan that she intended, and still intends, to pay back. The defendant says that the \$1 million payment discussed with the plaintiffs constituted a principal repayment of \$700,000, plus interest of \$300,000. She thought that the figure was unreasonable, and so declined.

[46] The defendant further denies that there was a construction contract between the plaintiffs, Mr Lam and herself. Consequentially, she says that there is no expectation of payment for that work.

[47] There are a series of text messages between Mr Lam and his father-in-law, Mr Liao, that bear upon this issue.

[48] On 19 November 2020, Mr Lam sent pictures to Mr Liao of early stages in the construction with a comment saying “Start working today”. On 26 November 2020, Mr Lam sent another picture and a message about removing rocks from the property. An exchange followed:

Mr Lam: [51 second voice message] ... In other words, the foundation will... probably be finished before Christmas. From the beginning of the year, the framing work will be done in about March... and the decoration work will probably be wrapped up too, probably without any major issues. The only problem now is the shortage of material everywhere...

Mr Liao: Understood, and thank you for your hard work

Mr Liao: Do what should be done, I can certainly rest assured 100% with my own son-in-law

Mr Lam: [35 second voice message] Fine, no problem, I promise to keep an eye... So all is good, and the progress isn't bad. And then, have communicated with the neighbours, who are all ok and have no major concerns.

[49] On 21 January 2021, Mr Liao messaged Mr Lam, “Is the overall timber framing work done now?”. Mr Lam replied by voice message, advising that the timber frames had only arrived that day. He provided other details about the progress of the build. Mr Liao replied, “OK, understood”. On 2 February 2021, Mr Lam messaged “Doing mid floor” and Mr Liao responded, “Getting to the mid-lower floor so quickly, thank you” to which Mr Lam replied with a picture of the floor.

[50] Then on 6 February 2021, the following conversation occurred:

Mr Lam: [39 second voice message] Dad, here is an advice: make one — will perhaps sell down the track or whatever — make a complete one, similar to that of Orewa. And then, for the lounge, do a separate one. It'll be better like this. If they're not separated, then there is no place to hang the external units, because when the compressors come, the garden will become an ugly sight if they are in a row.

Mr Liao: This house will only be occupied by us two elderlies and Ta Chang... I won't be selling, for sure. I want them installed behind the house, i.e., behind the kitchen — there will only be two main units. I've consulted with mum. Thanks.

[51] A further exchange occurred on 18 February 2021 where Mr Liao again thanked Mr Lam for his work on the build. Mr Lam also asked:

What colour for the front of the cabinets? ... Do you want the same type of electrical appliances as those in your current place? ... What colour for the external wall?

[52] There are also a series of messages between the defendant and both her mother and her father in which she agrees to transfer ownership of the Ellerslie property. Further, Mrs Liao made enquiries of the defendant about the construction of the dwelling and organising payment from the plaintiffs to D & T Homes Ltd. On 31 October 2020, Mrs Liao said:

Did [Mr Lam] tell you when the work would start? You must tell him not to worry about the money – I won't owe him – it will be remitted to his account the minute he signals. Or any reason should at least be explained. And then I need to ask you if you've told and so on... How to transfer from his name? Don't stay quiet.

[53] On 26 April 2021, the defendant messaged her father:

Firstly, regarding [the Ellerslie property], I will transfer it for sure, can even do the transfer now. But if anything gets discovered by the government, you have to be responsible for paying up all the fines incurred by me in that regard. Because we've consulted with a lawyer — the duration is not long enough... Secondly, any cost for construction relating to [the Ellerslie property] must be paid off at the time of the name-changing...

Discussion

[54] The circumstances surrounding the purchase of the Ellerslie property are quite different to those under which the Glen Innes purchase was made, in terms of an analysis for a resulting trust.

[55] The defendant has claimed that the plaintiffs authorised her to transfer the purchase monies for the property from their accounts as a loan to be paid back. She says that the deposit was paid out of Mr Lam's own funds. However, I found the plaintiffs' evidence on this matter preferable. As I will later discuss, the plaintiffs and their son, Chien-Chuan Lia (also known as Josh), had invested \$1,064,500 in a property development scheme with Mr Lam through a special purpose company. The plaintiffs received two payments from their investment: the first payment of \$986,700 was made on 8 April 2020 and the second payment consisted of a series of deposits amounting to \$600,000 in February 2021. The plaintiffs submit that the first payment was repayment of their principal investment and the second was the return on their

investment. The \$986,700 payment works out to be the initial investment of \$1,064,500 less \$77,800 (the amount of the Ellerslie deposit). In the absence of records from the defendant or Mr Lam showing otherwise, I am satisfied that Mr Lam did deduct the deposit from the plaintiffs' investment and that it was therefore paid by the plaintiffs, not Mr Lam.

[56] There is no dispute that the rest of the purchase price was paid by the plaintiffs. The only indication that the transaction was a loan, as claimed by the defendant, is that some of the transactions were recorded as "loan" in the plaintiffs' accounts when transferred to the defendant. I do not consider that that is enough when weighed against the countervailing context shown by the text messages between the parties. Mr Lam appeared to be keeping Mr Liao updated on the build's progress regularly and sought advice as to the specifications of the dwelling. Mr Liao says that the house will only be for himself and Mrs Liao. Mrs Liao tells the defendant that she wants to settle payment for the construction on the house that is outstanding. And the defendant herself says that she will transfer the property on more than one occasion. When offering to trade the property for another, or purchase it, I consider that she affirmed the plaintiffs' beneficial ownership of the Ellerslie property.

[57] On that basis, I consider that a resulting trust did arise in favour of the plaintiffs with respect to the purchase of the Ellerslie property. The presumption of advancement does not apply in these circumstances. The defendant was at this time married and owned at least two investment properties. She was well-settled in life.

[58] Having found that the beneficial ownership of the Ellerslie property lies with the plaintiffs, I nevertheless consider that this is a case in which the defendant, as fiduciary, is entitled to the recovery of expenses incurred with respect to the property. The defendant will be entitled to recover costs associated with the property while in her possession and any costs for the construction of the house. I note the plaintiffs' willingness to settle these costs at an earlier date and consider that doing so is in line with my understanding of the initial agreement between the parties.

[59] The plaintiffs' claim to the Ellerslie property is upheld with the proviso that the defendant is entitled to recover the costs of holding and developing the property.

Did the defendant breach her fiduciary duties with regard to the property development scheme?

Background

[60] In 2018, the plaintiffs invested in a property development scheme conducted by Mr Lam and D & T Homes Ltd under the special purpose company D & T Arran Point PDE Ltd, set up by Mr Lam as a third-party investment vehicle. The scheme involved the purchase and development of properties at 22 Arran Point Parade, Orewa and 15 Bight Road, Long Bay, to be sold after completion. The plaintiffs invested \$1,064,500 in the scheme, some of which the defendant transferred from their bank accounts.

[61] There is some dispute about the total amount invested in the scheme by the plaintiffs. The plaintiffs called an expert accountant who agreed that the plaintiffs and their son, Josh, had invested \$1,014,500 between March 2018 and December 2019. However, I consider it reasonable to include a further \$50,000 loan to bring the total investment to \$1,064,500. On 8 December 2019, the sum of \$50,000 was paid out of the plaintiffs' ASB bank account. On the bank statement, the bank account number to which the funds were paid is recorded together with the notation "Dennis loan". It was not paid to the bank account of the special purpose company, D & T Arran Point PDE Ltd, as all other sums were, but to Mr Lam's personal account. The payment is there recorded to be from Mr A-Wang Liao with the notation "Liao luLoan". It was then immediately transferred to another numbered bank account, which is followed by the notation "dennis input". Unfortunately, we do not have the bank statements for the numbered bank account to which the sum was immediately transferred, but someone has written on Mr Lam's bank statement "Lot 201 to D & T Action (?) Account". Lot 201 is a reference to the property in Arran Point Parade, which was bought by Mr Lam as part of his property development scheme. Therefore, although there is no record of it being deposited in the bank account of the special purpose company, it should be included in the investment total.

[62] Between April 2020 and February 2021, the plaintiffs were paid \$1,586,700 in two tranches of \$986,700 and \$600,000 as returns for their investment. No documentation was provided as to how their return was calculated.

Discussion

[63] The plaintiffs have claimed that the defendant acted in breach of her fiduciary obligations by failing to provide information about their investment in the property development scheme into which they entered with Mr Lam. The plaintiffs have not specified the remedy sought with respect to this claim. It can be inferred that the plaintiffs dispute the amount that they have received from the scheme, being \$1,586,700, and wish to see accounting as to how that figure was reached.

[64] An agent fiduciary may have a duty to provide information where they have acted on behalf of their principal, but the content and extent of that duty will depend on the circumstances.¹⁶ The plaintiffs describe the defendant's role as 'managing' their investment in the property development scheme and say that the defendant was tasked with updating them on its progress and liaising with Mr Lam. However, as with all of the financial agreements between the parties, there was no formal contract entered into by the plaintiffs and D & T Arran Point PDE Ltd, or between the defendant and the plaintiffs. No evidence has been submitted outlining the expectations placed upon the defendant with respect to the investment scheme. Nor is there any allegation of fraud or other misconduct which may reasonably place the defendant on notice to make enquiries on behalf of the plaintiffs.

[65] In cross-examination by Mr Jeffs, the defendant described her role in the scheme as follows:¹⁷

- Q. I'm asking you whether you know who decided how much your parents would invest in the development scheme?
- A. Dennis.
- Q. Dennis. It was Dennis who told you how much money your parents would need to invest in the scheme?
- A. I should put it this way, my mum, before the investment would ask how much money roughly, needed to be invested, I would then ask that to Dennis, Dennis could only give me a rough figure.

¹⁶ See *R v Prior* [2000] 1 NZLR 526 (CA) at [16]–[17].

¹⁷ When giving evidence, the defendant referred to the transferred sums as amounts of \$10,000. Based on information from the bank statements provided, the amount referred to is \$100,000. This has been corrected accordingly.

...

Q. You have listed five amounts there that you say reflects your parents investment in the project, do you agree?

A. Yes.

Q. Dennis would tell you that he needed a particular amount of money invested, is that right?

A. I don't know if that counts but Dennis would tell me: "Transfer [\$100,000] for the project," things like that.

Q. Would you talk to your parents before making that transfer?

A. I would.

Q. Did Dennis tell you specifically what the money was going to be used for in the development?

A. All he would say is that Arran Parade would need \$100,00[0] for the construction and then I would transfer that amount.

...

Q. So, I should ask Dennis about the detail of the development, shall I?

A. I was in an awkward position as I am my mum's daughter as well as Dennis' wife. In relation to Dennis' company, he had made it clear that the wife should not be involved in the internal operation of that, therefore I did not go into details in relation to the company. And because I believe that my mum was the silent partner, so I didn't press any further.

Q. So, you only know what Dennis has told you about the developments?

A. Correct.

[66] With respect to Mr Lam, he also described the agreement as one in which the plaintiffs were "silent partners" and did not consider that he had an obligation to account to them regarding their return. He said he would not have accepted their investment if he had to account for their return.

[67] In cross-examination by Mr Jeffs, Mr Lam explained, as follows:

Q. Phoebe would be responsible for telling the Liaos about their investment?

- A. From the very beginning I had said that I only want to deal with Phoebe.
- Q. Your expectation is that Phoebe would keep her parents updated about the progress of the developments, correct?
- A. Matter of fact is I did not have to update them because they were only required to invest money in it and wait until they would profit until they would share the profit.
- Q. Is it your evidence that you did not intend to provide them with any updates about the development?
- A. I didn't have to. If they had insisted to have a say in my development project then I would not have allowed it because that will be too troublesome.
- ...
- A. As I explained very earlier it was that agreement that they are going to put the money in, I will do the development without their involvement and in the end they will share the profits. If they had disagreed, they didn't have to participate in my project.

[68] The defendant's understanding of her role in the investment scheme appears, therefore, to be limited to discussing when transfers needed to be made and to carry them out, as she was authorised to do using the plaintiffs' accounts. She describes having 'updated' the plaintiffs by taking them to visit the developments at some point. There is no indication that the plaintiffs expected the defendant to keep investment records over this period. The impression from Mr Lam is that he did not discuss the details of the investment with the defendant in any case. In the absence of evidence to the contrary, I do not consider that the defendant acted in breach of a duty to inform the plaintiffs. If such a duty existed, it was very limited. This is in line with the casual nature of the agreement, being between family, and having regard to the skill and experience of the defendant fiduciary who is, on her own account, "a housewife looking after children".

[69] Mrs Liao's evidence on this matter also suggests that Mr Lam, on behalf of D & T Homes Ltd, was the appropriate person to approach for information on the investment scheme. The following exchange took place in cross-examination by Mr McAnally:

- Q. ...[M]y question I'm putting to you is you decided to invest that money with Dennis, didn't you?
- A. Yes, it was me, that's right.
- Q. And if you have any problems with that investment, you're quite capable of raising those problems with Dennis himself, aren't you?
- A. I asked Dennis now that the work side has come to an end, shouldn't you be giving me a breakdown from beginning to the end, and she ignored me to date — sorry, he ignored me to date.
- Q. So, the answer to my question then is “yes,” isn't it?
- A. To ask Dennis, to approach Dennis? He was quite often staying at my place, how could I not be able to ask him if I wanted to? But it's that he play cat and dog with me when I approached him. Sometimes he said that he has to ask his wife.
- Q. You haven't sued Dennis, have you?
- A. No, no, to sue him for what, for number 8?
- Q. And the reason you haven't sued Dennis is because Phoebe's the one that needs to be punished for disobeying you, isn't she?
- A. No. Because the husband — because the work side belonged to him, but he, as the husband, is pushing the blame onto the wife, his wife.

[70] As Mr McAnally points out in this exchange, neither Mr Lam nor D & T Homes Ltd are defendants in this proceeding. Insofar as the plaintiffs have claimed that the defendant failed in her fiduciary duties with respect to their investment in the property development scheme, I am not convinced that she has done so, whatever they may have been. In any case, there was no relief specified in the statement of claim as regards investment in the scheme. The plaintiffs' claim in relation to investment in the property development scheme is dismissed. It is a matter for the plaintiffs to pursue with D & T Homes Ltd.

Were the transactions from the accounts unauthorised?

Background

[71] In 2021, the plaintiffs' son Josh moved back to New Zealand after living in Taiwan for a number of years. Josh had concerns about the plaintiffs' reliance on the defendant and, after discussion, helped them to remove her authorisation over their accounts and look through their statements. Following this, the plaintiffs called into question a number of transactions recorded on their ASB and ANZ accounts during the period in which the defendant held authority over those accounts.

[72] The transactions are as follows:

ASB Account ending 1238

	Date	Amount	Details from statements
1	18.03.2015	25,000	FC02-0272-0199666-00 Pei Yabnz
2	30.08.2015	8,400	FC12-3089-0333840-00 Peiya
3	26.11.2015	16,000	FC12-3089-0333840-00 Tan Kuei
4	20.04.2016	60,000	FC12-3089-0333840-00 Liao Lu
5	22.08.2016	22,000	FC12-3287-000098 4 Maired Phoebe
6	27.11.2016	4,900	FC12-3089-0333840-00 Awang
7	10.03.2017	309,125.66	Maire Rd Baker Law Lot 4 106
	Total	445,425.66	

ANZ account ending 4449

	Date	Amount	Details from statements
8	07.03.2016	25,000	dennis lam loan to dennis
9	14.03.2016	75,000	0028774227
	Total	100,000	

[73] The plaintiffs allege that the defendant made these transactions without their authorisation and in breach of her fiduciary duties. They allege that the plaintiff owed them fiduciary duties to:

- (a) faithfully and strictly carry out the plaintiffs' instructions;

- (b) act honestly and in good faith;
- (c) take no action which conflicted with the plaintiffs' best interests; and
- (d) not profit from her position.

[74] The plaintiffs seek equitable compensation of \$231,400 for the monies transferred from the ASB and ANZ accounts. They also seek interest, under s 10 of the Interest on Money Claims Act 2016, on any amount the defendant is ordered to pay.

[75] The defendant denies that the transactions in question were made without the plaintiffs' authorisation. In her statement of defence to the plaintiffs' amended statement of claim, the defendant provided explanations for transactions 1–8:

	Date	\$ Amount	Defendant's explanation
1	18.03.2015	25,000	Gift from the plaintiffs to the defendant for the birth of the defendant's child.
2	30.08.2015	8,400	Reimbursement of portion of the deposit for the property at 8 Kahu Close that the defendant paid from her own funds on the plaintiffs' behalf on 21.08.2015
3	26.11.2015	16,000	Reimbursement of portion of the deposit for the property at 8 Kahu Close that the defendant paid from her own funds on the plaintiffs' behalf on 21.08.2015
4	20.04.2016	60,000	Payment of 10% deposit for the property at 8 Kahu Close
5	22.08.2016	22,000	Payment of council fees, Geotech fees and architect fees for 8 Kahu Close
6	27.11.2016	4,900	Contribution towards expenses for outgoings for the plaintiffs' rental property at 33 Palm Grove Crescent
7	10.03.2017	309,125	Settlement of the purchase price for 8 Kahu Close
8	07.03.2016	25,000	Funds to Dennis towards construction of dwelling on 8 Kahu Close

[76] The defendant says that she has no knowledge of the transaction dated 14 March 2016 for \$75,000 and does not recognise the account which received the transfer. She denies having executed the transaction.

[77] Following the exchange of evidence, the plaintiffs were satisfied the payment of \$4,900 on 27 November 2016 and \$309,125.66 on 10 March 2017 were properly

made by the defendant and were justifiable, thus reducing their claim to the outstanding amount not accounted for.

Discussion

[78] It is agreed that, in 2011, the defendant was given authority to manage the plaintiffs' ANZ and ASB accounts and was authorised to make transactions on their behalf at the relevant time. Again, no formal agreement was entered that outlined the plaintiffs' expectations as to how the defendant was to manage the accounts or approve the transactions being made. While the plaintiffs have alleged that the relevant transactions were unauthorised, there has been no suggestion of misconduct amounting to theft.

[79] In evidence, Mrs Liao said of the transactions that:

I've never said that Phoebe stole from me and that's her word, not mine. All I'm saying is that she was managing for me so she needs to account for the money to me, but instead she cut off completely from me, including from phone calls.

Under cross-examination, Mrs Liao was not able to confirm or deny most of the explanations provided by the defendant and suggested that questions about the transactions be put to the defendant. She was not able to confirm the specific amounts paid for the deposit, settlement and other expenses for the plaintiffs' property at 8 Kahu Close, which the defendant says accounts for much of the monies under dispute (\$445,425.66). Mrs Liao noted that the defendant "was the person who introduced me to this lot of land" and did not dispute that the defendant would have made payments from the accounts pertaining to the property.

[80] There was some dispute over transaction 4. The defendant claimed that the \$60,000 transfer was payment for a 10 per cent deposit on the 8 Kahu Close purchase. However, the purchase price for the property was approximately \$477,000. Two other transactions are also said to be part of a deposit — \$8,400 and \$16,000. However, when questioned by Mr McAnally, Ms Liao indicated she would take the defendant's word on small payments, such as that for \$60,000.

[81] LINE messages between Mrs Liao and the defendant were exchanged in early 2021 regarding transactions made from the accounts:

30 March 2021

Mrs Liao: Question – what account is the principal for the terrace kept? Please let me know sometime, thanks.

Phoebe: The money was transferred to Dad’s account as I didn’t have your ASB account number. Couldn’t explain to you the other day.

Mrs Liao: I don’t see this sum coming into the account. Do you want to come to explain it?

Phoebe: This sum is related to the company. He should explain it.

31 March 2021

Phoebe: The money has been transferred over long ago. Every transaction into your account(s) was clearly explained to you and Dad, and you guys also confirmed that there were no issues. I don’t know what you guys meant. Get your son to look closely first.

2 April 2021

Phoebe: Use a highlighter to mark out all the transactions that you are unsure of... and send it to me via email. Will reconcile the accounts in one go instead of keeping on talking about the accounts.

[82] It is regrettable that there is not more clarity regarding the transactions. In some cases, the failure by a fiduciary to keep adequate records when dealing with money would amount to a breach of duties. However, as discussed, the content and scope of a fiduciary’s duty will depend on the circumstances. Here, the defendant was authorised to manage the plaintiffs’ finances from 2011 to 2019. It is not disputed that communication about transactions was largely done orally and does not appear to have followed a prescribed or agreed-upon format. The defendant’s annotations on the various transactions are not consistent and it does not appear that the plaintiffs were regularly checking the accounts, if at all.

[83] The plaintiffs claim that their lack of oversight was due to their difficulties with technology, along with the difficulty in finding Mandarin-speaking staff at their banks who could assist them. This does not explain why they did not organise for the

defendant to reconcile the accounts on a regular basis and explain the transactions to them. The defendant appears to have been involved in the plaintiffs' various investments, including 33 Palm Grove Crescent (formally the Liaos' family home) and the property at 8 Kahu Close. It must be assumed that the defendant was authorised to make transactions on the accounts as needed where they concerned the plaintiffs' assets.

[84] While there is no evidence that each transaction was verbally authorised by the plaintiffs, I am prepared to accept that the parties discussed these matters with the defendant and instructed her to attend to the expenses generally. As the LINE messages from 2021 demonstrate, the defendant was willing to provide an account for the transactions once asked. In the absence of evidence to the contrary, I consider that she has provided an adequate explanation for transactions 2 to 8 and did not execute those transactions without authorisation, whether given directly or impliedly as part of the management of the plaintiffs' finances in New Zealand. The amounts purported to be for the deposit and settlement of 8 Kahu Close do broadly align with the purchase price of the property, and it was accepted in evidence that the defendant would have been authorised to compensate her husband for construction work undertaken during that period.

[85] With respect to transaction 1, the parties disagree entirely. In cross-examination by Mr McAnally, Mrs Liao denied that the transfer of \$25,000 on 18 March 2015 was a gift from the plaintiffs for the birth of the defendant's child:

A. The withdrawal of \$25,000, I don't know what is that for because it was done by Phoebe, not me.

Q. Well, Phoebe says that you told her she could make that payment, and you did, didn't you?

A. She didn't tell me.

Q. Well, you were sitting beside her when she put the transaction through, weren't you?

A. I don't know about the circumstances, whether I was sitting next to her or not, but even if I was sitting next to her I wouldn't know about what was going on.

Q. She was pregnant with Oliver when the two of you sat together and made that payment, wasn't she?

- A. I don't know about that.
- Q. And you said because of the baby coming, you would give Phoebe and Dennis that \$25,000, didn't you?
- A. That's even less possible.
- Q. Well, you're very generous with your children, aren't you?
- A. I wouldn't use the word generous but when they have a financial need and once I found out exactly what that need was, then I was willing to help.

[86] Once again, there is no contemporaneous evidence showing the \$25,000 transfer to be a gift, or otherwise. It has been established, however, that the plaintiffs would provide financial support and gifts to all of their children. For example, it was accepted that the plaintiffs gifted the 10 per cent deposit for the defendant's first investment property in East Tāmaki. Jimmy Liao gave evidence that the plaintiffs had provided financial assistance and gifts to him on many occasions, including by paying for his education and gifting him \$80,000 in 2013 to help him purchase a property. Josh Liao also confirmed that the plaintiffs had lent him approximately \$400,000 over the years, though he denied that any part of that amount was a gift. In any case, the plaintiffs have clearly been generous in supporting their children, whether by gifting them money or advancing interest-free loans. In this context, I do not think it unreasonable that the plaintiffs would gift \$25,000 to the defendant to celebrate the upcoming birth of their grandchild and help pay for expenses.¹⁸

[87] The final transaction is transaction 9, dated 14 March 2016, for \$75,000. The defendant denies any knowledge of the transfer. She suggested that it may have been carried out by someone else who had access to the ANZ account and that her brothers also had access at the relevant time (but this was not confirmed). When questioned, the plaintiffs did not claim to have any evidence that the defendant made the transfer. The defendant apparently suggested that the plaintiffs ask ANZ to trace the payment. Evidently, the bank informed them that too much time had passed for a trace to occur. Without any further information, I cannot determine whether this transfer was made by the defendant in breach of her fiduciary duties to the plaintiffs.

¹⁸ Mrs Liao characterised a \$60,000 transfer as a "small amount" in evidence. A gift of \$25,000 may not have been considered substantial and could well have been forgotten in the intervening eight years.

[88] The plaintiffs' claim with respect to the withdrawals from their bank account is dismissed.

Result

Glen Innes property

[89] The defendant is the beneficial owner of the Glen Innes property. She does not hold the property on resulting trust for the sole benefit of the plaintiffs.

Ellerslie property

[90] The plaintiffs are the beneficial owners of the Ellerslie property. The defendant holds the property on resulting trust for the sole benefit of the plaintiffs.

[91] The defendant is nonetheless entitled to recover costs incurred while the property was in her possession and the costs of construction of the dwellinghouse on the property, which may include a reasonable margin for the builder.

Property development scheme

[92] The plaintiffs have not proved that the defendant has breached any fiduciary duties she may have owed to the plaintiffs in respect of the property development scheme operated by her husband, Mr Lam.

Bank transactions

[93] The plaintiffs have not proved that the defendant has breached any fiduciary duties she may have owed to the plaintiffs, in respect of the withdrawals from the plaintiffs' bank accounts.

Further orders

[94] I do not make any further or ancillary orders as I expect the parties to negotiate on a good faith basis and reach agreement, in particular, on the costs associated with development of the Ellerslie property as well as any claim for use of money, interests and costs.

[95] Leave is, however, reserved for the parties to return to Court for any ancillary orders necessary to implement the terms of this judgment.

Woolford J