

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

CIV-2010-483-000101

AND UNDER Section 145A of the Land Transfer Act

BETWEEN TRUSTEES EXECUTORS LTD
 Plaintiff

AND EDEN HOLDINGS (2010) LTD
 Defendant

Hearing: 21 and 23 June 2010

Appearances: R J Gordon for Plaintiff
 S Kellett and S L Bacon for Defendant

Judgment: 12 August 2010 at 3:30 pm

JUDGMENT OF ASSOCIATE JUDGE BELL

*This judgment was delivered by me on 12 August 2010 at 3:30 pm
pursuant to Rule 11.5 of the High Court Rules.
Registrar/Deputy Registrar*

Date:

Solicitors:

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[1] Trustees Executors Ltd applies under s 145A of the Land Transfer Act for a final order that a caveat not lapse. Associate Judge Gendall made an interim order that the caveat not lapse pending further order of the Court on 12 April 2010.

[2] The caveat is 8407148.1 lodged against the title to 43-45 Mt Eden Road, Mt Eden, Auckland (identifier 103752 North Auckland registration district). The interest Trustees Executors Ltd claims in the caveat is:

Pursuant to a trust arising from the receipt on behalf of the registered proprietor, Eden Holdings 2010 Ltd, of funds applied towards the acquisition of equity in the said land of which it is registered proprietor, being funds obtained from the caveator by the deceit of Malcolm Duncan Mayer, the beneficial owner of the said Land.

[3] Trustees Executors Ltd says that it is the victim of mortgage fraud by Malcolm Mayer, that his fraud gives it proprietary rights by way of a constructive trust in assets in the names of associates of Malcolm Mayer and companies he is connected with, and that it is able to trace and follow those proprietary rights into the property in Mt Eden Road. It is not part of its case that it had any transactions involving Mt Eden Road or that it had any dealings with Eden Holdings 2010 Limited.

Trustees Executors Ltd's allegations of misconduct by Malcolm Mayer

[4] Trustees Executors Ltd says that Mr Mayer was a mortgage broker and had an established relationship with it. He had a company, MDM Holdings Ltd, which was an existing borrower from Trustees Executors Ltd. Trustees Executors Ltd says that it made 29 loans which it regards as part of a fraudulent scheme by Mr Mayer.

[5] Trustees Executors Ltd has outlined how it says that Mr Mayer was fraudulent. Trustees Executors Ltd has divided the loans into two parts, which it calls tranche A and tranche B. It has given a resume of the transactions in tranche A. It has not given a resume of the transactions in tranche B, but it has put in evidence documents relating to one of the transactions in tranche B – a loan to Champion Apartments Ltd secured over a property in Ellerslie. Trustees Executors Ltd says that there is a general pattern to the way Mr Mayer arranged loans from it. Mr Mayer would prepare the loan applications. The borrowers were persons known to

Mr Mayer or companies controlled by him. The borrowers were buying the properties for investment. Many of the properties were used for short-term rental accommodation.

[6] In some cases, the borrowers bought the property from a third party. In some other cases, Mr Mayer or some company or person associated with Mr Mayer would first buy the property from a third party and then arrange a resale of the property to the borrower at a price significantly above that payable to the third party. The two sales would settle at the same time. Mr Mayer would support the loan applications with false and misleading information. Examples given were of purported leases which apparently would generate sufficient income to meet loan commitments but which allegedly did not exist. Trustees Executors Ltd says that the data was presented to show that the borrowing would meet its requirements for a loan to value ratio, whereas it did not in fact. In other cases the borrower was said to have transferred an asset by way of payment of a deposit for a purchase, but no such transfer in fact took place.

[7] Trustees Executors Ltd says that it entered into loan agreements relying on the information Mr Mayer had provided.

[8] It claims that many of the borrowers were simply “fronts” for Mr Mayer. It also alleges that in some cases, funds advanced by Trustees Executors Ltd for the purchase of properties were diverted in part to Mr Mayer personally. It also complains that rental income from these properties was sometimes not used to repay loans.

[9] In *Trustees Executors Ltd v Turnbull* HC Auckland, CIV-2008-404-1511, 1 May 2009, Trustees Executors Ltd brought a summary judgment application against an elderly couple, Mr and Mrs Turnbull, who had borrowed \$4 million for the purchase of a residential investment property at 74-76 Upper Queen Street, Auckland. Mr Mayer is said to have had a part in the transaction. The Turnbolls defended on the basis of unconscionable bargain. It is clear from the decision that Trustees Executors Ltd regarded its loan to the Turnbolls as valid and enforceable.

[10] In this case, Trustees Executors Ltd used the Turnbull transaction to illustrate how it claimed Mr Mayer worked his frauds. \$1,200,000 of a total purchase price of \$5,500,000 was said to have been contributed by the transfer of a property at 365 West Coast Road, Glen Eden, when no such transfer occurred. Part of the funds advanced was diverted, allegedly to Mr Mayer personally.

[11] Another loan transaction used to illustrate alleged fraud was an advance of \$4,000,000 to Champion Apartments Ltd with security over a property at 28-34 Robert Street, Ellerslie in February 2007. Champion Apartments Ltd was incorporated on 7 February 2007. It is a 1,000 share company. The sole shareholder is Sho Chu. The directors are Sho Chu and Malcolm Duncan Mayer. Trustees Executors Ltd says that Sho Chu is the de facto partner of Malcolm Mayer. Champion bought the premises for \$7,700,000 of which \$2,250,000 was allegedly contributed by the transfer of two units at 126 Vincent Street in the city. The transfers did not occur.

43-45 Mt Eden Road

[12] Champion Apartments Ltd was the registered proprietor of the Mt Eden property before Eden Holdings (2010) Ltd. It became owner on 15 January 2008. Trustees Executors Ltd does not say that it knowingly financed Champion's purchase of 43-45 Mt Eden Road.

[13] On 2 December 2009, Champion Apartments Ltd entered into a written agreement to sell the property at 43-45 Mt Eden Road to LJK Investments Ltd or nominee. Lance Gilbertson of Wanganui is the sole director and sole shareholder of LJK Investments Ltd. It is a 100 share company incorporated in January 2008.

[14] Mr Gilbertson says that LJK Investments Ltd had provided services to Mr Mayer and his companies by way of restructuring companies, refinancing and redeeming mortgages, selling properties to avoid mortgagee sales. In an invoice dated 1 December 2009, LJK Investments Ltd charged Champion Apartments Ltd \$350,000 plus GST for consultancy services for the period October 2009 to April 2010.

[15] The purchase price for the sale by Champion Apartments Ltd to LJK Investments Ltd was \$700,000. Under clause 15 of the agreement for sale and purchase, the \$350,000 debt was set off against the purchase price. The balance was met by a payment of \$341,757.52. Of this, \$170,000 was funded by Malkev Properties Ltd by way of a term loan secured by second mortgage. Malkev Properties Ltd had been a former owner of the property and had a mortgage registered against the title securing a loan of \$300,000 plus interest. On settlement of the sale of Mt Eden Road, Malkev readvanced some of the funds it received from Champion Apartments Ltd.

[16] The directors and shareholders of Malkev Properties Ltd are Kevin and Robyn Reed. Mr Mayer used to be a shareholder and director of the company, but Mr Reed says that that came to an end in 2001.

[17] By a deed of assignment dated 4 December 2009, LJK Investments Ltd assigned its rights as purchaser under the agreement of 2 December 2009 to Eden Holdings (2010) Ltd. The deed shows no consideration given for the assignment.

[18] Eden Holdings (2010) Ltd was incorporated on 3 December 2009. Eden Holdings (2010) Ltd has 1000 shares. Lance Gilbertson is the director and sole shareholder of that company.

[19] On 24 December 2009, the sale by Champion Apartments Ltd to Eden Holdings (2010) Ltd as assignee of LJK Investments Ltd settled. There are mortgages registered to a solicitor's nominee company and Malkev Properties Ltd. The applicant's caveat was registered on 4 February 2010.

[20] Eden Holdings (2010) Ltd says that since it took title it has carried out extensive renovations and repairs on the property.

Evidence objections

[21] Eden Holdings 2010 Ltd objected to the evidence adduced to show the Mayer frauds alleged by Trustees Executors Ltd. The defendant's initial submissions were

that large parts of the evidence were hearsay and not admissible under s 17 of the Evidence Act and there were also extensive parts of the evidence that were no more than opinion and inadmissible under s 23 of the Evidence Act. While Eden Holdings 2010 Ltd did not resile from its primary stance that the Court should not accept any hearsay evidence and any opinion evidence from Trustees Executors Ltd, it accepted that the Court has a discretion to admit such evidence under r 7.30 of the High Court Rules.

[22] An application to sustain a caveat is an originating application under Part 19 of the High Court Rules: r 19.2(1). Under r 19.10(1), certain rules relating to interlocutory applications also apply to proceedings commenced by originating application. That includes rr 7.29 and 7.30:

- 7.29 Rules 9.75 to 9.88 apply, with all necessary modifications, to affidavits filed for interlocutory applications.
- 7.30 (1) A judge may accept statements of belief in an affidavit in which the grounds for the belief are given if –
 - (a) the interests of no other party can be affected by the application; or
 - (b) the application concerns a routine matter; or
 - (c) it is in the interests of justice.
- (2) Subclause (1) overrides r 7.29.

[23] Evidence in an application to sustain a caveat is given by affidavit. Rule 9.76 of the High Court Rules requires that evidence must be confined to matters that would be admissible if given in evidence at trial by the deponent. The Evidence Act 2008 governs the admission of evidence given at trial, except to the extent that the common law may be had regard to under s 12 or applied under s 12A.

[24] Accordingly, if evidence is admissible under the Evidence Act 2006 or under the common law saved by the Evidence Act, it is also admissible in affidavits in applications to sustain a caveat. Further, the Court may accept statements of belief in the circumstances allowed under r 7.30. Rule 7.30 and its predecessors have been interpreted to allow hearsay evidence but the practice is to require a proper

foundation for any grounds of belief. See for example *Bell v John Holland Properties Ltd* (1990) 3 PRNZ 536 (HC).

[25] Eden Holdings objected to evidence that Mr Mayer had made statements admitting that he had acted fraudulently in loan transactions. The statements made by Mr Mayer are recorded in the affidavit of Mr Nottingham in paragraphs 7 and 9-11, and newspaper reports of an interview with Mr Mayer by Tony Wall of the *Sunday Star Times* attached as exhibits to the affidavit of Mr Russell of Trustees Executors Ltd.

[26] Mr Mayer himself did not give evidence for Trustees Executors Ltd. The statements of Mr Mayer are hearsay statements within s 17 of the Evidence Act. They may be admitted if the requirements of ss 18 or 20 of the Evidence Act are satisfied. Section 18 says:

18 General admissibility of hearsay

- (1) A hearsay statement is admissible in any proceeding if—
 - (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
 - (b) either—
 - (i) the maker of the statement is unavailable as a witness; or
 - (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.
- (2) This section is subject to sections 20 and 22.

[27] The statements in the *Sunday Star Times* newspaper articles are against Mr Mayer's interest. The general presumption that no one would declare anything against himself unless it is true can be applied. A mainstream newspaper, such as the *Sunday Star Times*, would not publish an article under the heading "*The \$50 million swindler: I confess*", without taking proper care to ensure that the records of the interview with Mr Mayer which it published, were accurate records. I find that the circumstances relating to the statements made by Mr Mayer in his interview with the journalist are reliable under s 18(1)(a).

[28] Under s 18(1)(b)(ii), I consider that undue expense or delay would be caused if Mr Mayer, the person making the statements, were required to be a witness. Mr Mayer has shown himself to be very unco-operative with Trustees Executors Ltd and other people who have advanced him money.

[29] The decisions, *BNZ v Mayer* HC Auckland CIV-2009-404-7828, 3 December 2009, *Trustees Executors Ltd v Mayer* HC Auckland CIV-2009-404-7854, 14 December 2009, *re Champion Apartments Ltd* HC Wellington CIV-2009-485-2630, 5 February 2010, and *Trustees Executors Ltd v Mayer* HC Auckland CIV-2010-404-706, 11 March 2010, show that Mr Mayer is a difficult person to serve and that he continues to obstruct his mortgagees by lodging spurious caveats against mortgaged properties. It would not be reasonable to require Trustees Executors Ltd to call Mr Mayer as a witness. He would not co-operate in the making of an affidavit. A subpoena would need to be issued to secure his attendance at Court. Mr Mayer's whereabouts are unknown, but he is likely to be in or near Auckland. The present application was lodged in Wanganui and has been heard in Wellington. Service of a subpoena on Mr Mayer is likely to be by way of substituted service. There can be no assurance that Mr Mayer would comply with a subpoena if the Trustees Executors Ltd were able to serve him successfully. There would be undue expense and delay in requiring Mr Mayer to attend Court to give evidence.

[30] Accordingly, Trustees Executors Ltd has made out grounds to admit the newspaper reports of the interview with Mr Mayer under s 18 of the Evidence Act.

[31] The reports are also admissible under s 20 of the Evidence Act:

20 Admissibility in civil proceedings of hearsay statements in documents related to applications, discovery, or interrogatories

- (1) In a civil proceeding, a hearsay statement in an affidavit made to support or oppose an application is admissible for the purposes of that application if, and to the extent that, the applicable rules of court require or permit a statement of that kind to be made in the affidavit.
- (2) In a civil proceeding, a hearsay statement in a document by which documents are discovered or interrogatories are answered is admissible in that proceeding if, and to the extent that, the applicable rules of court require or permit the making of a statement of that kind.

[32] The applicable rule under s 20(2) is r 7.30 of the High Court Rules. In the context of an application to sustain a caveat where the caveator has limited time in which to file evidence and the caveator has a low threshold only to establish that there is an arguable case for an interest under s 137, the interests of justice include allowing for the efficient despatch of proceedings. An over-rigorous insistence on compliance with the rule against hearsay would stand in the way of the efficient and just determination of a caveat proceeding. I admit evidence as to the interview with Mr Mayer under r 7.30 as giving grounds for Trustees Executors Ltd's claim that Mr Mayer acted fraudulently.

[33] Mr Nottingham's affidavit reports statements made by Mr Mayer. That is also hearsay evidence, but is admissible because the grounds under s 18 are made out. Again the presumption that Mr Mayer would not tell other people that he had been fraudulent unless it is true can be applied. Mr Nottingham appears to have no reason or motive to misrepresent what Mr Mayer told him. The circumstances relating to Mr Nottingham's accounts of what Mr Mayer told him give reasonable assurance that what Mr Mayer said is reliable. Again undue expense and delay would be caused if Mr Mayer were required to be a witness.

[34] Eden Holdings 2010 Ltd objected to evidence in the affidavits of Mr Russell of Trustees Executors Ltd describing in outline how Mr Mayer went about his transactions with Trustees Executors Ltd. Mr Russell deposes that Trustees Executors Ltd holds an extensive record of the loan transactions. For this caveat application, it is reasonable for him to present in summary form the information that Trustees Executors Ltd holds about Mr Mayer.

[35] Trustees Executors Ltd has established a reasonably arguable case that:

- a) It made a significant number of substantial loans to Mr Mayer and companies, people and entities associated with Mr Mayer;
- b) Mr Mayer was instrumental in arranging those loans;

- c) In many cases, false information was presented to Trustees Executors Ltd with loan applications;
- d) Mr Mayer was involved in presenting that false information to Trustees Executors Ltd;
- e) Mr Mayer knew that the information was false;
- f) The false information was relevant to Trustees Executors Ltd's decisions to make the loans;
- g) Trustees Executors Ltd made the loans believing the false information to be true.

[36] There have been defaults under loans, but there is no clear evidence as to the amount or extent of Trustees Executors Ltd's losses.

[37] There is no evidence linking Mr Mayer's deceit with the property at 43-45 Mt Eden Road. That is, there is no evidence that any funds alleged to have been fraudulently obtained from Trustees Executors Ltd found their way directly or indirectly into the Mt Eden Road property.

[38] There is some evidence that Mr Mayer is trying to put assets out of reach of his creditors. The sale of the Mt Eden Road property may be such a transaction. Mr Nottingham's affidavit describes an offer of \$800,000 for the property made by a third party. Mr Nottingham says that Mr Mayer turned the offer down. On the other hand the sale to Mr Gilbertson's companies has irregular features:

- a) The nominal price is less than the offer from an outsider.
- b) The payment of \$350,000 for consultancy services by LJK Investments Ltd is extremely questionable. The price is high; evidence that any work of any real value was provided is scant; the credit was given when the consultancy had not been completed. The consultancy services were said to be generally for Mr Mayer and his

companies. There is no explanation why Champion Apartments Ltd should be charged for this work. There is no evidence of any work done for Champion Apartments Ltd.

- c) The true value of any consideration passing under the transaction appears considerably less than the nominal value.
- d) The assignment by LJ Holdings Ltd to Eden Holdings (2010) Ltd is not supported by any stated consideration.
- e) The sale was not an arm's length transaction. The same lawyer acted for both parties.

[39] Against that, there is evidence that since it became owner of the Mt Eden Road property, Eden Holdings (2010) has spent funds on renovating the premises.

Caveatable Interest

[40] In claiming a caveatable interest, the Trustees Executors Ltd is claiming an interest that comes within s 137(1) of the Land Transfer Act:

(1) Any person may lodge with the Registrar a caveat in the prescribed form against dealings in any land or estate or interest under this Act if the person—

(a) claims to be entitled to, or to be beneficially interested in, the land or estate or interest by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied, or otherwise; or

(b) is transferring the land or estate of interest to any other person to be held in trust.

[41] For Trustees Executors Ltd to bring itself within s 137, it must show something that is a recognisable property interest, whether arising beneficially under a trust or otherwise. In *Guardian Trust and Executors Co of New Zealand Ltd v Hall* [1938] NZLR 1020 Callan J said at 1025:

A caveat is the creature of statute and may be lodged only by a person upon whom a right to lodge it has been conferred by statute. It is not enough to

show that the lodging and continued existence of the caveat would be in some way advantageous to the caveator.

[42] Trustees Executors Ltd accepts the distinction between an interest in land, which the court recognises as already in existence, and an interest in land that arises only by court order. The first is caveatable, the second is not. It says that it is claiming an institutional constructive trust, not a remedial constructive trust, and refers to the distinction made in the Court of Appeal's decision in *Fortex Group Ltd (In Receivership) v McIntosh* [1998] 3 NZLR 171 at 172 per Tipping J:

An institutional constructive trust is one which arises by operation of the principles of equity and whose existence the Court simply recognises in a declaratory way. A remedial constructive trust is one which is imposed by the Court as a remedy in circumstances where, before the order of the court, no trust of any kind existed.

The difference between the two types of constructive trust, institutional and remedial, is that an institutional constructive trust arises upon the happening of the events which bring it into being. Its existence is not dependent on any Order of the Court. Such order simply recognises it came into being at the earlier time and provides for its implementation in whatever way is appropriate. A remedial constructive trust depends for its very existence on the Order of the Court; such order being creative, rather than simply confirmatory. This description should not be regarded as definitive or as precluding further developments in this area of the law when greater refinement may be necessary.

[43] The distinction between interests which the court recognises and interests which the court creates is a familiar one for caveats. It is well established that a testamentary promises claim and a claim for provision from an estate under the Family Protection Act do not give caveatable interests in land. A claim to a remedial constructive trust failed in *Metalplas Engineering Pty Ltd v Ellis* HC Auckland M293-IM/02, 21 August 2002.

[44] Similarly, in *re Pile's Caveats* [1981] Qd R 81, a case where fraud was alleged, Dunn J said at 83:

It is established that, in order to maintain a caveat, a caveator must prove facts which indicate *prima facie* that he has an estate or interest in the land in respect of which his caveat is lodged... However, the existence of a *prima facie* equity to relief involving land is not necessarily the same as the *prima facie* existence of an interest in the land.

[45] The case for Trustees Executors Ltd was that if it showed an arguable case that it was a victim of Mr Mayer's frauds, that Mr Mayer or companies or people associated with him derived benefits from its lending, and that there were other assets linked with Mr Mayer which were not subject to any security in its favour, then it could be inferred that benefits from Mr Mayer's frauds could be traced into those properties and it had a right to follow those benefits into those assets. It therefore claimed a caveatable interest on the basis of that tracing.

[46] A tracing claim is a proprietary claim available where the claimant has some form of proprietary right. The claim may be based on retention of legal title, as in *Taylor v Plumer* (1815) 3 M & S 562 and *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, or on an equitable interest. *Foskett v McKeown* [2001] 1 AC 102, relied on by Trustees Executors Ltd, is an example of the latter. In equity a fiduciary relationship may give rise to a finding that assets are held beneficially for the claimant so as to allow tracing. Thus, the agent who receives a bribe holds it for his principal. See *Attorney-General for Hong Kong v Reid* [1994] 1 NZLR 1 at 4, upholding a caveat:

The false fiduciary who received the bribe in breach of duty must pay and account for the bribe to the person to whom that duty was owed... As soon as the bribe was received it should have been paid or transferred instantly to the person who suffered from the breach of duty. Equity considers as done that which ought to have been done. As soon as the bribe was received, whether in cash or in kind, the false fiduciary held the bribe on a constructive trust for the person injured.

[47] But when property is transferred under a contract, the matter is different. Under an agreement for sale and purchase, the transferor loses any interest in the property sold. After transfer the vendor cannot claim a property interest in the asset disposed of. If the law says that the contract is void, no interest passes. But if the contract is voidable, the transferor loses his interest in the property. Whether the transferor can regain an interest in the property will turn on whether and how the law allows the transaction to be undone.

[48] An agreement to lend money is similar. The lender transfers money to the borrower on terms that the borrower is to pay back an equivalent sum. The relationship is one of debtor and creditor. The House of Lords decision in *Foley v*

Hill (1848) 2 HLC 28, 9 ER 1002 that a banker receiving money on deposit from a customer is not a trustee of the customer, but is bound to pay a similar sum on demand, is an example of this. In *Henry v Hammond* [1913] 2 KB 515, Channell J said at 521:

It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor.

[49] Trustees Executors Ltd advanced funds to Mr Mayer, his companies and associates under loan agreements. The agreement in evidence is quite clear that there is a lender-borrower relationship. The general terms of the agreement say, among other things:

1. We agree to lend and you agree to borrow the amount of the loan on the terms contained in this agreement and any security.

[50] There are no terms in the agreement under which the borrower was to hold separately the money lent for or on trust for Trustees Executors Ltd. It had security for repayment of its loans in mortgages over land, but it did not have any beneficial interest in the money it lent in any of the Mayer transactions. To the extent that mortgages were not adequate, Trustees Executors Ltd is an unsecured lender.

[51] The remedies available to Trustees Executors Ltd for the fraud it complains of fall into three general classes:

- a) Claims for monetary relief only;
- b) Claims for the court to create some property interest in its favour; and
- c) Claims under which property reverts in it by operation of law.

Claims for monetary relief only

[52] Trustees Executors Ltd's potential monetary remedies for the fraud include claims for payment of instalments under loan agreements, damages under s 6 of the Contractual Remedies Act against a borrower for misrepresentation, damages for breach of contract, orders for payment under s 9(2)(b) of the Contractual Remedies Act, damages for deceit or negligent misrepresentation against a person not a party to the loan agreement, and orders for payment under s 43(2)(d) of the Fair Trading Act. None of these gives Trustees Executors Ltd any property interest in any asset of the borrower or the person against whom the claim is made.

[53] Cancellation of a loan contract may give a claim in damages, s 8(4) of the Contractual Remedies Act, but it does not revest property in the vendor. At common law, termination of a contract for breach does not divest rights that have been unconditionally acquired: *Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd* [1972] 1 QB 318 (CA) at 324 and *Hurst v Bryk* [1999] Ch 1 (CA) 14 at 26, [2002] 2 AC 185 at 199. The position is the same under s 8(3) of the Contractual Remedies Act:

Subject to this Act, when a contract is cancelled the following provisions shall apply: ...

- (b) So far as the contract has been performed at the time of cancellation, no party shall, by reason only of the cancellation, *be divested of any property transferred or money paid pursuant to the contract.*

[54] Section 8(3) also applies to cancellation for misrepresentation, including fraudulent misrepresentation. I also note that there is no evidence that Trustees Executors Ltd cancelled any of the loan agreements for misrepresentation or for breach.

[55] In *Halifax Building Society v Thomas* [1996] Ch 217 (CA) at 227, a mortgage fraud case, the English Court of Appeal rejected a waiver of tort argument that the mortgagor's deceit allowed the mortgagee to claim an interest in the proceeds of sale of the property. Traditionally waiver of tort has given a monetary remedy only. That is because of its origins in the form of action, *indebitatus assumpsit*. See Lord

Atkin's discussion of its history in *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 26-29. While Lord Atkin got rid of the fiction that the restitutionary claim was dependent on an implied promise by the wrongdoer, he did not suggest that it gave a proprietary remedy. In *Goff & Jones The Law of Restitution* 7th ed. 2007 at 36-018 there is a discussion whether waiver of tort can give a proprietary remedy. The learned authors conclude:

Any proprietary claim to recover the proceeds of a tortious act, even if the tortfeasor acted cynically, will therefore apparently fail *unless* the proceeds represent the traceable proceeds of the plaintiff's undisputed title to, or possession of, property.

[56] Under a loan agreement where the lender has transferred title in money to the borrower, the lender does not have title to give a proprietary claim in waiver of tort. Trustees Executors Ltd cannot rely on waiver of tort.

[57] Potential claims for monetary relief do not give Trustees Executors Ltd any property interest in any of the assets of Mr Mayer or entities or people involved in any deception by him. They do not give it any caveatable interest.

Claims for the court to create some property interest in favour of Trustees Executors Ltd

[58] Under s 9(2)(a) of the Contractual Remedies Act, after cancellation of a contract a court may vest in another party to the contract property that was the subject of the contract. Under s 43(2)(c) of the Fair Trading Act a court can order the return of property. Whether these powers could be used in the case of a loan agreement is doubtful. These statutes have accompanying provisions for the payment of money (see [52] above) and those provisions are the appropriate remedy when the funds lent can no longer be identified. Even so, any remedy which involves the court creating an interest in the assets of the borrower is like a remedial constructive trust. It does not give a caveatable interest.

Revesting of Property

[59] Revesting of property by operation of law occurs on rescission of a contract. A right to rescind a contract is not an interest in property, but is said to be a “mere equity”: see *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265 at 277, 290 and *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 915, 916:

[A] chose in action is property, something capable of being turned into money ... a claim to rescission is a right of action but can in no way be described as a chose in action or part of a chose in action.

[60] A contract which may be rescinded is voidable, not void. Until there is rescission, any transfer of property under the contract is effective.

[61] The aim of rescission is to restore parties to the position they were in before they entered into the contract. Where property has been transferred under the contract, that property is revested in the original owner.

[62] When an innocent party disaffirms a contract at common law, property transferred under the contract is revested retrospectively. When a party applies to the Court for equitable relief and the Court is dealing with a rescission recognised by the common law, the Court makes orders which give effect to the position at common law. In New Zealand, in cases where there may not be a right of rescission at common law but equity allows rescission, the Court of Appeal has held that the rescission is effective from the date it is communicated to the other side. See *O'Connor v Hart* [1983] NZLR 280 (CA) at 295:

Where parties are of full capacity, he who seeks to avoid the contract must elect to do so and communicate his election to the other party. That is so because rescission is the act of the party seeking to set the contract aside; until there is an election to that end, the contract remains on foot. It follows that rescission is effective from the date it is communicated to the other side and not from the date of any judgment in subsequent litigation which may in some cases be brought to obtain the assistance of the Court ... Where a party lacks capacity and cannot therefore make a decision to rescind, the Court takes on itself the decision to set the contract aside.

[63] In these cases, property is revested from the moment that notice is given that the transaction is disaffirmed.

[64] In *Shalson v Russo* [2005] Ch 281 at [122] Rimer J explained how rescission gives rise to a right to follow and trace, following reversion:

Rescission is an act of the parties which, when validly effected, entitles the party rescinding to be put in a position he would have been in if no contract had been entered into in the first place. It involves a giving and taking back on both sides. If it is necessary to have recourse to an action in order to implement the decision, the court will make such orders as are necessary to put both contracting parties into the position they were in before the contract was made. There is, however, also a line of authority supporting the proposition that, upon rescission of a contract for fraudulent misrepresentation, the beneficial title which passed to the representor under the contract reverts in the representee. The representee then enjoys a sufficient proprietary title to enable him to trace, follow and recover what, by virtue of such reversion, can be regarded as having always been in equity his own property. This may be an essential means of achieving the proper restoration of the original position if the representor has in the meantime parted with the property and is ostensibly a man of straw unable to satisfy the court's orders for restoration of the original position.

[65] That was said in a case of fraudulent misrepresentation. It does not apply directly in New Zealand, because rescission is no longer available as a remedy for misrepresentation inducing a contract: see s 7 and 8 of the Contractual Remedies Act. But the principles may apply where contracts can be rescinded on other grounds.

[66] Tipping J recognised the right to trace in *Estate Realities v Wignall* [1992] 2 NZLR 615 (HC) at 631:

A person in a fiduciary relationship with another who acquires property from that other in breach of fiduciary duty does so under a contract which is voidable, not void. The fiduciary, by dint of entering into the voidable contract, becomes a potentially constructive trustee of the subject matter for the other party. If the contract is set aside, the Court may, by means of the concept of constructive trust, order the fiduciary to return the property to the other party, subject to refund of such benefits as the other party may have received under the contract and any other appropriate adjustments. Such an exercise is similar to rescission with accompanying restitution in integrum. If the subject matter of the voidable contract no longer exists in its original form or if it is no longer in the hands of the original fiduciary and cannot be traced, the concept of constructive trust may extend to such property as the fiduciary now holds. By this means, the constructive trust operates so as to require a fiduciary to account to the other party for the gains which he has made from the transaction. The contract is set aside but subject to fair and reasonable accounting between the parties.

[67] In *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, Brennan J applied such an approach to contracts of loan at 388:

The principles governing the setting aside of contracts of purchase or sale are applicable to contracts of loan. Since equity intervenes to prevent a fiduciary from retaining property acquired under a contract entered into in breach of his fiduciary obligation, equity will intervene to prevent him from retaining property acquired in like circumstances. Of course, the occasions for invoking the assistance of equity to recover money lent may be infrequent, and the remedy of tracing the money lent into the hands other than the borrower's – a remedy which the common law does not afford – may frequently be frustrated by dissipation of the money or its payment to another creditor: cf *In Re Diplock, Diplock v Wintle* [1948] 1 Ch 465 at 521. Nevertheless, a person lending money to a fiduciary who obtains the loan without discharging his fiduciary duty is entitled in equity to avoid the contract of loan and to recover, by tracing if need be, the money lent.

[68] Brennan J made it clear that these rights arise only on rescission. At 389 he said:

Similarly, until the lender elects to avoid the contract of loan, he cannot assert an equitable title to the money lent. He cannot at once leave the contract on foot and deny the borrowers the title to the money which the contract confers. When, as in the present case, a borrower acquires title to money paid to him under and pursuant to a contract of loan, the borrower cannot be made a trustee of the money without his consent so long as the contract stands. There is no analogy between the present case and one in which a constructive trust is imposed on money or other property which is acquired by a fiduciary in breach of his duty but not pursuant to a voidable contract. In such a case there is no question of avoiding the contract before the constructive trust is imposed.

[69] The proprietary title allowing tracing and following recognised by Rimer J in *Shalson v Russo* and the constructive trust recognised by Tipping J in *Estate Realities v Wignall* are caveatable interests under s 137(1) of the Land Transfer Act. The interest arises upon rescission. The court recognises and declares the interest, but does not create it.

[70] For Trustees Executors Ltd to be able to follow this approach, it needs to show the following:

- a) It has grounds to rescind its loan agreements for some ground recognised at law or in equity;

- b) It did in fact rescind; and
- c) The funds advanced under the loans can be traced through to the Mt Eden Road property.

[71] Trustees Executors Ltd fails on all points. Fraudulent misrepresentation is no longer a ground for rescission because of the Contractual Remedies Act s 7(1):

Except as otherwise expressly provided in this Act, this section shall have effect in place of the rules of the common law and of equity governing the circumstances in which a party to a contract may rescind it, or treat it as discharged, for misrepresentation or repudiation or breach.

[72] The evidence does not show any other ground for rescission of any of the loan agreements. In particular, the evidence does not show any basis for believing that Mr Mayer was a fiduciary of Trustees Executors Ltd so as to give any foundation for claiming that he breached a fiduciary duty. Trustees Executors Ltd says that Mr Mayer was deceitful, but it does not say that he was disloyal. He was a mortgage broker. He was also a director of companies that borrowed. He was also an associate of other borrowers. But there is nothing in the evidence to suggest that he was an agent of Trustees Executors Ltd or in any other sense owed them a fiduciary duty.

[73] Any tracing right would only arise if the loan contracts had been rescinded. There is no evidence that Trustees Executors Ltd did rescind any of the loan agreements. From the way it presented its case, Trustees Executors Ltd regarded the matter as irrelevant. Most mortgagees would not want to rescind loan agreements; they would lose any security for their loans.

[74] As noted above at [37], there is no evidence linking the funds lent with Champion Apartments Ltd's ownership of the property in Mt Eden Road. In *New Zealand Limousin Cattle Breeders Society Inc v Robertson* [1984] 1 NZLR 41 (CA) a claim to a caveatable interest based on alleged embezzlement failed because the caveator had not shown an arguable case that stolen funds could be traced into the caveated property. The absence of any linking evidence in this case gives the same result.

[75] The authority Trustees Executors Ltd relies on to support its claim for a caveatable interest arising from fraud is the dictum of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 716:

Although it is difficult to find clear authority for the proposition, when property is obtained by fraud, equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity.

[76] In England doubts as to its correctness have been expressed. In *Halifax Building Society v Thomas* [1996] Ch 217, decided before the *Westdeutsche Landesbank* case, the Court of Appeal rejected a claim that a defrauded mortgagee who had affirmed the loan and realised its security could claim a constructive trust over the surplus after sale. At 228 Peter Gibson LJ considered one of the authorities Lord Browne-Wilkinson cited, a dictum of Lord Westbury in *McCormick v Grogan* (1869) LR 4 HL 82 at 97, and held that it had to be read in context and could not be elevated into a universal principle that wherever there is personal fraud the fraudster will become a trustee for the party injured by the fraud.

[77] In *Box v Barclays Bank* (1998) The Times 30 April 1998, Ferris J reviewed the cases cited by Lord Browne-Wilkinson and said:

The observation of Lord Browne-Wilkinson in the *Westdeutsche* case only assists the plaintiffs if it is to be treated as a general statement of the law applicable to all cases of fraud. In my view it would be wrong so to treat it. It was a general statement of certain underlying principles instanced by examples two of which concerned transactions which were void, not voidable, and the third of which comes from the field of secret trusts where "fraud" is referred to in a special sense. I do not think that Lord Browne-Wilkinson can be taken to have been laying down a principle applicable to all cases of fraud when he did not deal with the reasoning in the other cases which I have mentioned.

[78] Ferris J rejected constructive trust claims by people who had placed on money on deposit with a company and alleged fraud.

[79] In *Shalson v Russo* [2005] Ch 281 at [109]–[118] Rimer J considered Lord Browne-Wilkinson's dictum and the cases he cited. At [111] he said:

As to Lord Browne-Wilkinson's more general proposition in the second paragraph that property obtained by fraud is automatically held by the

recipient on a constructive trust for the person defrauded, I respectfully regard the authorities he cites as providing less than full support for it. At any rate, they do not in my view support the proposition that property transferred under a voidable contract induced by fraud will immediately (and prior to any rescission) be held on trust for the transferor.

[80] In my judgment, Lord Browne-Wilkinson's dictum cannot be applied in New Zealand to contracts induced by fraud. For contracts where rescission is still available for fraud, sales of goods (s 15(d) Contractual Remedies Act), the Privy Council has held that purchasers do not obtain a proprietary right. In *re Goldcorp Exchange* [1994] 3 NZLR 385 (PC) at 403, Lord Mustill said:

Whilst it is convenient to speak of the customers "getting their money back" this expression is misleading. Upon payment by the customers the purchase moneys became, and rescission or no rescission, remained, the unencumbered property of the Company. What the customers would recover on rescission would not be "their" money, but an equivalent sum. Leaving aside for the moment the creation by the Court of a new remedial proprietary right superior to those of all the vendor's other creditors, exercisable against the whole of the vendor's assets. It is not surprising that no authority could be cited for such an extreme proposition.

[81] For other contracts the Contractual Remedies Act applies. When a contract has been induced by misrepresentation, cancellation or not, unconditionally acquired rights are not divested: s 8(3). There is therefore no place for an institutional constructive trust.

[82] Trustees Executors Ltd relied on *Zhong v Wang* (2006) 7 NZCPR 488 (CA) as a basis for claiming a constructive trust when funds had been advanced by way of loan. In that case, the Court of Appeal found that there was an arguable case for a fiduciary relationship between lender and borrower. The borrower was characterised as an agent of the principal. The fiduciary relationship was found to support the caveatable interest on the basis of a constructive trust. The case is not authority for a constructive trust in cases of fraudulent misrepresentation. As noted above, there is no relevant fiduciary relationship in this case.

[83] Trustees Executors Ltd also cited *Sun Developments Ltd (In Liquidation) v Finlayson* HC Wellington CIV-2007-485-032, 26 February 2007, *Fletcher Steel v Nahal Contractors Ltd* HC Auckland CIV-2006-404-498, *Nijkrake v Marsman* HC New Plymouth CIV-2007-443-3862 26 September 2007, *TE Group of Companies*

Ltd (In Liquidation) v Lin HC Auckland CIV-2003-404-677, 10 March 2004. The first and third cases are constructive trusts arising from misappropriation. The second is about payments under mistake induced by fraud. Those three cases do not address the transfer of property under a contract and the absence in New Zealand law of any reversion upon rescission for fraud.

[84] In *T E Group of Companies Ltd (In Liquidation) v Lin*, a vendor lodged a caveat against the title of the purchaser following a transfer, claiming fraud on the part of the purchaser. Associate Judge Sargisson considered the matter under s 28 of the Property Law Act 1952 and the fraud exception to indefeasibility under s 62 of the Land Transfer Act 1952. She upheld the caveat. However, while her judgment presupposes that the vendor was entitled to a reversion of property upon discovery of the alleged fraud, her judgment does not discuss the absence in New Zealand law of rescission for fraud and the alternative position now prevailing under the Contractual Remedies Act 1979. These issues were not raised in argument before her.

[85] Trustees Executors Ltd does not have a relevant property interest that will support a caveat. Its claims of fraud do not give it an institutional constructive trust over any assets of Malcolm Mayer or any entities or people associated with him.

[86] As the application only concerns caveat 8407148.1, I am not required to consider whether Trustees Executors Ltd has other remedies against Mr Mayer, Champion Apartments Ltd or Eden Holdings (2010) Ltd.

[87] At the hearing Trustees Executors Ltd indicated its intention to appeal if I did not uphold the caveat. It is entitled to some interim protection while it considers and exercises any appeal rights. Accordingly the caveat will not lapse on this decision being delivered, but after 3 weeks. That will give time for any appeal to be filed. Any further orders to sustain the caveat pending any appeal will have to be the subject of an application under r 12(3) of the Court of Appeal (Civil) Rules 2005.

[88] I make these orders:

- a) Caveat 8407148.1 will lapse on 3 September 2010.

Trustees Executors Ltd will pay Eden Holdings (2010) Ltd costs on this application on a 2B basis, plus disbursements approved by the Registrar.

R M Bell
Associate Judge