SUPREME COURT OF QUEENSLAND

CITATION:	*Canehire Pty Ltd & Anor v Themis Holdings Pty Ltd* [2014] QCA 296
PARTIES:	**CANEHIRE PTY LTD** ACN 010 920 519 (first appellant) **PHILIP ROBERT HAM** (second appellant) **v** **THEMIS HOLDINGS PTY LTD AS TRUSTEE FOR THE HOLZAPFEL PROPERTY TRUST** ACN 141 216 944 (respondent)
FILE NO/S:	Appeal No 3466 of 2014 SC No 1993 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 November 2014
DELIVERED AT:	Brisbane
HEARING DATE:	8 October 2014
JUDGES:	Muir and Fraser JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal be dismissed with costs.**
CATCHWORDS:	EQUITY – TRUSTS AND TRUSTEES – IMPLIED TRUSTS – CONSTRUCTIVE TRUSTS – GENERALLY – where the second appellant had acted as accountant for Mr Holzapfel and his various entities – where on the second appellant's advice, the Holzapfel Property Trust (HPT) was established – where the HPT was a discretionary trust of which Mr Holzapfel, members of his family and companies controlled by them were beneficiaries – where the first appellant, a shelf company of the second appellant who was its sole director and shareholder, was appointed trustee of the HPT – where the first appellant, as trustee of the HPT, acquired the lessee's interest in a Crown lease over real property at Fison Avenue on which one of the companies controlled by Mr Holzapfel conducted its business – where Mr Holzapfel was interested in acquiring the freehold title to

the land – where the freehold of the property was acquired by the first appellant and sold for $4,892,030 – where no part of the proceeds was paid to the HPT or any of its beneficiaries – whether the freehold interest vested in the first appellant in its capacity as trustee of the HPT immediately upon the deed of grant taking effect – whether the first appellant held the freehold interest on a constructive trust for the HPT

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – WHAT IS – GENERALLY – where the appellants asserted that counsel for the respondent did not put to the second appellant that his decision not to distribute the proceeds of the sale of the property to the beneficiaries of the HPT was made in "personal conscious bad faith" – where the appellants argued that this resulted in a failure to adhere to the rule in *Browne v Dunn* – whether unfairness to the second appellant resulted from his cross-examination

Land Act 1994 (Qld), s 165A, s 165A(a), s 166, s 167
Uniform Civil Procedure Rules 1999 (Qld), r 165(2)

Bevan v Webb [1905] 1 Ch 620, cited
Boardman v Phipps [1967] 2 AC 46; [1966] UKHL 2, considered
Brenner v Rose [1973] 1 WLR 443, cited
Browne v Dunn (1894) 6 R 67, considered
Calverley v Green (1984) 155 CLR 242; [1984] HCA 81, applied
Chan v Zacharia (1984) 154 CLR 178; [1984] HCA 36, considered
Charles Marshall Pty Ltd v Grimsley (1956) 95 CLR 353; [1956] HCA 28, cited
Clay v Clay (2001) 202 CLR 410; [2001] HCA 9, considered
Cook v Deeks [1916] 1 AC 554; [1916] UKPC 10, considered
FHR European Ventures LLP v Cedar Capital Partners LLC [2014] 3 WLR 535; [2014] UKSC 45, considered
Furs Ltd v Tomkies (1936) 54 CLR 583; [1936] HCA 3, considered
Giumelli v Giumelli (1999) 196 CLR 101; [1999] HCA 10, cited
Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41; [1984] HCA 64, considered
Keech v Sandford (1726) 25 ER 223; [1726] EWHC Ch J76, distinguished
Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd (1958) 100 CLR 342; [1958] HCA 33, considered
LM Investment Management Limited (in liq) v Bruce & Ors [2014] QCA 136, cited
Maguire v Makaronis (1997) 188 CLR 449; [1997] HCA 23, cited
Muschinski v Dodds (1985) 160 CLR 583; [1985] HCA 78, considered
Parsons v McBain (2001) 109 FCR 120; [2001] FCA 376, cited
Re Hallett's Estate (1879) 13 Ch D 696, cited

Secretary, Department of Social Security v Agnew (2000) 96 FCR 357; [2000] FCA 59, cited
Shephard v Cartwright [1955] AC 431; [1954] UKHL 2, cited
Themis Holdings Pty Ltd v Canehire Pty Ltd & Anor [2014] QSC 38, considered
Thompson's Trustee in Bankruptcy v Heaton (1974) 1 All ER 1239, considered
Warman International Ltd v Dwyer (1995) 182 CLR 544; [1995] HCA 18, considered
Zobory v Commissioner of Taxation (1995) 64 FCR 86; [1995] FCA 1226, cited

COUNSEL: M M Stewart QC, with K A O'Gorman, for the appellants
D G Clothier QC, with C A Johnstone, for the respondent

SOLICITORS: Russells for the appellants
Tucker & Cowen for the respondent

[1] **MUIR JA:**

The principal issues for determination

[2] The central issues identified in the agreed statement of issues provided by the parties to the primary judge were whether an agreement as alleged by the appellants or an agreement as alleged by the respondent in respect of a parcel of Crown land in the process of being freeholded by Canehire had been made and whether Canehire acquired the freehold title to the property in its own right or as trustee for the Holzapfel Property Trust (the HPT).

[3] The agreement issue was decided in favour of the respondent and the primary judge's findings in that regard are unchallenged.

[4] At trial, the respondent's claims against the appellants were limited to a claim for equitable compensation in an amount equal to the net sale proceeds of land and in the alternative, a claim that the appellants "account to [the respondent] for all of the activities of the Trust". In relation to the trust issue, the appellants argued on appeal that the primary judge's judgment ordering the appellants to pay equitable compensation in the sum of $4,241,258 including compound interest, was necessarily based on the finding that "… the payment by Canehire of the proceeds derived by it from the sale of the property to entities or persons other than the beneficiaries [of the HPT], [were] in contravention of its duties under an express trust"[1]. That finding depended upon proof that Canehire acquired the property in 2002 on an express trust for the HPT. The finding, it was submitted, was not open to be made by the primary judge. It was submitted also that the primary judge found in the extract from paragraph [209] of the reasons just quoted that the property was held on an express trust. The same finding is implicitly made elsewhere in the reasons.[2]

[5] The central issues on the appeal were whether the freehold interest vested in Canehire in its capacity as trustee of the HPT immediately upon the deed of grant

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1 *Themis Holdings Pty Ltd v Canehire Pty Ltd & Anor* [2014] QSC 38 at [209].
2 *Themis Holdings Pty Ltd v Canehire Pty Ltd & Anor* [2014] QSC 38 at [206] and [244].

taking effect and, if not, did Canehire hold the freehold interest from that time until sold on a constructive trust.

Events prior to the freeholding of the subject land

[6] Mr Trevor Holzapfel carried on a shopfitting business through companies controlled by him. Mr Philip Ham had acted as accountant for Mr Holzapfel and his various entities for many years and was a family friend. In July 1991, on Mr Ham's advice, the HPT, a discretionary trust of which Mr Holzapfel, members of his family and companies controlled by them were beneficiaries, was established. Canehire Pty Ltd, a shelf company of Mr Ham, who was its sole director and shareholder, was appointed trustee. The family members relevant for present purposes are Mr Holzapfel's adult son and daughter, Todd and Simone.[3]

[7] In September 1993, Canehire, as trustee, of the HPT, acquired the lessee's interest in a Crown lease over real property at Fison Avenue on which one of the Myttons group of companies controlled by Mr Holzapfel, Myttons (Qld) Fabrications Pty Ltd, was conducting its business. Between 1993 and 2000, various Holzapfel entities made improvements to the land.

[8] Mr Holzapfel was interested in acquiring the freehold title to the land. Between 1996 and 1998, Canehire, through Mr Holzapfel, conducted negotiations in that regard with the Department of Natural Resources. Canehire, however, was not financially able to pay the purchase price sought by the Department and obtained a renewal of the lease for a period of five years from 1 January 1998.

[9] In 2000, Myttons (Qld) experienced financial difficulties. Demand was made on Canehire by Suncorp-Metway (Suncorp) for payment of amounts owing under credit facilities provided by Suncorp to Myttons (Qld). Canehire was a guarantor of the borrower's obligations under such facilities.

[10] Mr Holzapfel and his entities lacked the capacity to satisfy Suncorp's demand. Mr Ham, who was able to obtain funds at a cheaper rate than Suncorp was charging, proposed to Mr Holzapfel that Canehire, in its own right, pay out Suncorp and that the Holzapfel entities assume an obligation to repay Canehire. Mr Holzapfel accepted the proposal and a loan agreement dated 2 November 2000 was entered into. Under it, H & P Services Pty Ltd, a company connected with Mr Ham agreed "to provide Canehire with the funds to enable it to discharge, in its own right, all of the moneys and liability due by it under the Guarantee and Indemnity given by it to Suncorp".[4] Myttons and other Holzapfel entities, including Canehire in its capacity as trustee for the HPT, agreed to provide securities to H & P Services Pty Ltd "including an assignment by Suncorp to Canehire of all the securities it held over the interests of the Myttons group".[5]

[11] On 29 November 2000, Suncorp, Myttons, Canehire as trustee for the HPT, Jandine Pty Ltd, Mr Holzapfel and his wife executed a deed of forbearance under which Canehire, in its own right, agreed to repay the Suncorp debts and Suncorp agreed to

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3 Mr Holzapfel's wife, Judith, ceased to be a beneficiary in July 2002 pursuant to a Family Court property settlement agreement: see Consent Order of the Family Court of Australia dated 10 July 2002, "Terms of Settlement".

4 *Themis Holdings Pty Ltd v Canehire Pty Ltd & Anor* [2014] QSC 38 at [13].

5 *Themis Holdings Pty Ltd v Canehire Pty Ltd & Anor* [2014] QSC 38 at [13].

forbear temporarily from enforcement of the loans and guarantees.[6] On 5 April 2001 Suncorp assigned its securities in respect of the debts to Canehire.[7] The securities included a mortgage by Suncorp over the Crown lease.

[12] Until 2002, Mr Holzapfel exercised control over the property and negotiated with the Department of Natural Resources for Canehire's acquisition of the freehold to the property.[8]

[13] On 14 November 2002, Mr Ham and his business partner in property development ventures, Mr Russell Kempnich, established the Fison Avenue Unit Trust (FAUT).[9] Canehire was appointed trustee of FAUT. The unit holders of the FAUT were Meikleour Pty Ltd, a company controlled by Mr Ham, and Terraford Pty Ltd, a company controlled by Mr Kempnich. None of Mr Kempnich's conduct was subjected to any criticism by the parties or the primary judge.

[14] An offer dated 29 November 2002 by the Department of Natural Resources to Canehire to acquire the freehold for $924,000 was accepted by Canehire.[10] It paid the acquisition price from monies advanced by South East Property Developments Pty Ltd (SEPD), a property development company controlled by Mr Ham and Mr Kempnich. That advance was repaid after November 2002 from monies borrowed by Canehire, the repayment of which was guaranteed by Mr Ham and Mr Kempnich.

[15] A deed of grant of the land in favour of Canehire was issued on 30 January 2003 and registered on 3 February 2003.[11] The deed of grant made no reference to any trust.

Events after the freeholding of the subject land

[16] After acquiring the freehold, Canehire made improvements to the property to facilitate its letting to Allight Pty Ltd for a term of five years commencing from June 2003.[12]

[17] The property was sold by Canehire on 30 October 2008 for $4,892,030.[13] Until that time, Canehire remained the registered proprietor. The proceeds of sale were used to discharge indebtedness to Canehire's secured lender and the balance was paid to SEPD which expended the monies in development projects. No part of the proceeds was paid to the HPT or any of its beneficiaries.

The evidence of pre-freeholding discussions

[18] Mr Holzapfel gave evidence that, prior to the freeholding of the property, he had a discussion with Mr Ham in which Mr Ham suggested that he would borrow on the security of the property for the cost of acquisition of the freehold interest and to cover the monies owing to Suncorp and to himself for outstanding fees and expenses. The HPT was to "inherit the rent from the property". There was no suggestion that the HPT would not remain the beneficial owner of the land.

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6 *Themis Holdings Pty Ltd v Canehire Pty Ltd & Anor* [2014] QSC 38 at [16].
7 *Themis Holdings Pty Ltd v Canehire Pty Ltd & Anor* [2014] QSC 38 at [17].
8 *Themis Holdings Pty Ltd v Canehire Pty Ltd & Anor* [2014] QSC 38 at [167].
9 *Themis Holdings Pty Ltd v Canehire Pty Ltd & Anor* [2014] QSC 38 at [25].
10 *Themis Holdings Pty Ltd v Canehire Pty Ltd & Anor* [2014] QSC 38 at [26].
11 *Themis Holdings Pty Ltd v Canehire Pty Ltd & Anor* [2014] QSC 38 at [27].
12 *Themis Holdings Pty Ltd v Canehire Pty Ltd & Anor* [2014] QSC 38 at [28].
13 *Themis Holdings Pty Ltd v Canehire Pty Ltd & Anor* [2014] QSC 38 at [33].

[19] Mr Ham's account of a discussion with Mr Holzapfel concerning the proposed freeholding was very different. In evidence-in-chief he said that he told Mr Holzapfel, in effect, that if he was to be involved he would do so through an entity of his, in his own right. Mr Holzapfel asked him "what was in it for him" and was told that there "could be a payment to him" if there was a surplus after Mr Ham had achieved "a suitable rate of return on investment".

[20] Mr Astill, a solicitor who acted for and advised Mr Ham in relation to relevant matters, gave evidence to the effect that he advised Mr Ham before the freeholding of the land that Canehire "as trustee of the [HPT] was the only party that had the option to take the option [to freehold] and pay out that lease".[14] He denied the suggestion made to him in cross-examination that when he raised with Mr Ham the need to get the consent of the beneficiaries in relation to the freeholding transaction, he was told that he would have no difficulty in obtaining it. Mr Astill's response to the suggestion was, "No. That's not correct at all. If he did, we should've got it".[15]

The primary judge's findings concerning the pre-freeholding discussions

[21] The primary judge accepted Mr Holzapfel's evidence about his pre-freeholding discussion or discussions with Mr Ham. She found that it was agreed between the two men that the freehold was to be acquired on trust for the HPT. She further found that "Mr Ham well knew … that he could not acquire the freehold except on trust for the HPT, unless he had the consent of the beneficiaries".[16] Her Honour also found that "… Mr Ham knew in 2002 that the terms of the agreement with Mr Holzapfel were that the freehold was to be acquired on trust for the HPT"[17] and that Mr Holzapfel was not told of Mr Kempnich or the involvement of Mr Kempnich or any entity connected with him before 2008.[18]

The appellants' arguments on the trust issue

[22] The appellants contended that the evidence and equitable presumptions established that Canehire acquired the property on an express trust for the FAUT. The argument was developed as follows. As Canehire purchased the freehold with funds provided by the beneficiaries of the FAUT, Meikleour Pty Ltd and Terraford Pty Ltd, there is a presumption that Canehire held the property on trust for them.[19] If part of the purchase price of a property is provided by a loan secured by a mortgage on the property, the presumption of a resulting trust is applied by treating the monies raised by the mortgage as a contribution by the person who is liable to repay the money.[20]

[23] The presumption operates although the loans advanced by Mr Kempnich's and Mr Ham's companies and SEPD were later "repaid" out of the proceeds of a loan obtained from the Commonwealth Bank of Australia (CBA). Although the purchase price of the property was provided by a loan secured by a mortgage on the property, the presumption of a resulting trust is applied by treating the monies raised by the mortgage as a contribution by the person who is liable to repay the money. Both

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14 *Themis Holdings Pty Ltd v Canehire Pty Ltd & Anor* [2014] QSC 38 at [82].
15 *Themis Holdings Pty Ltd v Canehire Pty Ltd & Anor* [2014] QSC 38 at [84].
16 *Themis Holdings Pty Ltd v Canehire Pty Ltd & Anor* [2014] QSC 38 at [205].
17 *Themis Holdings Pty Ltd v Canehire Pty Ltd & Anor* [2014] QSC 38 at [206].
18 *Themis Holdings Pty Ltd v Canehire Pty Ltd & Anor* [2014] QSC 38 at [202].
19 *Calverley v Green* (1984) 155 CLR 242 at 266.
20 *Calverley v Green* (1984) 155 CLR 242 at 251 per Gibbs CJ; 257–258 per Mason and Brennan JJ; 267–268 per Deane J.

Meikleour Pty Ltd and Terraford Pty Ltd were liable as guarantors to repay the loan to the CBA under guarantees. Also the bank lent the money to Canehire as trustee of the FAUT.

[24] The rebuttable presumption is not easily displaced[21] and the primary judge did not explain why she displaced it. She in fact found that Mr Kempnich's intention was that Canehire was to acquire the property on express trust for the FAUT. Her Honour also appears to have found that Mr Ham intended Canehire to acquire the property on trust for the FAUT.[22]

[25] The primary judge erred in failing to apply the principles established by *Calverley v Green*.[23] She reasoned, erroneously, that the freehold interest could not have been acquired by Canehire on an express trust for the FAUT if Canehire, in so doing, was acting in breach of its duties as trustee of the HPT. Had the primary judge found that Canehire acquired the property on an express trust for the FAUT, that finding would not have entailed any finding that the acquisition was "legitimate". The authorities offer no reason why her Honour may not have found that Canehire acquired the property:

(a) on an express trust for the FAUT; and in doing so,

(b) was in breach of the express trust of the HPT.

[26] The primary judge was precluded from considering or finding that Canehire breached its duties as trustee of the HPT when Canehire acquired the property on an express trust for the FAUT. The respondent did not allege that any such conduct was a breach of trust or duty. It merely did not admit the allegation and was thereby precluded by r 165(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) from adducing evidence to the contrary.

[27] The respondent is unable to rely on *Keech v Sandford*;[24] it does not have an invariable application in circumstances in which a trustee purchases the reversion in respect of a non-renewable lease.[25] The evidence was that the lessor had decided not to renew the lease. Moreover, Canehire did not purchase the reversion. It exercised a statutory right to apply to the Crown to freehold the land.

[28] Even if *Keech v Sandford* applied, Canehire would have held the property as constructive trustee and not, as the respondent alleged, "on an express trust for the HPT". The respondent did not seek the imposition of a constructive trust and "positively disavowed a constructive trust case". If the respondent is permitted to advance a case on appeal relying on a constructive trust, the appellants would suffer significant prejudice. They would have been deprived of the opportunity to call evidence in respect of and to rely on a defence of laches. The appellants would also be prevented from pleading and proving the quantum of any profit that Canehire may have obtained from its alleged breach of trust in 2002, including the quantum of any costs that offset the proceeds of sale.

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21 *Shephard v Cartwright* [1955] AC 431 at 445; *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353 at 365.

22 *Themis Holdings Pty Ltd v Canehire Pty Ltd & Anor* [2014] QSC 38 at [191].

23 (1984) 155 CLR 242.

24 (1726) 25 ER 223.

25 *Bevan v Webb* [1905] 1 Ch 620; *Brenner v Rose* [1973] 1 WLR 443.

Consideration of the express trust issue

[29] Under s 166 of the *Land Act* 1994 (Qld) (the Act), Canehire, as lessee, had the right to apply to convert the lease to freehold. Any such application was required by s 167 of the Act to be considered and determined by the Chief Executive. Section 167 specifies matters that the Chief Executive is obliged to consider in determining whether or not to offer to convert a lease and the conditions upon such an offer should be made. The Act did not entitle any person or entity other than a lessee to make an application for conversion of Crown leasehold land to freehold.[26] It was by the exercise of its rights under s 166 of the Act that Canehire applied to freehold the land. At the time, Canehire's interest under the lease was part of the corpus of the HPT and the right under s 166 accrued to Canehire by virtue of its capacity as trustee of the HPT.

[30] Mr Ham, Canehire's sole director and shareholder, was of the understanding that the informed consent of the beneficiaries was required if the freehold interest was to be acquired by Canehire in any capacity other than trustee for the HPT. He was also aware, having been so advised by Mr Astill, that Canehire, as trustee of the HPT, was the only entity with the right to make the freeholding application.

[31] Mr Ham did not seek the consent of the beneficiaries. Instead, he told Mr Holzapfel, a beneficiary under the HPT, a person whom Mr Ham would have believed either controlled the other beneficiaries or was in a position to act on their behalf in respect of matters concerning the HPT, that Canehire was acquiring the freehold as trustee of the HPT.

[32] There was no resolution of Mr Ham as director of Canehire purporting to authorise or cause Canehire to act in breach of its duties as trustee of the HPT. Nor was there any evidence that Mr Ham, prior to the issue of the deed of grant, consciously did anything in his capacity as director of Canehire to cause Canehire to undertake the acquisition of the freehold in a capacity other than trustee of the HPT. Consequently, when the title to the freehold land issued in favour of Canehire, it was held by Canehire as trustee of the HPT.

[33] The fact that, prior to the issue of the deed of grant, Mr Ham had plans to ignore the rights of the beneficiaries of the HPT and treat the land as being held by Canehire on behalf of Meikleour Pty Ltd and Terraford Pty Ltd could not affect the rights and interests of the beneficiaries of the HPT or the capacity in which Canehire held title to the land. Nor did the fact that Mr Ham and Mr Kempnich, through entities controlled by them, procured the loans that enabled the freeholding to take place.

[34] The appellants relied on tax invoices issued to Myttons by Mr Ham in the name of "Canehire Pty Ltd ATF Fison Avenue Unit Trust" claiming rent for specified periods. The first two of these were respectively dated 1 December 2002 and 1 January 2003. They were forwarded to Mr Holzapfel attached to an email from Mr Ham dated 17 January 2003. The deed of grant of the land did not issue until 30 January 2003. Until then, on any view of the matter, Canehire was lessee of the Crown lease in its capacity as trustee of the HPT. These documents, which were unexplained in the evidence, provide no assistance to the appellants.

[35] If the foregoing conclusions require any support, it is afforded by the principle that a court of equity will presume that a person acts pursuant to and not in violation of

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[26] *Land Act* 1994 (Qld), s 165A(a).

his obligations as trustee. The principle is stated in Story's *Equity Jurisprudence* as follows:[27]

> "… A Court of Equity will presume that the party meant to act in pursuance of his trust and not in violation of it … the general doctrine proceeds that, whatever acts are done by trustees in regard to the trust property, shall be deemed to be done for the benefit of the *cestui que* trust, and not for the benefit of the trustee … The same principle will apply to persons standing in other fiduciary relations to each other."

[36] In *Clay v Clay*,[28] the Court, in discussing the principles applicable to sales by a trustee of trust property to himself and the inability at common law for a person to convey to himself freehold or leasehold land or personal property, observed:[29]

> "Further, a distinction is to be drawn between conveyances of legal title and the overreaching of beneficial interests in the subject matter of the conveyance. Thus, in equity, these attempted dispositions also would be breaches of trust by the trustee and would not displace or override the interests of the beneficiaries. Equity would intervene to support the beneficiaries, for example, by orders for delivery up of the purported conveyance and for an accounting." (citations omitted)

[37] Their Honours cited McPherson, *Self-dealing Trustees*.[30] The late B H McPherson stated at that reference:

> "However, a trustee who appropriates the trust property to purposes of his own necessarily misapplies it. Such conduct is a breach of trust, which means that in equity it is ineffective unless with full knowledge the beneficiary elects to ratify it, or is estopped from asserting his beneficiary interest in the property.
>
> The distinction between the self-dealing rule and the fair-dealing rule entails something more than a difference in what must be established by a beneficiary wishing to avoid the transaction. A fundamental difference of theory is involved. Self-dealing, as Professor Waters notices, amounts to a breach of trust. Unless ratified by the beneficiaries, it has no effect in equity. The property in the hands of the trustee or his nominee remains subject to the trust. Even if the beneficiary does elect to ratify the transaction, or the original trust property passes to a *bona fide* purchaser for value without notice, the trust will fasten on the proceeds of sale. The beneficiary's interest is overreached but the trust survives. By contrast, fair-dealing extinguishes the trust. If the trustee fulfils the requirement of full disclosure to the beneficiaries and obtains their informed consent, he acquires beneficial ownership of the property. If he already holds the legal title, it means that he becomes the absolute owner both in equity as well as in law.

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27 Story J, *Commentaries on Equity Jurisprudence*, Little, Brown & Company, Boston, 1853 as cited in Lord P Millett, "Bribes and Secret Commissions Again", *The Cambridge Law Journal*, 71(3), 2012 at 591. See also *Maguire v Makaronis* (1997) 188 CLR 449 at 469 per Brennan CJ, Gaudron, McHugh and Gummow JJ referring to *Re Hallett's Estate* (1879) 13 Ch D 696 at 727.

28 (2001) 202 CLR 410.

29 *Clay v Clay* (2001) 202 CLR 410 at 434–435.

30 A J Oakley (ed), *Trends in Contemporary Trust Law*, Clarendon Press, Oxford, 1996, p 135 at 148.

> What he is purchasing, however, is not the legal title to the trust property (which as trustee he already holds), but the equitable ownership. Statute apart, no one but the beneficiaries are able to sell that interest." (citations omitted)

[38] *Furs Ltd v Tomkies*[31] is one of many decisions identifying the circumstances in which a fiduciary (at times a trustee) holds property acquired in breach of trust, breach of fiduciary duty or in circumstances in which a conflict of interest exists, in trust. In that case, the respondent when acting for the appellant in a fiduciary capacity, derived undisclosed benefits for himself for which he was accountable to the appellant. Rich, Dixon and Evatt JJ relevantly said:[32]

> "In our opinion the decision of this appeal is governed by the inflexible rule that, except under the authority of a provision in the articles of association, no director shall obtain for himself a profit by means of a transaction in which he is concerned on behalf of the company unless all the material facts are disclosed to the shareholders and by resolution a general meeting approves of his doing so, or all the shareholders acquiesce. *An undisclosed profit which a director so derives from the execution of his fiduciary duties belongs in equity to the company. It is no answer to the application of the rule that the profit is of a kind which the company could not itself have obtained, or that no loss is caused to the company by the gain of the director. It is a principle resting upon the impossibility of allowing the conflict of duty and interest which is involved in the pursuit of private advantage in the course of dealing in a fiduciary capacity with the affairs of the company.* If, when it is his duty to safeguard and further the interests of the company, he uses the occasion as a means of profit to himself, he raises an opposition between the duty he has undertaken and his own self interest, beyond which it is neither wise nor practicable for the law to look for a criterion of liability. The consequences of such a conflict are not discoverable. Both justice and policy are against their investigation. With reference to a transaction arising out of another relation of confidence, Lord Eldon said: 'The general interests of justice' require 'it to be destroyed in every instance; as no Court is equal to the examination and ascertainment of the truth in much the greater number of cases'." (citations omitted; emphasis added)

[39] Another application of the principle is provided by *Boardman v Phipps*[33] in which agents of certain trustees purchased shares having had that opportunity only because of their agency. The shares were found to be held by the agents beneficially for the trust. Of course, the fact that the agents paid for the purchase of the shares did not defeat the rights and interests of the company.

[40] In *Cook v Deeks*,[34] directors of a company who entered into a contract, using their knowledge of the commercial opportunity to do so obtained by virtue of their directorships in the plaintiff company, were held to hold the benefit of the contract on behalf of the company.[35]

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31 (1936) 54 CLR 583.

32 *Furs Ltd v Tomkies* (1936) 54 CLR 583 at 592.

33 [1967] 2 AC 46.

34 [1916] 1 AC 554.

35 See in particular at 563.

[41] The line of cases culminating in *FHR European Ventures LLP v Cedar Capital Partners LLC*,[36] a decision of the United Kingdom Supreme Court, is also relevant for present purposes. In those cases it was found that bribes or secret commissions obtained by an agent in breach of his or her fiduciary duty to his or her principal were held in trust for his or her principal. In *Cedar Capital Partners*, the Court identified the question with which the Court was concerned as the limits or boundaries of the rule that:[37]

> "… where an agent acquires a benefit which came to his notice as a result of his fiduciary position, or pursuant to an opportunity which results from his fiduciary position, the equitable rule ('the Rule') is that he is to be treated as having acquired the benefit on behalf of his principal, so that it is beneficially owned by the principal. In such cases, the principal has a proprietary remedy in addition to his personal remedy against the agent, and the principal can elect between the two remedies."

[42] The following passage from the reasons of Dixon CJ, McTiernan and Fullagar JJ in *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd*,[38] although referring to the doctrine of *Keech v Sandford*, appears to have general application to circumstances in which trustees use their position as trustees for personal gain:

> "The doctrine of *Keech v. Sandford* is shortly stated by saying that a trustee must not use his position as trustee to make a gain for himself: any property acquired, or profit made, by him in breach of this rule is held by him in trust for his *cestui que trust*. The rule is not confined to cases of express trusts. It applies to all cases in which one person stands in a fiduciary relation to another: it has been applied as between partners, as between principal and agent, and as between master and servant: see, e.g., *Re Biss; Biss v. Biss; Prebble v. Reeves and Wicks v. Bennett*. The case of *Birtchnell v. Equity Trustees Executors and Agency Co Ltd* may be regarded as an instance of the application of the same rule." (citations omitted)

[43] If contrary to my view, the freehold when acquired by Canehire was not held by it in its capacity as trustee of the HPT, it was held by Canehire on a constructive trust for the beneficiaries of the HPT. The rights and remedies of the beneficiaries of the HPT and the duties and obligations of the appellants under either trust were and remain the same.

[44] In *Chan v Zacharia*,[39] Deane J expressed the opinion that the principle in *Keech v Sandford* should not be seen either as a completely independent equitable principle or as a "mere manifestation of the general principle governing the liability of a beneficiary (sic) to account for personal benefit or gain". In his view the case was concerned with the application of the principle to particular types of property and that it provided an illustration of the general principle.

[45] A similar view of the rule in *Keech v Sandford* was taken by Pennycuick VC in *Thompson's Trustee in Bankruptcy v Heaton*.[40] His Lordship said of the rule:

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36 [2014] 3 WLR 535.

37 *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] 3 WLR 535 at 541.

38 (1958) 100 CLR 342 at 350.

39 (1984) 154 CLR 178 at 201.

40 (1974) 1 All ER 1239 at 1248–1249.

> "… is really in modern terms an application of the broad principle that a trustee must not make a profit out of the trust estate. This principle applies to all kinds of collateral advantages, for instance director's remuneration received by a trustee acting as a director for a company controlled through the shares of the trust.
>
> In *Phillips v Phillips* the Court of Appeal applied the principle to the purchase of a reversion by a tenant for life. I ought to make one observation in this connection. Obviously the beneficiary under the trust in such circumstances cannot be compelled to accept and pay for the reversion. If he refuses to do so, either before or after the acquisition by the trustee, no doubt the latter is entitled to acquire and retain the reversion for his own use, but if the beneficiary does require that the reversion be brought into the trust estate, then the trustee must deal with it accordingly, subject of course to recoupment out of the trust estate." (citations omitted)

[46] Earlier in his reasons, in discussing a fiduciary liability to account for personal benefit or gain, he said:[41]

> "Stated comprehensively in terms of the liability to account, the principle of equity is that a person who is under a fiduciary obligation must account to the person to whom the obligation is owed for any benefit or gain (i) which has been obtained or received in circumstances where a conflict or significant possibility of conflict existed between his fiduciary duty and his personal interest in the pursuit or possible receipt of such a benefit or gain or (ii) which was obtained or received by use or by reason of his fiduciary position or of opportunity or knowledge resulting from it. *Any such benefit or gain is held by the fiduciary as constructive trustee:* see *Keith Henry & Co. Pty. Ltd. v. Stuart Walker & Co. Pty. Ltd*. That constructive trust arises from the fact that a personal benefit or gain has been so obtained or received and it is immaterial that there was no absence of good faith or damage to the person to whom the fiduciary obligation was owed. In some, perhaps most, cases, the constructive trust will be consequent upon an actual breach of fiduciary duty: e.g., an active pursuit of personal interest in disregard of fiduciary duty or a misuse of fiduciary power for personal gain. In other cases, however, there may be no breach of fiduciary duty unless and until there is an actual failure by the fiduciary to account for the relevant benefit or gain: e.g., the receipt of an unsolicited personal payment from a third party as a consequence of what was an honest and conscientious performance of a fiduciary duty." (emphasis added)

[47] Deane J concluded that Dr Chan, having abused his fiduciary position as a trustee and former partner to seek an advantage for himself, held "any fruits of that abuse of fiduciary position and pursuit of personal interest upon constructive trust for those entitled to the property of the dissolved partnership".[42]

[48] In this regard Brennan J said:[43]

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41 *Chan v Zacharia* (1984) 154 CLR 178 at 199.

42 *Chan v Zacharia* (1984) 154 CLR 178 at 205.

43 *Chan v Zacharia* (1984) 154 CLR 178 at 186.

> "There was a misuse of his position as a former partner to obtain a personal benefit and that, as Deane J. points out, was a breach of his fiduciary duty. Therefore I agree that Dr. Chan holds the fruits of his conduct upon a constructive trust for those entitled to the property of the dissolved partnership."

[49] In *Warman International Ltd v Dwyer*,[44] the Court, referring to cases in which an actively dishonest fiduciary obtains an identifiable profit from his dishonesty, said:

> "The outcome in cases of this kind will depend upon a number of factors. They include the nature of the property, the relevant powers and obligations of the fiduciary and the relationship between the profit made and the powers and obligations of the fiduciary. Thus, according to the rule in *Keech v. Sandford*, a trustee of a tenancy who obtains for himself the renewal of a lease holds the new lease as a constructive trustee, even though the landlord is unwilling to grant it to the trust. But the rule 'depends partly on the nature of leasehold property' and partly on the position which the trustee occupies. A similar approach will be adopted in a case in which a fiduciary acquires for himself a specific asset which falls within the scope and ambit of his fiduciary responsibilities, even if the asset is acquired by means of the skill and expertise of the fiduciary and would not otherwise have been available to the person to whom the fiduciary duty is owed." (citations omitted)

[50] The above observations are directly applicable to the facts of this case. Also on point are the following observations of Mason CJ in *Hospital Products Ltd v United States Surgical Corporation*,[45] referring to circumstances in which a fiduciary obtained a profit in circumstances in which there was a conflict, or possible conflict, of interest and duty or by reason of the fiduciary protection or by reason of the fiduciary taking advantage of an opportunity or knowledge that he derived in consequence of his occupation of the fiduciary position:[46]

> "Any profit or benefit obtained by a fiduciary in either of the two situations already described is held by him as a constructive trustee: *Keith Henry & Co. Pry. Ltd. v. Stuart Walker & Co. Pry. Ltd*. Neither principle nor authority provide any support for the proposition that relief by way of constructive trust is available only in the case where a profit or benefit obtained by the fiduciary was one which it was an incident of his duty to obtain for the person to whom he owed the fiduciary duty. Once it is established that the fiduciary is liable to account for a profit or benefit which he has obtained there can be no objection to his being held to account as a constructive trustee of that profit or benefit. It can make no difference that it was not his duty to obtain the profit or benefit for the person to whom the duty was owed. What is important is that the advantage has accrued to him in breach of his fiduciary duty or by his misuse of his fiduciary position. The consequence is that he must account for it and in equity the appropriate remedy is by means of a constructive trust."

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44 (1995) 182 CLR 544 at 560.

45 (1984) 156 CLR 41.

46 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 107–108.

[51] The appellants contended that, if on a correct analysis, Canehire held the freehold interest on its acquisition on a constructive trust for the HPT, the appeal must succeed. Reliance was placed on the then senior counsel for the respondent's statement in his closing submissions that the respondent has:

> "… never sought the relief of constructive trust in relation to how the freehold was actually acquired … It is our case that there was an express trust [in that regard] … The breach of trust that has always been pleaded and has always been relied on is, in fact, the distribution of the sale proceeds, that is, … that … the beneficiaries of the [HPT] were completely ignored."

[52] In my view, in the circumstances under consideration, the description given to the trust claimed by the respondent is a matter of semantics. If the trust to which the property was subjected is to be properly characterised as a constructive trust, it arose in precisely the way the pleaded trust is alleged to have come into existence. It also came into existence immediately upon the freehold interest being acquired by Canehire. There was no point at which others could acquire the beneficial interest in the property in priority to or instead of the beneficiaries of the HPT.

[53] If, contrary to my opinion, Canehire had succeeded in acquiring the freehold other than as trustee of the HPT, it would have done so in circumstances in which a conflict existed between its fiduciary duty and its own interest in pursuing such a benefit or gain. Moreover, the freehold interest would have been obtained by Canehire by the use of or by reason of its fiduciary position.

[54] As the above authorities demonstrate, judicial intervention was not necessary in the circumstances under consideration to bring the constructive trust into existence. Other authorities support the same conclusion.[47] The relevant principles are discussed at some length in *On Equity*[48] and Ford and Lee's *Principles of the Law of Trusts*.[49]

[55] In any event, where a constructive trust is of a kind which does not come into existence when the circumstances giving rise to the imposition of the trust take place, it may be imposed retrospectively. In *Muschinski v Dodds*,[50] Deane J relevantly said:

> "Equity acts consistently and in accordance with principle. The old maxim that equity regards as done that which ought to be done is as applicable to enforce equitable obligations as it is to create them and, notwithstanding that the constructive trust is remedial in both origin and nature, there does not need to have been a curial declaration or order before equity will recognize the prior existence of a constructive trust: cf. Scott, *Law of Trusts*, 3rd ed. (1967), vol. V, par. 462.4. Where an equity court would retrospectively impose a constructive trust by way of equitable remedy, its availability as such a remedy provides the basis for, and governs the content of, its existence inter partes independently of any formal order declaring or enforcing it. In this more limited sense, the constructive trust is also properly seen as

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47 *Giumelli v Giumelli* (1999) 196 CLR 101 at 112 per Gleeson CJ, McHugh, Gummow and Callinan JJ; *Parsons v McBain* (2001) 109 FCR 120 at 123–124; *Muschinski v Dodds* (1985) 160 CLR 583 at 614; *Secretary, Department of Social Security v Agnew* (2000) 96 FCR 357 at 365.

48 Law Book Company, 2009 at paras 6.650, 6.660, 6.670, 6.680, 6.690, 6.700 and 6.850.

49 H Ford & W A Lee, *Principles of the Law of Trusts* (Thomson, Subscription Service) at 22.020, 22.6040.

50 (1985) 160 CLR 583 at 614; see also *Zobory v Federal Commissioner for Taxation* (1995) 64 FCR 86.

> both 'remedy' and 'institution'. Indeed, for the student of equity, there can be no true dichotomy between the two notions."

[56] The respondent did not seek a declaration that Canehire held the freehold interest in the land at all times prior to its sale on trust for the beneficiaries of the HPT. That was because the land had been disposed of by Canehire before the beneficiaries of the HPT discovered Canehire's breaches of trust and/or fiduciary duties.

[57] It is apparent from the pleadings, however, that the respondent's claim for equitable compensation is based on an implicit, if not express, allegation that the land was held by Canehire in trust for the beneficiaries of the HPT. It matters not if the trust should have been described as a constructive trust. In the circumstances under consideration, there are no good reasons why a constructive trust would not be regarded by the Court as having attached the moment the freehold interest came into existence.

[58] There is no substance in the appellants' argument that the appellants would be prejudiced if the respondent was permitted to rely on a constructive trust. It was contended that, had the respondent advanced a constructive trust case at first instance, the appellants could have mounted a defence of laches and relied on the alleged acquiescence of Mr Holzapfel, Todd Holzapfel and Simone Holzapfel in the alleged breaches of trust and fiduciary duty.

[59] It is very doubtful that the appellants' case would have been conducted differently had the respondent alleged a constructive trust. The appellants at first instance did attempt to show knowledge on the part of the beneficiaries of the HPT and acquiescence in Canehire's conduct despite such knowledge. The appellants failed in that regard and it follows that any defence of laches would have failed.

[60] The primary judge expressly found that Mr Ham did not inform the beneficiaries of the HPT of any proposal for Canehire to hold the freehold interest in a capacity other than as trustee for the HPT or of any conduct taken by Mr Ham and his interests in furtherance of such proposal. She traced at considerable length the process under which the Holzapfels, by themselves and with the aid of their solicitors, between about February 2008 and mid-May 2010 prised from Mr Ham some of the material facts relating to Canehire's dealings with respect to the land and Mr Ham's version of events.

[61] The other prejudice pointed to was the appellants' loss of opportunity to plead and prove the quantum of any profit that Canehire may have accrued from its alleged breach of trust in 2002. It was submitted that there was no evidence from which the primary judge or this Court could quantify any claim for an account of profits. After the conclusion of the evidence, the respondent elected to pursue its claim for equitable compensation and thus abandoned the claim for an account of profits. In any event, the quantum of profit that Canehire may have accrued from its breach of trust was in issue. The respondent claimed an account of the profit made by Canehire and equitable compensation on the same basis.

[62] Another argument advanced was to the effect that the respondent should be taken to have admitted by implication that the HPT did not have the capacity to acquire the freehold to the property. The deemed admission was said to flow from a combination of an allegation in the respondent's further amended reply and a finding that "by 2002, none of the Holzapfel entities had the capacity to raise the funds necessary to acquire the freehold to the property". There was no such finding. Mr Holzapfel personally had no capacity to raise the finance but Mr Ham had offered to procure

Canehire to obtain the necessary finance by way of a short term loan followed by bank finance. Such finance was obtained.

[63] Even if Canehire as trustee for the HPT or the beneficiaries could not have obtained finance themselves, the above authorities make it plain that in the absence of the fully informed consent of the beneficiaries the land was held in trust for the beneficiaries of the HPT who were thus entitled to net proceeds of sale.[51]

[64] The appellants contended that the primary judge erred in not applying the rebuttable presumption that "where A purchases a property with funds provided by B then, unless the presumption of advancement applies, there is a presumption that A holds the property on trust for B".[52] The contention must be rejected.

[65] No authority was identified by the appellants that would displace the rights of beneficiaries in the circumstances under consideration and it is highly unlikely that any exist. It is unlikely to be the policy of the law that equitable principles of the nature of those under consideration are displaced by a rule of thumb, of which Deane J observed in *Calverley v Green*,[53] "… their propriety is open to serious doubt".

[66] Furthermore, the funds to permit the freeholding were provided by way of loan to Canehire by SEPD. Subsequently, that loan was repaid from the monies borrowed from the CBA.[54] Canehire thus paid for the freeholding.

The *Browne v Dunn*[55] argument

[67] The appellants argued that the primary judge erred in finding that Canehire's breach of trust was not excused by cl 24(b) of the deed constituting the HPT trust. It relevantly provided:

> "The Trustee shall not be liable … for any breach of duty or trust whatsoever unless they shall be proved to have been committed given or omitted in personal conscious bad faith by the Trustee charged to be so liable…"

[68] The basis for the argument was the assertion that counsel for the respondent did not put to Mr Ham that his decision not to distribute to the beneficiaries of the HPT the proceeds of the sale of the property was made in "personal conscious bad faith".

[69] Whether Canehire through Mr Ham had acted or omitted to act in personal conscious bad faith was an issue on the pleadings. The existence of "conscious bad faith" on the part of Mr Ham was raised in the opening address of the respondent's senior counsel who submitted that "conscious bad faith" equated to dishonesty. He submitted "What it requires is the trustee knowingly acting in its own interest or in the interest of third parties not connected [with] the trust rather than knowingly acting in the interest of the trust and its beneficiaries".

[70] It was a central issue of the respondents' case that Mr Ham, while representing to Mr Holzapfel that he was assisting Canehire to freehold the land for the benefit of

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51 See also *Maguire v Makaronis* (1997) 188 CLR 449 at 469–470.

52 *Calverley v Green* (1984) 155 CLR 242 at 266.

53 (1984) 155 CLR 242 at 266.

54 *Themis Holdings Pty Ltd v Canehire Pty Ltd & Anor* [2014] QSC 38 at [26].

55 (1894) 6 R 67.

the HPT trust, was clandestinely setting out to deprive the beneficiaries of the HPT of any interest in the land once freeholded. Mr Ham met this allegation by asserting that he acted pursuant to an agreement with Mr Holzapfel. He was cross-examined about the agreement and his conduct generally at considerable length. In the course of the cross-examination, it was put to him a number of times that, there was no agreement as alleged by him, he did not have the consent of the beneficiaries of the HPT trust, the beneficiaries were unaware that he was acting to deprive them of their interests in the land and that there was a discussion in relation to the freeholding as asserted by Mr Holzapfel. It would have been apparent to Mr Ham that his credibility generally was subject to challenge.

[71] The object of the rule in *Browne v Dunn*[56] is to secure fairness to witnesses.[57] No unfairness to Mr Ham resulted from his cross-examination. He had adequate notice that the respondent intended to infer from the conduct alleged against him that he had acted in "conscious bad faith". He would have been in no doubt that the aim of the cross-examination, generally, was to impeach his credit and, specifically, to adduce evidence in support of the allegation of conscious bad faith.

[72] This ground of appeal was not made out.

Conclusion

[73] None of the grounds of appeal has been made out. I would order that the appeal be dismissed with costs.

[74] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Muir JA. I agree with those reasons and with the order proposed by his Honour.

[75] **MULLINS J:** I agree with Muir JA.

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56 (1894) 6 R 67.

57 *LM Investment Management Limited (in liq) v Bruce & Ors* [2014] QCA 136 at [40] and the cases there cited.