

SUPREME COURT OF QUEENSLAND

CITATION: *Leighton Contractors Pty Ltd v O’Carrigan & Ors* [2016] QSC 223

PARTIES: **LEIGHTON CONTRACTORS PTY LTD**
ACN 000 893 667
(plaintiff)
v
DAMIAN VICTOR O’CARRIGAN
(first defendant)
JULIE DALE O’CARRIGAN
(second defendant)
JODY DALE O’CARRIGAN
(third defendant)
BELINDA JAYNE LEONARD
(fourth defendant)
BLAKRAYNE PASTORAL PTY LTD
ACN 103 102 656
(fifth defendant)

FILE NO/S: Brisbane No 969 of 2013

DIVISION: Trial Division

PROCEEDING: Civil Trial

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 30 September 2016

DELIVERED AT: Brisbane

HEARING DATE: 13 – 16, 24 June 2016

JUDGE: Boddice J

ORDER: **I shall hear the parties as to the form of orders and costs.**

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – FOLLOWING TRUST PROPERTY – GENERALLY – where the plaintiff is a large corporation primarily involved in the construction industry – where the first defendant was a senior employee of the plaintiff – where the first defendant was convicted of fraudulently obtaining in excess of \$20 million from the plaintiff between 2000 and 2012 – where the first defendant’s fraud involved the creation of false invoices to the plaintiff from a business name owned by the first defendant, “Acorn Cottage” – where the invoices sent to the plaintiff were approved for payment by the first defendant in his senior management position and funds were subsequently paid to the accounts controlled by the first defendant – where the plaintiff

alleges the funds misappropriated from it by the first defendant through the Acorn Cottage invoices were used to provide funds to the fourth defendant – where the plaintiff seeks recovery of those funds, which it is alleged were used by the fourth defendant to undertake improvements on a property at Mt Pleasant and to purchase plant and equipment, horses and other property – where the fourth defendant admits she received funds from the first defendant – where the question of whether the funds received by the fourth defendant were funds misappropriated from the plaintiff depends upon a tracing exercise – whether the plaintiff has proven the funds received by the fourth defendant from the first defendant were misappropriated funds

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – FORMATION OF CONTRACTUAL RELATIONS – MATTERS NOT GIVING RISE TO BINDING CONTRACT – where the fourth defendant is an escort who was first engaged by the first defendant to provide sexual services in or about mid-2004 – where the first defendant paid the fourth defendant’s living and other expenses from late 2004 – where the payments only ceased when the first defendant’s fraud was discovered by the plaintiff in 2012 – where the fourth defendant alleges that in or about late 2004 she entered into an agreement with the first defendant whereby she agreed to provide, for reward, sexual services and advice and companionship on a professional basis, exclusively to the first defendant – where the fourth defendant alleges that between late 2004 and October 2012 she provided these services in accordance with the agreement, in exchange for which she was provided with funds and lines of credit by the first defendant – where the fourth defendant alleges she accepted the funds and lines of credit as a bona fide purchaser for value and without notice of any breaches of contract or fiduciary duty on the part of the first defendant – where the plaintiff denies the existence of the alleged agreement between the fourth defendant and the first defendant – where the plaintiff also alleges any such agreement is legally unenforceable, by reason of uncertainty and public policy – where the plaintiff also alleges any payments received by the fourth defendant from the first defendant cannot constitute payment for the services alleged, by reason of uncertainty, immorality or lack of connection – whether the fourth defendant has established she was a bona fide purchaser for a value without notice of the first defendant’s fraud

REAL PROPERTY – TORRENS TITLE – INDEFEASIBILITY OF TITLE – EXCEPTIONS TO INDEFEASIBILITY – GENERALLY – where the first defendant provided funds to the fourth defendant to purchase land, construct a house on that land and make improvements

to the land – where the plaintiff alleges those funds constituted misappropriated funds – where the fourth defendant is the registered owner of the property and claims she enjoys indefeasibility of title – where the plaintiff alleges indefeasibility does not prevent the imposition of a personal equity upon the fourth defendant’s property – whether indefeasibility of title defeats the plaintiff’s claim for the fourth defendant’s property

American Express International Inc v Commissioner of State Revenue [2003] VSC 32, applied

Ashton v Pratt (2015) 88 NSWLR 281; [2015] NSWCA 12, applied

Ashton v Pratt (No.2) [2012] NSWSC 3, followed

Australian Receivables Ltd v Tekitu Pty Ltd [2011] NSWSC 1306, cited

Brady v Stapleton (1952) 88 CLR 322; [1952] HCA 62, cited
Clayton’s Case; *Devaynes v Noble* (1816) 1 Mer 572; 35 ER 781, cited

Fistar v Riverwood Legion and Community Club Ltd [2016] NSWCA 81, cited

Foskett v McKeown (1998) Ch 265, cited

Frith v Cartland (1865) 2 H&M 417; 71 ER 525

Heperu Pty Ltd v Belle (2009) 76 NSWLR 230; [2009] NSWCA 252, cited

In Re Diplock; *Diplock v Wintle* [1948] 1 Ch 465, cited

Parker v The Queen (1997) 186 CLR 494; [1997] HCA 15, cited

Re Charge Card Services Ltd [1989] Ch 497; [1988] 3 All ER 702, cited

Re French Caledonia Travel Services Pty Ltd (2003) 59 NSWLR 361; [2003] NSWSC 1008, distinguished

Re Hallett’s Estate; *Knatchbull v Hallett* (1880) 13 Ch D 696, cited

The Federal Republic of Brazil v Durant International Corporation [2016] AC 297; [2015] UKPC 35, cited

Toksoz v Westpac Banking Corporation (2012) 289 ALR 577; [2012] NSWCA 199, cited

Williams v Peters [2010] 1 Qd R 475; [2009] QCA 180, cited

COUNSEL: J Peden for the plaintiff
D de Jersey, with D Whitehouse, for the fourth defendant

SOLICITORS: K & L Gates for the plaintiff
Bennett & Philip for the fourth defendant

[1] The plaintiff claims equitable relief from the fourth defendant in respect of real and personal property owned by her which the plaintiff claims was purchased using money stolen from it by one of its employees, the first defendant.

- [2] The fourth defendant does not dispute the first defendant paid her significant sums over an eight year period between late 2004 and October 2012. The fourth defendant asserts these monies were paid to her pursuant to an agreement between the fourth defendant and the first defendant for the provision of sexual and other services by the fourth defendant to the first defendant, or on account of such services provided by the fourth defendant, for reward without notice of any fraud.
- [3] The fourth defendant also claims indefeasibility of title defeats the plaintiff's claim in respect of real property. By counterclaim, the fourth defendant seeks recovery of costs and expenses she incurred in maintaining the property since it was the subject of restraining orders.
- [4] At issue is whether the plaintiff has established that any property owned by the fourth defendant was derived through funds stolen by the first defendant from the plaintiff ("misappropriated funds"), whether the fourth defendant has established she was a bona fide purchaser for a value without notice of the first defendant's fraud, whether indefeasibility of title defeats the plaintiff's claim for real property, and whether the fourth defendant is entitled to the sums sought by counterclaim.

Background

- [5] The plaintiff is a large corporation primarily involved in the construction industry. The first defendant was a senior employee of the plaintiff, holding the title Manager Finance and Administration Northern Region Infrastructure. In that position, the first defendant reported to the General Manager of the plaintiff. The fourth defendant is an escort who was first engaged by the first defendant to provide sexual services in or about mid-2004.
- [6] The first defendant had been an employee of the plaintiff for some 30 years. In late 2012, it was discovered the first defendant had fraudulently obtained in excess of \$20 million from the plaintiff between 2000 and 2012. On 21 November 2012, the first defendant pleaded guilty to an offence of fraud. He was convicted and sentenced to 15 years imprisonment with a non-parole period of six years. On appeal, the non-parole period was reduced from six years to five years.
- [7] The first defendant's fraud involved the creation of false invoices to the plaintiff from a business name owned by the first defendant, "Acorn Cottage". The invoices claimed payment for consultancy services provided to the plaintiff. No consultancy services were provided to the plaintiff by Acorn Cottage. The invoices sent to the plaintiff were approved for payment by the first defendant in his senior management position.
- [8] Over the period of the fraud, some 308 false invoices were issued and paid pursuant to this arrangement. Prior to establishing the arrangement, the first defendant opened a bank account with the Commonwealth Bank in the name of Acorn Cottage. The amounts fraudulently obtained by the first defendant from the plaintiff were largely deposited into the account of Acorn Cottages. Some monies were deposited in other accounts.
- [9] In mid-2004, the first defendant met the fourth defendant via an online prostitution service. They developed a close relationship. The first defendant paid the fourth

defendant's living and other expenses from late 2004. Those payments only ceased when the first defendant's fraud was discovered by the plaintiff in 2012. Throughout this time, the first defendant lived with his wife, the second defendant.

Pleadings

- [10] The plaintiff alleges the monies dishonestly appropriated from the plaintiff by the first defendant through the Acorn Cottage invoices were used to provide funds to the fourth defendant. The plaintiff seeks recovery of those monies and other monies had and received by the fourth defendant which it is alleged were used to undertake improvements on a property at Mt Pleasant and to purchase plant and equipment, horses and other property. Alternatively, the plaintiff alleges the fourth defendant has been unjustly enriched at its expense by receipt of those sums and seeks their recovery.
- [11] The fourth defendant denies she is liable to repay any of the monies she received from the first defendant. She alleges that in or about late 2004 she entered into an agreement with the first defendant whereby she agreed to provide, for reward, sexual services and advice and companionship on a professional basis, exclusively to the first defendant. The agreement included the provision of advice to the first defendant in respect of the breeding and maintenance of his race horses and cattle, the maintenance and improvement of his properties, advice and counselling as to his marriage and employment, advice and personal assistance as to his appearance and presentation, accompanying the first defendant to work functions and on interstate and overseas travel, providing home baked biscuits, slices and cakes, feeding and caring for the first defendant's domestic pets and horses when he and his wife were absent, assisting the first defendant to source parts for and assemble his model train set, collecting groceries and cooking for the first defendant when his wife and daughter were absent and driving the first defendant when he required the services of a driver.
- [12] The fourth defendant alleges that between late 2004 and October 2012 she provided these services in accordance with the agreement, in exchange for which she was provided with funds and lines of credit by the first defendant. The fourth defendant utilised those funds and lines of credit to acquire livestock, property and chattels. The fourth defendant alleges that until she was informed in or about October 2012 by the first defendant of an accusation that he was stealing money from his employer, she had no knowledge those funds and lines of credit were stolen by the first defendant from the plaintiff.
- [13] The fourth defendant alleges she accepted the funds and lines of credit as a bona fide purchaser for value and without notice of any breaches of contract or fiduciary duty on the part of the first defendant. The fourth defendant also alleges she has expended effort to improve the Mt Pleasant property, a property of which she is the registered owner and in respect of which she enjoys indefeasibility of title. No act of hers causes an equity adverse to that title.
- [14] By way of counterclaim the fourth defendant alleges that by reason of freezing and other ancillary orders obtained by the plaintiff on 13 March 2013, the fourth defendant has incurred and continues to incur costs and expenses in respect of the Mt Pleasant property,

which is the subject of those orders, in order to preserve that property. The fourth defendant claims indemnity for those costs and expenses, or alternatively, restitution.

- [15] By further amended reply and answer, the plaintiff denies the existence of the alleged agreement between the fourth defendant and the first defendant. In the alternative, the plaintiff alleges any such agreement is legally unenforceable, by reason of uncertainty and public policy. Further, any payments received by the fourth defendant from the first defendant cannot constitute payment for the services alleged, by reason of uncertainty, immorality or lack of connection.
- [16] The plaintiff further alleges indefeasibility does not prevent the imposition of a personal equity upon the Mt Pleasant property. The fourth defendant is obliged in equity to account for the funds received by her from the first defendant. The plaintiff denies the fourth defendant is entitled to the sums by way of counterclaim. The fourth defendant elected to retain possession of the Mt Pleasant property and the expenses occurred are unrelated to the preservation of that property.

Evidence

- [17] The plaintiff's case relied upon the contents of documentary evidence tendered at the hearing (some of which was tendered by calling a witness from each of the Commonwealth Bank of Australia and Citibank). No employee of the plaintiff was called to give evidence. The first defendant also was not called by the plaintiff.
- [18] The documentary evidence establishes that funds in the amount of the invoices in the name of Acorn Cottage to the plaintiff were paid into the Acorn Cottage bank account. Those funds were the source of the funds paid by the first defendant to the fourth defendant. The fourth defendant received payment from the first defendant in various ways, including cash, bank transfers and debits on a Citibank credit card in the name of the first defendant. In the vast majority of the payments made to the fourth defendant, the source of the funds is the Acorn Cottage account. There are, however, some sums not readily identified as coming from that account.
- [19] The fourth defendant gave evidence in her own defence. The fourth defendant did not call the first defendant or any other witness at trial. The fourth defendant, who was born in 1981, left school in 1999. She worked for several years in a supermarket chain and subsequently a security firm. In early 2003, she returned to tertiary study. After one year, she ceased those studies and began working as a prostitute in the Gold Coast area.
- [20] In 2004, the fourth defendant was living at Lacey's Creek near Dayboro, in a rental property. She subsequently moved to rental properties in the Mt Glorious, Narangba and Samford areas. She resided in those properties with a male, Damien Lightbody. In 2006, she purchased the property near Mt Pleasant. She built a new house on that property in 2009. She has resided on that property with Damien Lightbody from December 2009. She keeps horses and other livestock on the property.
- [21] The fourth defendant had an interest in horses from an early age. As a teenager, she worked in stables in her local area. She acquired her first horse during this period. At

the time she met the first defendant she owned a number of horses. She had experience in the purchase of and caring for horses, including thoroughbreds. The first defendant also had an interest in thoroughbreds, on properties at Carney's Creek and Moggill.

- [22] In mid to late 2004 the fourth defendant met the first defendant when he responded to an advertisement on a website called "Australian Babe". He engaged her for sexual services on that occasion. She provided those services from an apartment in Kangaroo Point in Brisbane. The fourth defendant gave evidence that she was earning between \$3,000 and \$4,000 per week from prostitution services at that time. Thereafter, the first defendant arranged to meet with the fourth defendant once or twice a week for sexual services.
- [23] At this stage, the first defendant did not give her any gifts or speak about securing her services for the whole night.¹ On 6 October 2004, the first defendant asked the fourth defendant how much she would charge for an overnight visit. The fourth defendant responded "\$1,000 for 12 hours". When the first defendant asked how much for a week, the fourth defendant replied jokingly "you couldn't afford it".²
- [24] During this conversation, the first defendant asked whether, if he could match that, she work for him exclusively. The fourth defendant replied "... no. It was a financial risk for me and it wasn't Pretty Woman ... there wasn't going to be a happy ending. I'd just have to return to work and lose my regular clients".³ The first defendant raised the topic again on several occasions in November/December 2004.
- [25] The fourth defendant said on one of these occasions the first defendant said she would make a better horse stud manager than an escort. The fourth defendant replied that would be nice if were possible. This was late October 2004. The fourth defendant raised the idea of going back to university. The first defendant said he would support her through university if he could then engage her services as a vet or vet nurse.
- [26] The fourth defendant said when the first defendant raised working for him exclusively he said it would be less onerous working conditions for her so she could expect a little bit of a drop in pay but he would look after her living expenses and any veterinary expenses for the horses or expenses setting up the horse stud which was her ultimate goal. There was also a discussion about the fourth defendant being available to help the first defendant at his Carney's Creek property. The first defendant kept quarter horses on that property.
- [27] Towards the end of 2004, the first defendant purchased for the fourth defendant a 2004 Toyota Hilux. The first defendant said he expected her to work for him exclusively. If she became interested in another gentleman she was to let him know and they would "finish".⁴ The fourth defendant said after she was given the 2004 Hilux she agreed she would work for the first defendant exclusively. The fourth defendant was to receive \$1,000 per week cash. The first defendant would also pay her expenses. The first

¹ T4-3/25 – 30.

² T2-47/15.

³ T2-47/25.

⁴ T2-49/33.

defendant expected her to give up her “white picket like fence, boyfriend/husband and two cats”.⁵

- [28] The fourth defendant said after she agreed to this exclusive arrangement with the first defendant she closed her private escort service. Had she not done so she expected to have maintained the same earnings. Thereafter, she rendered sexual services to the first defendant two to three times per week at a time organised by him. She also regularly gave advice to the first defendant in relation to livestock and horses kept on his properties.
- [29] The fourth defendant agreed that when she entered into this agreement she did not know whether the first defendant would pay her but considered the first defendant a stable well to do gentleman. The arrangement gave her the opportunity to return to university to make something more of her life.⁶ At that time the fourth defendant assets consisted solely of some savings, five horses and a motor vehicle.
- [30] When this arrangement first commenced, the first defendant paid the fourth defendant in cash. The fourth defendant would ask the first defendant to pay specific expenses and he would leave cash for those expenses in an envelope in the motor vehicle when they met each week. This could be two or three times each week. The expenses were for rent, hay and horse expenses. It could be \$2,000 to \$3,000 per week. The first defendant would visit her two or three times a week. When they met it was at apartments rented by the first defendant. They would have sexual intercourse on these occasions.
- [31] The fourth defendant said she spoke to the first defendant daily, generally in the morning on his way to work and in the afternoon on his way home from work. She would also talk to him at various times during the day, depending on his movements. The fourth defendant discussed the pressures of his home and work life, as well as his horses, with the first defendant. She did not enjoy the telephone calls. It was part of what she was being paid to do. The fourth defendant would meet the first defendant for meals, often two to three times a week. She did not enjoy the meals but went because he was her employer and she was being paid to meet with him.
- [32] The fourth defendant attended the first defendant’s residence at Moggill on occasions to care for his animals when he was away. She would collect groceries at the first defendant’s request and cooked when the first defendant was at the residence and his wife was away. On those occasions she was allowed onto the back verandah but not into the backyard because she would be visible from the neighbour’s property.
- [33] In April 2005, the first defendant gave the fourth defendant a Citibank credit card. She could withdraw \$1,000 a week cash on that card. Her living expenses would also be taken off that card. The fourth defendant used the credit card for living and maintenance expenses, mortgage payments, hay, as well as for payment of the cash advance of \$1,000 a week. The \$1,000 a week was “a gratuity ... on top of any living expenses”.⁷ On occasions, trades people would be provided with a cheque signed by the first defendant.

⁵ T2-49/40.

⁶ T4-4/26 – 29.

⁷ T2-51/8 – 9.

- [34] The fourth defendant did not keep a record of the number of cash withdrawals. She went on recollection.⁸ The fourth defendant accepted there were many times when she withdrew \$1,000 cash on the credit card and immediately banked it into her own bank account.⁹ She said this occurred after the commencement of her mortgage.
- [35] The fourth defendant agreed on some occasions the withdrawals of cash occurred on sequential days. She would also incur other expenses on the credit card on those days.¹⁰ Where several withdrawals of cash occurred in the space of a few days, the cash could have been for hay which she paid for in cash.¹¹ The fourth defendant asked the first defendant for money from time to time. If the first defendant considered her request relevant or important and that she had “earned it” he would sometimes say something like “I’ll take it out of your hide later”.¹²
- [36] The fourth defendant could not recall whether her average withdrawal of cash per month was around \$10,000 and her average withdrawal for expenses per month was around \$13,500. The fourth defendant did not keep track of how much money was being expended by her.¹³ The fourth defendant accepted that on some occasions she withdrew large amounts on the credit card. She said this was for paying horse transportation costs. The first defendant always paid the outstanding Citibank credit card. The fourth defendant never paid anything towards the credit card account. She was not aware of anybody else paying that credit card account.¹⁴
- [37] The fourth defendant said that once she received the credit card she no longer received cash payments from the first defendant.¹⁵ The \$1,000 per week retainer would always be taken off the credit card as the first defendant found the idea of giving her cash “tacky”.¹⁶ The fourth defendant believed the first defendant also had other girls he paid for sexual services.¹⁷ The fourth defendant agreed that on occasions the first defendant would pay her expenses directly on her behalf.
- [38] The fourth defendant used the credit card almost on a daily basis. The fourth defendant would speak to the first defendant before using the credit card to make a purchase in respect of her expenses. The arrangement with the first defendant did not allow for unlimited expenses. The fourth defendant would discuss her upcoming expenses and the first defendant would agree or disagree to pay those expenses. The fourth defendant would store hay.¹⁸ The hay shed could store up to 450 bales. She would purchase in 300 bale lots, which would last between three and four weeks.
- [39] In 2006, the fourth defendant started her own horse breeding business, SOS Equity. She intended to use it to set up a horse stud. The fourth defendant did not prepare any tax

⁸ T4-5/30.

⁹ T4-6/1 – 3.

¹⁰ T4-6/7 – T4-8/10.

¹¹ T4-8/16 – 18.

¹² T2-50/15 – 17.

¹³ T4-14/14 – 18.

¹⁴ T4-43/17 – 26.

¹⁵ T4-20/9 – 11.

¹⁶ T4-18/38.

¹⁷ T4-18/44 – 45.

¹⁸ T4-13/20.

returns or financial statements for this business. The fourth defendant also did not submit any personal tax returns during this period. The purchase of the fourth defendant's horses were all were paid for either by cheque or international money transfers.¹⁹ If the first defendant paid for them he would give the fourth defendant a cheque or do a transfer into her bank account.²⁰

- [40] The fourth defendant accepted she sent the first defendant an email wherein she referred to herself turning into “a worry-wart girlfriend”.²¹ She also sent the first defendant an email which ended “In the meantime, love you heaps and a bit (heaps didn't seem to cover it), and missing you something chronic!!!!!!.” The fourth defendant accepted she regularly sent the first defendant emails containing photographs of her horses. She denied these types of communications were sent because she was the first defendant's “kept mistress”.²² It was part of that role she was paid to play.
- [41] The fourth defendant accepted they were private emails not intended to be seen by others. There was no compulsion to send the emails. The fourth defendant said the contents were not true. It was part of the “girlfriend” arrangement. The first defendant had replied to an advertisement where she was offering a girlfriend experience.
- [42] The fourth defendant said she gave advice about the horses and properties virtually every time she met the first defendant. The advice in respect of the Carney's Creek property included matters such as fencing arrangements, layout and management of the herd structure. The advice in respect of his Moggill properties was in relation to fencing and appropriate structures such as shelters for the horses, feed management systems and herd dominance structure. She discussed basic management strategies. She also gave advice to the first defendant when he purchased cattle for his Moggill property. The first defendant also wanted to set up a horse stud. Over time the first defendant's livestock, particularly horses, grew substantially. He ended up having about 65 thoroughbreds.
- [43] The fourth defendant said she gave advice about specific horses over a number of years. She had no formal qualifications but had practical experience. She had worked around horses her entire life. She had owned horses from a young age. She had looked after horses on her own behalf for approximately 10 years. On one occasion the fourth defendant met the first defendant's wife and subsequently met with his daughter two or three times. There was no explanation as to who she was and they did not ask her.
- [44] The fourth defendant visited each of these properties after giving the advice. She observed that her advice had been taken by the first defendant. The fourth defendant did not arrange trades people to undertake the work in accordance with her advice. The first defendant made all such arrangements. The fourth defendant travelled to New Zealand and interstate with the first defendant to visit horse studs. She gave advice in relation to some horses.

¹⁹ T4-24/12 – 14.

²⁰ T4-24/39 – 41.

²¹ T4-73/43 – 45.

²² T4-78/41 – 42.

- [45] The fourth defendant gave the first defendant advice in relation to work relationships, including how to work within a politically correct workplace and how to deal with fellow employees. The advice was given on the telephone and in person. She advised the defendant about pressures he had felt during the day. On occasions, she would speak to the first defendant about actual work projects and his monthly work reports. The first defendant felt extraordinary pressure in respect of the monthly reports. The fourth defendant would make herself available waiting for his telephone calls. If the fourth defendant did not answer immediately, the first defendant would become upset.
- [46] The fourth defendant said she gave advice to the first defendant about his physical appearance. She assisted him to buy clothing and advised him on his attire for work functions and around the property. She accompanied him to Sydney in 2006 and gave him advice about footwear for a court case involving Leightons. She advised him on appropriate attire for his motorcycle. She purchased a jacket from Harley Davidson at Breakfast Creek. She did not enjoy giving the advice but “needed the money”.²³
- [47] The fourth defendant accepted she had no formal qualifications in the areas in which she says she was engaged to give advice and support to the first defendant, except for a Certificate 4 in Vet Nursing from TAFE. She undertook this course in 2007, after she had met the first defendant. The first defendant paid for the course. The course related to both small and large animals.
- [48] The fourth defendant attended sporting events with the first defendant in the plaintiff’s corporate box. She was presented as a graphic designer from the plaintiff at a football match. When she attended a soccer match she was introduced as a freelance graphic designer. In 2006 she attended a cricket match with the first defendant, where she was simply introduced as Belinda with no indication of her occupation. She did not enjoy attending these games. She went because she was paid to do so.
- [49] The fourth defendant regularly baked biscuits, cakes or slices at the first defendant’s request. She did so personally on a fortnightly basis. On a monthly or second monthly basis, she cooked for his office. She would produce a variety of items. He told her other staff enjoyed “the melting moments”.²⁴ The ingredients would be paid for with the Citibank credit card provided by the first defendant.
- [50] The fourth defendant also assisted the first defendant with his hobby which was model trains. She would source train sets for him. Again, this was because she was paid to do so. The first defendant established a dedicated room for his model trains at his Moggill home. He later moved the set up to a shed on the property.
- [51] At the first defendant’s request, the fourth defendant drove him on various occasions,. She generally did so in her Toyota Hilux. The first defendant gave her another new Hilux in 2008. On one occasion, she drove the first defendant’s new Mercedes Benz. When the fourth defendant was living at the Mt Pleasant property she would drive for over an hour to pick up the first defendant at his office and transport him to wherever she was directed to take him. She did this because it was part of her agreement with the first

²³ T3-14/23 – 24.

²⁴ T3-16/34 – 35.

defendant. She would wait in the car and then drive him back to his office and drive home to Mt Pleasant.

- [52] The fourth defendant also undertook banking for the first defendant at his request. Again, she would be telephoned in advance and would arrange to pick him up at a set time. They generally would go for lunch after doing that banking. Those trips were once a week or once a fortnight, depending on the activities of the social club the banking was being undertaken in relation to.
- [53] In late 2006, the fourth defendant purchased the Mt Pleasant property for \$635,000. She obtained a bank loan of \$450,000. The balance of \$188,812.07 was provided by the first defendant, except for \$7,500 which came from the fourth defendant.²⁵ This was her only contribution to the purchase of the land at Mt Pleasant. That sum came from earlier savings or monies she had received from the first defendant.²⁶ Whatever cash she had accumulated from the first defendant was contributed to the property. She would keep cash in a kitchen drawer,²⁷ in case it was needed for an emergency.
- [54] The balance of the purchase price for the land at Mt Pleasant was paid to her by the first defendant, either by cheque or direct deposit.²⁸ The fourth defendant told the first defendant how much money she needed to meet the bank's requirements by way of deposit to purchase the property.²⁹ After the fourth defendant purchased the land she built a Titan shed on it using monies paid to her by the first defendant.³⁰ She later purchased a shade structure using monies provided by the first defendant. The monies for the construction of the house on the property were also provided by the first defendant. She told him what sums were required and he transferred the funds to her.
- [55] The fourth defendant remained living in rented accommodation in the Samford area until 2009 when she completed a house on the Mt Pleasant land. The fourth defendant accepted she had referred to this property, in an email to the first defendant, as "your property by proxy". It was a private joke. Although the first defendant had provided most of the funds to buy the land and had paid for the building and sheds on the property, that was money she received as part of her arrangement with the first defendant.³¹
- [56] The fourth defendant accepted she on occasions received large payments from the first defendant. Some of these amounts were by direct transfer, others by cheque. The majority of the large deposits were in payment of the construction of the residence on the Mt Pleasant property. The fourth defendant did not have any other source of income by the time she was building that residence.³² The first defendant would provide the money after the fourth defendant had met with him to discuss the amounts.

²⁵ T4-52/24 – 29.

²⁶ T4-48/14 – 17.

²⁷ T4-48/43 – 46.

²⁸ T4-49/39 – 46.

²⁹ T4-50/21.

³⁰ T4-55/5 – 6.

³¹ T4-77/20.

³² T4-11/40.

- [57] The fourth defendant accepted she did not lodge any tax returns during the period she was receiving monies from the first defendant, except for 2008 when she was working in a vet surgery. She did not declare the money she received from the first defendant in that income tax return. Since 2012, when the payments of money from the first defendant ceased, she has lodged outstanding tax returns for the financial years ending 30 June 2004 and 30 June 2013. The balance of the tax years remain outstanding.
- [58] The fourth defendant said she intended to lodge returns for those years, including an amended return for 2008 which would include the income she received from the first defendant. She was awaiting documentation. The fourth defendant denied she had only considered lodging tax returns after she decided to allege the existence of an agreement in these proceedings.³³ The fourth defendant said she had an agreement with the tax office to defer lodging the tax returns. She denied such an assertion was a “complete lie”.³⁴ She agreed she had not put in tax returns for monies earned in the years prior to having met the first defendant.³⁵
- [59] The fourth defendant accepted the spreadsheet she had prepared for this proceeding did not record \$1,000 per week being paid to her in accordance with the alleged agreement. The fourth defendant sometimes did not withdraw that amount every week. The arrangement was “fluid”, “it evolved with time, in that at the beginning, you know, there were seven horses ... by the end of it there were 65. And – yeah – it evolved along those lines”.³⁶ The agreement changed between 2004 and 2012. The fourth defendant agreed that in preparing that spreadsheet she had access to the Citibank credit card statements.³⁷
- [60] The fourth defendant agreed that in the affidavit initially prepared for this proceeding she did not mention the purported agreement with the first defendant. She denied that was because there was no such agreement.³⁸ The fourth defendant also agreed all of the horses currently on the Mt Pleasant property were horses identified by her in that affidavit or their progeny. She had cattle but they no longer exist on that property.
- [61] The fourth defendant accepted the arrangement she had with the first defendant required that she be his exclusive sexual partner “professionally”.³⁹ She accepted she shared a house with Damien Lightbody throughout this period. She accepted she had previously given evidence she had commenced a sexual relationship with Mr Lightbody in November 2012, shortly after the termination of her relationship with the first defendant. She denied having any sexual relationship with him before that date. She agreed she had portrayed him to the world as her partner but said he was her partner “with the horses”, not romantically. She agreed she removed a ring from her wedding finger in the course of the trial. She tended “to fiddle with it a lot”.⁴⁰

³³ T4-29/4 – 6.

³⁴ T4-33/22 – 23.

³⁵ T4-30/1 – 2.

³⁶ T4-38/30 – 33.

³⁷ T4-39/40 – 42.

³⁸ T4-44/34 – 35; exhibit 50.

³⁹ T4-79/15 – 18.

⁴⁰ T4-80/31.

- [62] The fourth defendant said that after she purchased the Mt Pleasant property she incurred a number of expenses in relation to the property and horses. She claims the cost of the improvements on that property, repairs and maintenance by way of counterclaim. These expenses were paid using the Citibank credit card supplied by the first defendant. The fourth defendant also sourced tractor parts on one occasion. This was done as part of her arrangements with the first defendant.
- [63] The parties subsequently agreed, for the purpose of the counterclaim, that the quantum of loan repayments made by the fourth defendant in respect of the Mt Pleasant property from December 2012 to June 2016 was principal and interest payments of \$129,842 and interest in the sum of \$69,000 and that a reasonable quantum of expenses incurred by the fourth defendant since November 2012 to June 2016 in respect of the property was agreed at \$73,000 (including GST).

Plaintiff's submissions

- [64] The plaintiff submits it has established the funds received by the fourth defendant from the first defendant were funds misappropriated from the plaintiff which had not been mixed with funds belonging to different parties.
- [65] The plaintiff submits it is entitled to recover the fourth defendant's real and personal property, either on the legal basis that it was acquired by funds held on trust by the first defendant for the plaintiff or on the equitable basis that the fourth defendant was under an equitable obligation, touching her conscience, to restore to the plaintiff the proceeds of the misappropriated funds that could be traced into her property at the date she received notice of its claim. The fourth defendant's liability is as a constructive trustee.
- [66] The plaintiff submits the fourth defendant was not a bona fide purchaser for value without notice. The fourth defendant's evidence of the existence of an "agreement" was not reliable or credible. The fourth defendant was a liar prepared to give false evidence in support of the claimed agreement. Her evidence was inconsistent with the contemporaneous emails and her initial affidavits. The fourth defendant had at best an informal arrangement with the first defendant in the nature of a kept or paid mistress. She was simply a volunteer in respect of the monies paid to her by the first defendant.
- [67] In any event, the plaintiff submits the alleged agreement is inherently uncertain and the fourth defendant's subsequent conduct was inconsistent with its alleged terms. The evidence established the fourth defendant took well in excess of \$1,000 per week in cash and other extraordinarily large payments inconsistent with the terms of the alleged agreement. There is no basis, by agreement or quantum meruit, for attributing any value to the services allegedly provided by the fourth defendant.
- [68] Alternatively, the plaintiff submits the alleged agreement is void as being against public policy. There was no relationship or consideration beyond "meretricious sexual services". Such an agreement is contrary to public policy and illegal.⁴¹ Further, there

⁴¹ See *Ashton v Pratt (No 2)* [2012] NSWSC 3; on appeal *Ashton v Pratt* (2015) 88 NSWLR 281; [2015] NSWCA 12.

was no intention to create legal relations and even if there was such an intention the contract was void for uncertainty.

- [69] The plaintiff submits that in respect of the Mt Pleasant property, whilst the fourth defendant enjoys indefeasibility of title pursuant to s 184 of the *Land Title Act 1994* (Qld), that enjoyment does not defeat the plaintiff's claim to the property. The plaintiff's claim is a claim in personam touching upon the owner of the land, not the title.⁴²
- [70] The plaintiff submits that in considering equitable relief, it is significant to note the fourth defendant displayed a cavalier attitude to her obligations to pay tax. Her evidence that she had reached an agreement with the Australian Tax Office about the non-lodgement of the returns until the conclusion of the case was not supported by the evidence. Her disregard for her tax obligations reflected on her credit and was itself disentitling conduct to the extent she sought to establish an equitable defence to the plaintiff's claim.

Fourth defendant's submissions

- [71] The fourth defendant submits the plaintiff has not established its claim. The plaintiff called none of its officers or employees to give evidence of the payments of the Acorn Cottage invoices. The plaintiff also did not call the first defendant to give evidence. Whilst common sense and reasonable inference play a part in any tracing exercise, the necessary inferences are more easily drawn where the recipient gives no explanation as to the circumstances of the receipt of the money or any source of it. That is not the case here. The fourth defendant has given evidence she received the money for services rendered for value.
- [72] The fourth defendant submits the significant shortcomings in the evidence led by the plaintiff leave the Court unable to infer that funds paid into the Acorn Cottage accounts, the Citibank credit card facility or any jointly held accounts in the name of the first defendant's wife and daughter were funds misappropriated from the plaintiff. There are many unexplained transactions, leaving open an inference there has been a mixing of legitimate and misappropriated funds into those accounts. Such a finding prevents a tracing exercise being undertaken in all the circumstances. Any evidence by the fourth defendant as to the source of the funds received by her is not an admission upon which the Court should act. It is the duty of the Court to undertake the tracing exercise.
- [73] The fourth defendant further submits, in respect of the Citibank credit card and the fourth defendant's home loan, that no evidence has been led of the first defendant's intention, when each of the payments were made to the accounts, to treat those monies subsequently paid as trust funds. Accordingly, it is not possible to trace into the fourth defendant's home loan account or through the Citibank credit card facility.
- [74] The fourth defendant submits the Court would accept that in respect of any misappropriated funds found to have been paid by the first defendant to the fourth defendant, the fourth defendant was not a volunteer. The fourth defendant received the

⁴² *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230; [2009] NSWCA 92 at 252 – 253 [92]; 265 – 266 [154]; *Sze Tu v Lowe* (2014) 89 NSWLR 317; [2014] NSWCA 462 at 361; *Fistar v Riverwood Legion and Community Club Ltd* [2016] NSWCA 81 at [82].

payments from the first defendant pursuant to an agreement for the provision of sexual and other services for reward or, alternatively, on account of services rendered for value by the fourth defendant to the first defendant. The consideration provided by the fourth defendant for that agreement was valuable consideration. It consisted of eight years of personal service, in circumstances where the fourth defendant gave up her escort business having agreed to provide the services to the first defendant on an exclusive basis.

- [75] The fourth defendant submits the agreement is not illegal. The agreement was made at a time when the fourth defendant was providing paid escort services. The promise is an enforceable promise which the fourth defendant relied upon because she ceased rendering escort services to others after entering into the agreement. Such an agreement is not contrary to public policy. The arrangement included not only the provision of sexual services. It included the provision of a suite of other services as part of a wider relationship. The agreement formalised the financial aspects of a pre-existing arrangement between the first defendant and the fourth defendant.
- [76] The fourth defendant submits the arrangement was also sufficiently certain. The services to be provided were specified and the fourth defendant relied on the first defendant performing his obligations under the agreement as her only substantial continuing source of income. It was never put to the fourth defendant that the conversations with the first defendant did not occur.
- [77] The fourth defendant submits her default in her obligations to file tax returns is consistent with the fourth defendant not diligently managing her personal affairs. Further, whether the fourth defendant remained faithful to the terms of the arrangement did not affect the reliability of her evidence as to the existence of that arrangement. Similarly, whether the fourth defendant received amounts in excess of the terms of the agreement did not affect the credibility of her evidence.
- [78] The fourth defendant submits, in the alternative, that if there was no such agreement the fourth defendant received the funds on account of services rendered by her. Such services were provided for value. Accordingly, she is not a volunteer. No inference should be drawn from the failure to call the first defendant as a witness. The first defendant was not a witness of credit. Further, it was never put to the fourth defendant the conversations with him did not occur.
- [79] Finally, the fourth defendant submits that any claim over the Mt Pleasant property is defeated by indefeasibility of title. For the personal exception to apply, the personal claim against the registered proprietor must arise from personal conduct of the registered proprietor which is more than merely becoming the new registered proprietor. No such additional conduct is alleged in the present case. In any event, the fourth defendant changed her position such that it would be inequitable to require her to effect restitution. The significant costs incurred by the fourth defendant as pleaded in the counterclaim are supportive of that change of position.
- [80] In the event the plaintiff succeeds in the claim, the fourth defendant claims, by way of counterclaim, the monies expended by her in respect of the maintenance and improvement of the real property and other assets.

Findings

Generally

- [81] There is no doubt the first defendant misappropriated substantial funds from the plaintiff throughout the period he was providing funds to the fourth defendant. His conviction for that offence and the factual basis upon which he entered his plea of guilty amply support that conclusion.⁴³ I draw no adverse inference from the plaintiff's failure to call witnesses from the plaintiff to establish that misappropriation. It was entirely unnecessary in all of the circumstances.
- [82] I also draw no adverse inference from the failure of the plaintiff and the fourth defendant to call the first defendant as a witness at the trial. The first defendant is plainly devoid of any credit. Any party calling him would have had to acknowledge they were calling a witness without credit. In those circumstances, there is a proper explanation for both the plaintiff and the fourth defendant's failure to call the first defendant as a witness.
- [83] The evidence establishes the fourth defendant received substantial sums from the first defendant between 2004 and November 2012. The fourth defendant confirmed in evidence the receipt of funds from the first defendant throughout that period. The fourth defendant accepted she had no other legitimate source of income in that period. In large measure, the evidence establishes the funds provided to the fourth defendant by the first defendant were provided from the Acorn Cottage account, through which he misappropriated the funds from the plaintiff.
- [84] Adopting a practical approach to the tracing of those funds, I am satisfied that any funds provided by the first defendant to the fourth defendant from Acorn Cottage accounts were funds misappropriated from the plaintiff. That conclusion includes funds advanced by way of the Citibank credit card which were subsequently repaid by payment of the outstanding balance on the card through the Acorn Cottage account. There are some transactions which require special consideration. I have dealt with those issues later in this judgment.
- [85] Whilst I accept the fourth defendant's evidence that she received large sums from the first defendant throughout the course of their time together, I did not find the fourth defendant a credible witness in relation to the circumstances in which she received those funds. The fourth defendant impressed me as being prepared to give inaccurate evidence in an attempt to advance the prospects of her version of the circumstances in which she received these funds being accepted as truthful. I do not accept much of the fourth defendant's account of the circumstances of her relationship with the first defendant.

Were the funds used by the fourth defendant to purchase assets misappropriated funds?

- [86] The plaintiff submits it is able to trace misappropriated funds into five categories: various chattels; horses, together with their progeny; the acquisition of vacant land at Mt Pleasant

⁴³ The factual basis is also set out in judgment of the Queensland Court of Appeal, dealing with his appeal against sentence: *R v O'Carrigan* [2013] QCA 327. The judgment is Exhibit 12.

in November 2006; a house constructed on the Mt Pleasant land; and improvements to the house constructed on the Mt Pleasant land.

[87] The plaintiff submits the property in each of these five categories was purchased by the fourth defendant, using funds misappropriated from the plaintiff, with the exception of the Mt Pleasant land, which it accepts were partly funded by non-misappropriated funds.

[88] Whether those funds received by the fourth defendant from the first defendant were funds misappropriated from the plaintiff depends upon a tracing exercise. In *Heperu Pty Ltd v Belle*⁴⁴, Allsop P observed:

“Tracing has been said to be neither a claim nor a remedy, rather the process by which a claimant demonstrates what has happened to its property, identifies its proceeds and the persons who have handled or received them; and the successful completion of a ‘tracing exercise’ may be a preliminary to the making of a personal or proprietary claim, to the extent such is available ...”

[89] A tracing exercise is to be undertaken having regard to several rules. Relevantly, those rules include, in the case of a bank account, that the first sum paid in is regarded as the first sum paid out,⁴⁵ except where there is a mixture of funds belonging to different parties. In that event, the presumption is that the first funds drawn out are those of the defaulting fiduciary. Accordingly, where a defaulting fiduciary pays funds into an account in which there are trust monies of a third party the presumption is that the first funds drawn out are the defaulting fiduciary’s own monies.⁴⁶ A further rule is that if funds are deposited into the account of a volunteer and there is no mixing of funds from the volunteer’s own funds, the volunteer holds the funds on behalf of the true owner.⁴⁷

[90] In undertaking a tracing exercise in respect of misappropriated funds, the Court is to adopt a sensible, robust approach, drawing inferences where necessary. In *Toksoz v Westpac Banking Corporation*⁴⁸ Allsop ACJ said:

“Where the facts as proved are sufficient to permit the inference that moneys have been received or property bought without there being an honest source available to explain the wealth and the sums or value can be seen as referable to the following party’s property wrongfully obtained, such that the inference is open that the wrongfully obtained funds were the source of the wealth, the funds can be so treated. One does not need to be able to show every link in the chain of accounts from and through which the money passed. Inferences will be more easily drawn, as here, in circumstances where the funds were stolen, the person who is said to have provided the funds was one of the thieves who stole money from the follower, when the recipient has an apparent close relationship with the thief, which recipient gave no value for

⁴⁴ (2009) 76 NSWLR 230; [2009] NSWCA 252 at 252 [89].

⁴⁵ *Clayton’s Case*; *Devaynes v Noble* (1816) 1 Mer 572; 35 ER 781.

⁴⁶ *Re Hallett’s Estate*; *Knatchbull v Hallett* (1880) 13 Ch D 696 applied in *Brady v Stapleton* (1952) 88 CLR 322; [1952] HCA 62 at 336.

⁴⁷ *In Re Diplock*; *Diplock v Wintle* [1948] 1 Ch 465.

⁴⁸ (2012) 289 ALR 577; [2012] NSWCA 199 at 579 – 80 [9].

it, has no personal source of income and gives no explanation as to the source or circumstances of the receipt of the money or any honest source of it.”

- [91] Prior to considering any tracing exercise in the present case, it is necessary to consider four preliminary submissions of the fourth defendant.
- [92] First, the fourth defendant submits there is no reason why it should be inferred the funds in accounts controlled by the first defendant were the plaintiff’s funds as the plaintiff has not tendered any of its accounts showing that any amounts were paid by the plaintiff to the first defendant.
- [93] I do not accept that submission. Where it is relevant, the plaintiff has demonstrated the flow of its money into accounts controlled by the first defendant (primarily into the Acorn Cottage account) by tendering invoices rendered by Acorn Cottage, remittance advices prepared by the plaintiff to confirm payment of those invoices and contemporaneous bank account statements showing the deposit of amounts into those bank accounts.
- [94] One example suffices to demonstrate the sufficiency of this evidence. An Acorn Cottage bank statement shows a deposit of \$56,100 on 24 February 2006.⁴⁹ This deposit is from funds deposited from the plaintiff. There is an invoice rendered by Acorn Cottage to the plaintiff for \$56,100⁵⁰ and a remittance advice recording payment of \$56,100 from the plaintiff to Acorn Cottage.⁵¹
- [95] Having regard to the documentary evidence, there was no need for the plaintiff to have tendered its accounts. As the above example demonstrates, the evidence it tendered was sufficient to prove the flow of money misappropriated by the plaintiff into accounts controlled by the first defendant. On some occasions the tracing exercise becomes even more straightforward. Deposits into the Acorn Cottage bank account bears the narration “Leighton Contrac”, evidencing the source of the funds.⁵²
- [96] Second, the fourth defendant submitted the various bank accounts contain a mixture of untraceable and misappropriated funds. So much is candidly conceded by the plaintiff throughout its submissions. The true controversy between the parties is the tracing rule that ought to be applied when an account contains mixed funds.
- [97] The fourth defendant submits the tracing rule to be applied is the lowest intermediate balance rule, as set out in *Re French Caledonia Travel Services Pty Ltd*⁵³, not the tracing rule set out in *Re Hallett’s Estate*,⁵⁴ namely, that the first funds drawn out of an account containing mixed funds are presumed to be the untraceable funds.

⁴⁹ Exhibit 13, E-99.

⁵⁰ Exhibit 10, B-333.

⁵¹ Exhibit 9, B-205.

⁵² See, for example, the 13 March 2009 deposit: exhibit 13, E-161.

⁵³ (2003) 59 NSWLR 361; [2003] NSWSC 1008 at 417–18 [175] per Campbell J, applying *James Rosoe (Bolton) Ltd v Winder* [1915] 1 Ch 62.

⁵⁴ (1880) 13 Ch D 696.

- [98] *Re French Caledonia* is distinguishable from the present case, as there was no allegation of wrongdoing. In the case of a wrongdoer, the tracing rules are different. As was observed by Edelman J in his discussion “Understanding Tracing Rules”, the case of a wrongdoer presents an exception to the rules for tracing through unused funds.⁵⁵ *Frith v Cartland*⁵⁶ contains the statement of the relevant tracing rule in such a case, namely, that where a wrongdoer mixes his own funds with trust property he cannot claim that any withdrawals applied for personal purposes were of trust money. The trust must have its money, so long as sufficient funds remain in the account containing the mixed funds.
- [99] The rule in *Frith v Cartland* was cited with approval in *Re Hallett’s Estate*.⁵⁷ Both decisions were also cited with approval by Brennan CJ in *Parker v The Queen*⁵⁸ and a majority of the High Court of Australia in *Brady v Stapleton*.⁵⁹ The tracing rules contended for by the plaintiff are applicable.
- [100] Third, the fourth defendant submits that whilst the plaintiff relies on her evidence (elicited under cross examination) to prove the transfer of the plaintiff’s money from the Acorn Cottage accounts to the fourth defendant, in respect of certain assets claimed by the plaintiff, her evidence does not establish the plaintiff’s money funded the purchase of assets by her. However, that submission misunderstands the plaintiff’s case, insofar as it relies on the fourth defendant’s evidence in support of its claim for certain assets.
- [101] The plaintiff relies on the fourth defendant’s evidence about the first defendant’s bank statements that relate to the Citibank credit card, which she marked up to note charges that related to assets in her possession, to prove how the fourth defendant purchased the assets.⁶⁰ The plaintiff relies on other evidence to prove that misappropriated funds were used to repay charges on the Citibank credit card.
- [102] The fourth defendant also submitted I should not accept her evidence as to how she purchased the various assets because she cannot give admissible evidence regarding documents created by the first defendant and his banks. However, the fourth defendant was in a position to give evidence about the charges incurred on that Citibank credit card, as recorded on the various statements. She used that card.
- [103] Whilst I have made adverse findings as to the fourth defendant’s credit in respect of other matters, there is no reason to doubt the accuracy with which she undertook the exercise of marking up the credit card statements in order to identify charges that relate to assets in her possession. The narrations for those charges often accorded with those assets. I accept the fourth defendant’s evidence identifying the entries in the Citibank credit card statements that relates to specific assets in her possession.

⁵⁵ Justice Edelman, ‘Understanding Tracing Rules’ (Speech delivered at the W A Lee Equity Lecture 2015, Banco Court, Supreme Court of Queensland, 26 November 2015) < <http://www.fedcourt.gov.au/publications/judges-speeches/justice-edelman/edelman-j-20151126>>.

⁵⁶ (1865) 2 H&M 417; 71 ER 525 at 527.

⁵⁷ (1880) 13 Ch D 696 at 719 – 720.

⁵⁸ (1997) 186 CLR 494; [1997] HCA 15 at 501 – 503.

⁵⁹ (1952) 88 CLR 322; [1952] HCA 62 at 336 – 339.

⁶⁰ Exhibit 43.

- [104] Fourth, the fourth defendant submitted it is not possible to trace funds through the Citibank credit card because it is an overdrawn account. The fourth defendant submits, as a matter of law, tracing is not possible into overdrawn accounts.⁶¹ However, a credit card is not the same as an overdrawn account. It is a substitute for cash.⁶²
- [105] In respect of such an account, the observations of the Privy Council in *The Federal Republic of Brazil v Durant International Corporation*⁶³ are apposite:
- “... a court should not allow a camouflage of interconnected transactions to obscure its vision of their true overall purpose and effect. If the court is satisfied that the various steps are part of a co-ordinated scheme, it should not matter that, either as a deliberate part of the choreography or possibly because of the incidents of the banking system, a debit appears in the bank account of an intermediary before a reciprocal credit entry.”
- [106] Tracing can apply to the Citibank credit facility provided the plaintiff has established “a co-ordination between the [the misappropriated funds] and the acquisition of the asset which is the subject of the tracing claim, looking at the whole transaction, such as to warrant the court attributing the value of the interest acquired to the [misappropriated funds].”⁶⁴ As I will explain later in these Reasons, the plaintiff has established this co-ordination for most of the assets it alleges were purchased with the Citibank credit card.⁶⁵
- [107] In any event, the principle that tracing is not possible where funds are placed into an account the balance of which is overdrawn, is subject to an exception, where it is shown it was always the intention to use the misappropriated funds to acquire the asset.⁶⁶ That exception is applicable here.
- [108] I am satisfied it was always the first defendant’s intention to use funds misappropriated by him to acquire the assets identified by the fourth defendant. The first defendant gave the fourth defendant the Citibank credit card for the express purpose that she should use it.⁶⁷ The first defendant always intended throughout its use that funds from Acorn Cottage account would be used to pay the credit card balance. The Acorn Cottage account contained the misappropriated funds. The only reasonable inference is that it was the first defendant’s intention for misappropriated funds to be used to acquire the assets identified by the fourth defendant as having been acquired through her use of the Citibank credit card.

⁶¹ *Williams v Peters* [2010] 1 Qd R 475; [2009] QCA 180 at 492-493 [31]-[44].

⁶² *American Express International Inc v Commissioner of State Revenue* [2003] VSC 32 at [20], citing *Re Charge Card Services Ltd* [1989] Ch 497 at 509; [1988] 3 All ER 702 at 705.

⁶³ [2016] AC 297; [2015] UKPC 35 at 312 [38].

⁶⁴ *The Federal Republic of Brazil v Durant International Corporation* [2016] AC 297; [2015] UKPC 35 at 313 [40].

⁶⁵ Reasons at [109] – [115], 0 – [143].

⁶⁶ *Australian Receivables Ltd v Tekitu Pty Ltd* [2011] NSWSC 1306 at [154]; *Foskett v McKeown* (1998) Ch 265 at 283 – 84.

⁶⁷ T2-50/1 – 11.

Chattels

- [109] The fourth defendant identified a number of items she concedes were purchased using funds provided to her by the first defendant.⁶⁸ The plaintiff alleges that all but two of those items were purchased using the Citibank credit card. I accept the plaintiff has proven that to be the case.
- [110] However, the plaintiff must also prove the items were paid for using misappropriated funds. In its submissions, the plaintiff prepared a document showing the repayments made towards the Citibank credit card.⁶⁹ There is also a document that summarises the repayments and whether they were made using misappropriated or untraceable funds.⁷⁰
- [111] The question whether the items paid for using the Citibank card were repaid using misappropriated funds does not have a straightforward answer because the first defendant never fully repaid the balance of the Citibank card. Items which were purchased in one month were not necessarily repaid in the following month, because there was still an outstanding balance from previous months.
- [112] The plaintiff's submissions do not address this issue in detail. The plaintiff's submissions do not match the relevant items to the funds used to repay them, so as to demonstrate that those items were repaid using misappropriated funds. This is a necessary step because the plaintiff concedes the Citibank credit card was repaid using both untraceable and misappropriated funds.⁷¹
- [113] However, the evidence makes it possible to do so in the following way:
- The first Citibank statement relied upon is for the period "December 2006". There is an opening balance of \$33,408.58, which represents charges already incurred.
 - During the "December 2006" period, there was a repayment of \$25,000 using misappropriated funds. Under the assumption that any repayment is first applied to the oldest charges, that repayment must be applied to the opening balance, which means \$8,408.58 of that opening balance remains unpaid.
 - The next repayment was \$20,000, which included \$5,792.83 of untraceable funds and \$14,207.17 of misappropriated funds. Using the principles of tracing relied upon by the plaintiff,⁷² it must be assumed the untraceable funds are used first and applied to the remainder of the opening balance (\$8,408.58). This leaves \$2,615.75 unpaid on the opening balance.

⁶⁸ Exhibit 43; Exhibit 50. These items were summarised in two tables, set out in Annexure G to the plaintiff's written submissions.

⁶⁹ Plaintiff's written submissions, Annexure B.

⁷⁰ Plaintiff's written submissions, Annexure I.

⁷¹ Plaintiff's written submissions, Annexure I.

⁷² *Re Hallett's Estate* (1880) 13 Ch D 696.

- The misappropriated funds (\$14,207.17) are then applied to the unpaid amount of \$2,615.75. This is sufficient to discharge the remainder of the “December 2006” opening balance, leaving \$11,591.42 of misappropriated funds from that repayment.
- The remainder of these misappropriated funds must then be applied to the next amounts that were charged to the Citibank credit card, namely the new charges incurred during the “December 2006” period.

[114] The above exercise has been completed to the point at which the available evidence is exhausted. It is set out in Annexure A to these Reasons, which commences with the new charges incurred during the “December 2006” period. The result of that exercise is that the plaintiff has proven some of the items were paid for using misappropriated funds, while others were not. These are set out in the table below, with a brief explanation of how that conclusion is reached.

Item	Statement period in which item purchased	Repaid using misappropriated or untraceable funds	Explanation	Amount paid (only for items paid using misappropriate funds)
Toro ride-on mower	July 2007	Misappropriated funds	All charges incurred during the July 2007 statement period were paid using misappropriated funds.	\$3,906
Superior aerorator for tractor	February 2008	Untraceable funds	All charges incurred during the February 2008 statement period were paid using untraceable funds.	N/A
Walker exercise machine	February 2010	Untraceable funds	All charges incurred during the February 2010 statement period were paid using untraceable funds.	N/A
Water rowing machine	December 2011	Misappropriated funds	All charges incurred during the December 2011 statement period were paid using misappropriated funds.	\$2,458
King furniture lounge (\$2,110 payment)	August 2011	Misappropriated funds	The first repayment of August 2011 charges constituted untraceable funds, but the subsequent repayment was made with misappropriated funds. This item was repaid with misappropriated funds.	\$2,110
King furniture payment (\$7,994 payment)	October 2011	Misappropriated funds	All charges incurred during the October 2011 statement period were paid using misappropriated funds.	\$7,994
Acer desktop computer	July 2010	Misappropriated funds	The first repayment of July 2010 charges constituted misappropriated funds. This item was repaid by that first repayment and therefore repaid with misappropriated funds.	\$2,836

Item	Statement period in which item purchased	Repaid using misappropriated or untraceable funds	Explanation	Amount paid (only for items paid using misappropriate funds)
Dishwasher	August 2009	Misappropriated funds	All charges incurred during the August 2009 statement period were paid using misappropriated funds.	\$1,800
Washing machine/dryer	August 2009	Misappropriated funds	All charges incurred during the August 2009 statement period were paid using misappropriated funds.	\$2,300
Generator	January 2011	Misappropriated funds	The first repayment of January 2011 charges constituted misappropriated funds. This item was repaid by that first repayment and therefore repaid with misappropriated funds.	\$1,751
Dining set	December 2006	Misappropriated funds	The first repayment of December 2006 charges constituted misappropriated funds. This item was repaid by that first repayment and therefore repaid with misappropriated funds.	\$600
Gerni	November 2011	Misappropriated funds	All charges incurred during the November 2011 statement period were paid using misappropriated funds.	\$586
Whipper snipper	January 2010	Misappropriated funds	The first repayment of January 2010 charges constituted misappropriated funds. This item was repaid by that first repayment and therefore repaid with misappropriated funds.	\$818.90
TV cabinet, chest of drawers and coffee table	December 2009	Misappropriated funds	All charges incurred during the December 2009 statement period were paid using misappropriated funds.	\$1,823
Kitchen stools	August 2009	Misappropriated funds	All charges incurred during the August 2009 statement period were paid using misappropriated funds.	\$224.97
Framing	October 2008	Misappropriated funds	All charges incurred during the October 2008 statement period were paid using misappropriated funds.	\$1,010.00
Conveyor belt for stables	June 2008	Misappropriated funds	All charges incurred during the June 2008 statement period were paid using misappropriated funds.	\$671.56

Item	Statement period in which item purchased	Repaid using misappropriated or untraceable funds	Explanation	Amount paid (only for items paid using misappropriate funds)
Rubber for stables	March 2008	Untraceable funds	The first repayment of March 2008 charges constituted untraceable funds. This item was repaid by that first repayment and therefore repaid with untraceable funds.	N/A
Bird cage feed bins	February 2008	Untraceable funds	All charges incurred during the February 2008 statement period were paid using untraceable funds.	N/A
Couch	February 2008	Untraceable funds	All charges incurred during the February 2008 statement period were paid using untraceable funds.	N/A
Photos for framing	August 2009	Misappropriated funds	All charges incurred during the August 2009 statement period were paid using misappropriated funds.	\$425.00
Filter & tripod	June 2009	Misappropriated funds	All charges incurred during the June 2009 statement period were paid using misappropriated funds.	\$215.67
Pump for horse troughs	April 2009	Misappropriated funds	All charges incurred during the April 2009 statement period were paid using misappropriated funds.	\$701.80
Laptop	March 2009	Misappropriated funds	All charges incurred during the March 2009 statement period were paid using misappropriated funds.	\$1,176.26
Bullbar for Hilux	February 2009	Misappropriated funds	All charges incurred during the February 2009 statement period were paid using misappropriated funds.	\$2,000.00
Spotlights for Hilux	February 2009	Misappropriated funds	All charges incurred during the February 2009 statement period were paid using misappropriated funds.	\$673.52
Microwave & oven	February 2009	Misappropriated funds	All charges incurred during the February 2009 statement period were paid using misappropriated funds.	\$6,007.00
Conveyer belt for stables	September 2010	Misappropriated funds	All charges incurred during the September 2010 statement period were paid using misappropriated funds.	\$855.22
Printer	September 2010	Misappropriated funds	All charges incurred during the September 2010 statement period were paid using misappropriated funds.	\$765

Item	Statement period in which item purchased	Repaid using misappropriated or untraceable funds	Explanation	Amount paid (only for items paid using misappropriate funds)
Car accessories	June 2010	Misappropriated funds	All charges incurred during the June 2010 statement period were paid using misappropriated funds.	\$334.77
Curtains	February 2010	Untraceable funds	All charges incurred during the February 2010 statement period were paid using untraceable funds.	N/A
Curtains	January 2010	Misappropriated funds	The first repayment of January 2010 charges constituted misappropriated funds. This item was repaid by that first repayment and therefore repaid with misappropriated funds.	\$3,000.00
Cordless drill	July 2011	Misappropriated funds	The first repayment of July 2011 charges constituted misappropriated funds. This item was repaid by that first repayment and therefore repaid with misappropriated funds.	\$272.37
Cordless phones	September 2012	Misappropriated funds	The evidence of repayments is exhausted when considering the repayment of the September 2012 charges. However, the evidence demonstrates this item was repaid using misappropriated funds.	\$249.55
Printer	August 2012	Misappropriated funds	All charges incurred during the August 2012 statement period were paid using misappropriated funds.	\$787.95
Drums	May 2012	Misappropriated funds	All charges incurred during the May 2012 statement period were paid using misappropriated funds.	\$517.00
TOTAL (MISAPPROPRIATED FUNDS ONLY):				\$48,871.54

[115] Some of the above items were purchased during statement periods that were repaid using a combination of misappropriated and untraceable funds. For example, the cordless drill in the above table was purchased during the “July 2011” statement period. The charges incurred during that period were repaid using a combination of misappropriated and untraceable funds (see the relevant entry in the table in Annexure A). For such items, it was necessary to add up all charges incurred in the statement period prior to that item. That calculation revealed whether the item was repaid using misappropriated or untraceable funds.

[116] The exercise set out in [113] requires an acceptance the relevant repayments constituted misappropriated funds. The plaintiff provided comprehensive written submissions

addressing that question.⁷³ I am satisfied the plaintiff has proven misappropriated funds were used to repay the Citibank card, where it alleges that to be the case.

- [117] There were two items the plaintiff submits were not purchased using the Citibank credit card but using other misappropriated funds: a tractor and ride-on mower.
- [118] The tractor was allegedly purchased by the fourth defendant on 12 July 2007 for \$35,000. The plaintiff submits the tractor was paid for using funds withdrawn from the Acorn Cottage account on 21 March 2007.⁷⁴ That withdrawal was for \$35,000 and bore the narration “cashed cheque 001183”. However, apart from the similarities in amounts, there is no evidence this withdrawal was used to purchase the tractor. That similarity is not enough to prove this withdrawal was used to purchase the tractor, especially given the withdrawal and purchase are nearly four months apart. The plaintiff’s claim in respect of this item fails.
- [119] The ride-on mower was purchased on 24 October 2012 for \$14,150. The plaintiff submits the mower was paid for using funds withdrawn from the Blackrayne bank account on 24 October 2012.⁷⁵ That withdrawal was for \$14,150 and bore the narration “Transfer to other Bank NetBank”. I accept this withdrawal was used to pay for the mower. The withdrawal and payment are for the same amount and occur on the same date.
- [120] To succeed in its claim for the mower, the plaintiff must also prove the withdrawal constituted misappropriated funds. I am satisfied the withdrawal constituted misappropriated funds.⁷⁶ I shall briefly set out my reasons:
- As at 22 October 2012, the Blackrayne bank account contained only untraceable funds.⁷⁷
 - As at 23 October 2012, the Acorn Cottage bank account contained misappropriated funds only.⁷⁸
 - On 23 October 2012, a withdrawal was made from the Acorn Cottage bank account for \$50,000. It bore the narration “Transfer to CBA A/c NetBank”.⁷⁹
 - On 23 October 2012, the Blackrayne bank account statements record a \$50,000 deposit with the narration “Transfer from NetBank”. I accept this deposit was the money withdrawn from the Acorn Cottage account on that same day. This inference is available having regard to the fact the withdrawal and deposit occurred on the same

⁷³ Plaintiff’s written submissions, annexure B.

⁷⁴ Plaintiff’s written submissions, annexure G, A-1. This is an extract of a bank statement that is included in exhibit 13.

⁷⁵ Plaintiff’s written submissions, annexure D. This is an extract of a bank statement that is included in exhibit 14.

⁷⁶ Plaintiff’s written submissions, annexure D.

⁷⁷ Plaintiff’s written submissions, annexure D, E-263.

⁷⁸ Plaintiff’s written submissions, annexure C, E-236. This is an extract of a bank statement that is included in exhibit 13.

⁷⁹ Plaintiff’s written submissions, annexure C, E-236.

date, for the same amount and that Blackrayne bank account is a CBA account (which matches the narration on the withdrawal). The omission of CBA from the deposit narration is of no moment. A perusal of the extract of the Blackrayne bank statement reveals it is only withdrawals which specify whether a transfer is to a CBA account or bank account held with another bank; deposits simply record a transfer from “NetBank”.

- After the deposit, the Blackrayne bank account contained a mixture of untraceable and misappropriated funds. Following the rule in *Re Hallett*,⁸⁰ the untraceable funds are assumed to be withdrawn first. The untraceable funds are exhausted in transactions on 23 and 24 October, *prior* to the withdrawal used to pay for the mower. Accordingly, the mower was paid for using misappropriated funds.

Horses

- [121] The fourth defendant states she purchased numerous horses using funds paid to her by the first defendant.⁸¹ She has listed the names of horses she owns, including (where relevant) the purchase prices and dates of purchase and/or transportation. There are four horses in that list the plaintiff submits were purchased using misappropriated funds: Sky’s Limit Tax, Imperial Griffin, Jensen’s Major Ivy and Southern Cross Glamour Girl.
- [122] I accept those four horses were purchased by the fourth defendant using funds provided to her by the first defendant. However, the plaintiff must prove the funds used by the fourth defendant were misappropriated funds. To prove this, the plaintiff identifies withdrawals from the Acorn Cottage account and the fourth defendant’s account.
- [123] Sky’s Limit Tax was purchased on 20 September 2007 for US\$12,000. The plaintiff submits this purchase was made with funds provided by a withdrawal on 19 September 2007 of \$15,443.46 (all of which, I accept, constituted misappropriated funds⁸²) from the Acorn Cottage account. The withdrawal bore the narration “netbank transfer”. While there is no evidence the payments for horses were contemporaneous, the fourth defendant’s evidence was that payments of money may be temporally distinct from the dates of acquisition and transport.⁸³ Adopting the robust sensible approach, the only reasonable inference from the contemporaneousness of the dates and the fourth defendant’s evidence that the horse was purchased using funds provided by the first defendant is that Sky’s Limit Tax was purchased using misappropriated funds.
- [124] Imperial Griffin was purchased on 24 February 2010 for US\$10,000. The plaintiff submits this purchase was made with funds provided by a withdrawal on 5 March 2010 of \$10,047.95 from the fourth defendant’s bank account 3905. The withdrawal bore the narration “Repayment Redraw Netbank”. However, there is no evidence the amount transferred from the fourth defendant’s bank account constituted misappropriated funds. The plaintiff’s submissions suffer from the added doubt that the alleged payment was

⁸⁰ *Re Hallett’s Estate* (1880) 13 Ch D 696.

⁸¹ Exhibit 50, paragraph 9.

⁸² Plaintiff’s written submissions, annexure C, E-126.

⁸³ Plaintiff’s written submissions, annexure A, paragraph 21.

sufficient to cover the payment price, when exchange rates are taken into account. The plaintiff has not proven Imperial Griffin was purchased using misappropriated funds.

- [125] Jensen's Major Ivy was purchased on 2 November 2008 for US\$12,000. The plaintiff submits this purchase was made with funds provided by two withdrawals on 3 November 2008 from the Acorn Cottage account, totalling \$15,801.04. I accept both withdrawals constituted misappropriated funds.⁸⁴ The withdrawals each bore the narration "netbank transfer". Again, using the robust sensible approach, the only reasonable inference from the fourth defendant's evidence and the contemporaneous dates, is that Jensen's Major Ivy was purchased using misappropriated funds.
- [126] Southern Cross Glamour Girl was purchased on 11 October 2012 for \$15,000. The plaintiff submits this purchase was made with funds provided by a withdrawal on 12 October 2012 of \$13,500 from the fourth defendant's account 8799. The withdrawal bore the narration "Glamour Girl". I accept this withdrawal was used to pay, in part, for Southern Cross Glamour Girl. There is no evidence, however, the amount transferred from the fourth defendant's bank account 8799 constituted misappropriated funds. For that reason, I do not accept the plaintiff has proven Southern Cross Glamour Girl was purchased using misappropriated funds.

Purchase of Mt Pleasant land

- [127] The plaintiff submits it can trace misappropriated funds into the land purchased by the fourth defendant at 41 Mt Brisbane Road, Mt Pleasant ("Mt Pleasant land"). The Mt Pleasant land was purchased by agreement dated 6 November 2006, for a sale price of \$635,000.⁸⁵ The fourth defendant's evidence is that she was advised by a bank manager she would require a 20% deposit. The fourth defendant only had \$7,500. The first defendant provided her with the 20% deposit.⁸⁶
- [128] A consideration of the fourth defendant's bank account 8799 around the time of the contract date shows three deposits the plaintiff submits are relevant: \$10,000 on 1 November 2006, \$173,000 on 8 December 2006 and \$7,500 on 14 December 2006. There is then a withdrawal of \$188,812.07 on 14 December 2006 (after the deposit on that same day). I accept the withdrawal was used to pay the deposit on the Mt Pleasant land.
- [129] The plaintiff concedes the \$7,500 deposit constitutes untraceable funds. It submits the remainder constitutes misappropriated funds. The fourth defendant accepted the deposits of \$10,000 and \$173,000 came from the first defendant. The plaintiff submits that approximately \$75,000 of these amounts can be traced back through the Acorn Cottage bank account. It refers to one page of the Acorn Cottage bank account, which shows transactions between 1 December 2006 and 21 December 2006.⁸⁷
- [130] The difficulty with this submission is that the sum of withdrawals from the Acorn Cottage accounts between 1 December 2006 (being the start of the statement it refers to) and 8

⁸⁴ Plaintiff's written submissions, annexure C, E-153.

⁸⁵ Exhibit 3.

⁸⁶ Exhibit 51.

⁸⁷ Plaintiff's written submissions, Annexure A, paragraph 34, footnote 41.

December 2006 (being the date the 8 December 2006 deposit was made) is \$43,080.40. Further, each withdrawal bears a non-specific narration (being a six-digit number). While I accept each withdrawal constituted misappropriated funds, the plaintiff has not established these withdrawals were part of the \$173,000 deposit made into the fourth defendant's account on 8 December 2006.

- [131] The only evidence relied upon in this regard is the proximity between the withdrawals from the Acorn Cottages account and the deposit into the fourth defendant's account. However, it is reasonable to assume the first defendant had other expenses and payments he was making at this time, which the withdrawals from the Acorn Cottage account may have been used to pay.
- [132] The plaintiff submits it can be inferred the first defendant dealt in large amounts of cash. As such, it is likely the balance of the \$183,000 deposited into the fourth defendant's account was sourced from a large cash reserve accumulated by the first defendant. I do not accept that submission. Irrespective of whether the first defendant dealt in large amounts of cash, there is no evidence the cash deposited into the fourth defendant's account (assuming there was such a cash deposit) constituted misappropriated funds.
- [133] The plaintiff has not established the Mt Pleasant land was funded in part by misappropriated funds.

House constructed on the Mt Pleasant land

- [134] The fourth defendant arranged for a house to be constructed on the Mt Pleasant land. There are three withdrawals from the fourth defendant's 4203 bank account (both the MISA and Complete Home Loan accounts) the plaintiff submits constitute payments made towards that construction: \$117,845.71 withdrawn on 22 June 2009 (from the MISA account); \$84,175.50 withdrawn on 13 May 2009 (from the Complete Home Loan account) and \$50,505.30 withdrawn on 27 July 2009 (from the MISA account).
- [135] The plaintiff submits it may be inferred each of these withdrawals were used to pay for the construction because the amounts correlate with three of the amounts set out in the progress payment table of the unsigned contract for construction of the house.⁸⁸ I accept that submission. However, the plaintiff must also prove the funds which were withdrawn constituted misappropriated funds.
- [136] The plaintiff has proven this in respect of the 22 June withdrawal. That withdrawal was made at a time when the fourth defendant's MISA account contained solely misappropriated funds. This is demonstrated by a bank statement for the MISA account,⁸⁹ which includes three deposits from an unspecified source, each of which constituted misappropriated funds.⁹⁰

⁸⁸ Exhibit 22, page F-8.

⁸⁹ Plaintiff's written submissions, Annexure F, page E-869 (included in Exhibit 21).

⁹⁰ For the \$50,000 13 February 2009, see plaintiff's written submissions, Annexure C, E-159; for the \$90,000 deposit on 27 April 2009, see plaintiff's written submissions, Annexure C, E-164; for the \$125,000 deposit on 26 May 2009, see plaintiff's written submissions, Annexure C, E-165.

- [137] The plaintiff has also proven the 27 July withdrawal constituted misappropriated funds. This is demonstrated by another extract from the MISA account,⁹¹ which has an opening balance and one deposit, each of which constituted misappropriated funds.⁹²
- [138] The plaintiff has not, however, proven the 13 May 2009 withdrawal (which was withdrawn from the Complete Home Loan, not MISA, account) constituted misappropriated funds. As with the 22 June and 27 July withdrawals, the plaintiff submits the 13 May withdrawal constituted misappropriated funds by marking up an extract from the fourth defendant's bank statement,⁹³ which includes the 13 May withdrawal. It then submits a payment of \$90,000 made into the account on 27 April 2009 constituted misappropriated funds, which is then traced to the 13 May withdrawal.
- [139] I accept the payment on 27 April did constitute misappropriate funds. However, it was reversed two days later, and applied to the MISA account.⁹⁴ As such, the balance in the Complete Home Loan account must revert to its pre-27 April position. As the plaintiff does not submit any other funds in the Complete Home Loan account constituted misappropriated funds, it has not proven the 13 May withdrawal from that account constituted misappropriated funds.
- [140] The plaintiff has proven two payments made towards construction of the Mt Pleasant home, \$117,845.71 and \$50,503.50, constituted misappropriated funds.

Other improvements to Mt Pleasant land

- [141] The fourth defendant made various other improvements to the Mt Pleasant land. The plaintiff has proven that each of these improvements was paid using the Citibank credit card.⁹⁵ However, as with the chattels, the plaintiff must also prove that, at the relevant times, the Citibank credit card was repaid using misappropriated funds. As with the chattels, the relevant time in respect of each improvement is the time at which that improvement was repaid.
- [142] The plaintiff submits payment for each improvement was predominantly made at times when there were only misappropriated funds used for paying off the credit card. No further details are provided in support of that submission. However, as with the chattels, the evidence makes it possible to determine whether misappropriated funds were used to pay off the Citibank credit card at the relevant times. This analysis is set out in Annexure A to these Reasons.
- [143] Ultimately, that Annexure reveals that some of the improvements were repaid using misappropriated funds, while others were not. This is summarised in the table below.

⁹¹ Plaintiff's written submissions, Annexure F, page E-873 (included in Exhibit 21).

⁹² The opening balance is carried from the closing balance of the previous period's statement: see plaintiff's written submissions, Annexure F, page E-869 (included in Exhibit 21), which sets out why that closing balance constituted misappropriated funds; for the deposit, see plaintiff's written submissions, Annexure C, E-168.

⁹³ Plaintiff's written submissions, Annexure F, page E-871 (included in Exhibit 21).

⁹⁴ Plaintiff's written submissions, Annexure F, page E-869 (included in Exhibit 21).

⁹⁵ Plaintiff's written submissions, Annexure G, Table C and the extracts from the Citibank credit card statements marked C-#; the statement extracts are included in Exhibit 43.

Item	Statement period in which item purchased	Repaid using misappropriated or untraceable funds	Explanation	Amount paid (only for items paid using misappropriate funds)
Steel fencing for	December 2007	Misappropriated funds	All charges incurred during the December 2007 statement period were paid using misappropriated funds	\$2,090.00
Steel fencing for	August 2007	Misappropriated funds	All charges incurred during the August 2007 statement period were paid using misappropriated funds	\$205.00
Deposit for shed	June 2007	Misappropriated funds	All charges incurred during the June 2007 statement period were paid using misappropriated funds	\$2,432.00
Payment for shed	April 2007	Misappropriated funds	All charges incurred during the April 2007 statement period were paid using misappropriated funds	\$7,350.00
Payment for shed	March 2007	Misappropriated funds	The March 2007 charges were repaid with both misappropriated and untraceable funds. This item was repaid using misappropriated funds.	\$7,350.00
Steel fencing for	February 2007	Untraceable funds	The February 2007 charges were repaid with both misappropriated and untraceable funds. This item was repaid using untraceable funds.	N/A
Steel fencing for	February 2007	Untraceable funds	The February 2007 charges were repaid with both misappropriated and untraceable funds. This item was repaid using untraceable funds.	N/A
Steel fencing for	February 2007	Misappropriated funds	The February 2007 charges were repaid with both misappropriated and untraceable funds. This item was repaid using misappropriated funds.	\$1,509.41
Metal fencing for	December 2008	Misappropriated funds	All charges incurred during the December 2008 statement period were paid using misappropriated funds	\$2,215.05
Iive oven	December 2008	Misappropriated funds	All charges incurred during the December 2008 statement period were paid using misappropriated funds	\$5,857.00
Bath	November 2008	Misappropriated funds	All charges incurred during the November 2008 statement period	\$3,200.00

Item	Statement period in which item purchased	Repaid using misappropriated or untraceable funds	Explanation	Amount paid (only for items paid using misappropriate funds)
			were paid using misappropriated funds	
Payment for GJ Gardner (house)	October 2008	Misappropriated funds	All charges incurred during the October 2008 statement period were paid using misappropriated funds	\$2,200.00
Pump near dam	May 2008	Misappropriated funds	All charges incurred during the May 2008 statement period were paid using misappropriated funds	\$1,762.55
Irrigation hoses & fittings	December 2009	Misappropriated funds	All charges incurred during the December 2009 statement period were paid using misappropriated funds	\$258.40
Agricultural pipe & fittings	September 2009	Misappropriated funds	All charges incurred during the September 2009 statement period were paid using misappropriated funds	\$228.50
Carpet for the house	September 2009	Misappropriated funds	All charges incurred during the September 2009 statement period were paid using misappropriated funds	\$3,463.00
House pump	August 2009	Misappropriated funds	All charges incurred during the August 2009 statement period were paid using misappropriated funds	\$2,726.00
Metal for fencing	July 2009	Misappropriated funds	All charges incurred during the July 2009 statement period were paid using misappropriated funds	\$2,439.60
Shower & sink fittings	June 2009	Misappropriated funds	All charges incurred during the June 2009 statement period were paid using misappropriated funds	\$1,338.90
Front door for the house	June 2009	Misappropriated funds	All charges incurred during the June 2009 statement period were paid using misappropriated funds	\$3,822.50
Steel for fencing	June 2009	Misappropriated funds	All charges incurred during the June 2009 statement period were paid using misappropriated funds	\$709.40
Installation for the front door	May 2009	Misappropriated funds	All charges incurred during the May 2009 statement period were paid using misappropriated funds	\$3,822.50
Shower & tap fittings	May 2009	Misappropriated funds	All charges incurred during the May 2009 statement period were paid using misappropriated funds	\$628.40

Item	Statement period in which item purchased	Repaid using misappropriated or untraceable funds	Explanation	Amount paid (only for items paid using misappropriate funds)
Shower & tap fittings	May 2009	Misappropriated funds	All charges incurred during the May 2009 statement period were paid using misappropriated funds	\$265.00
Fencing supplies	March 2009	Misappropriated funds	All charges incurred during the March 2009 statement period were paid using misappropriated funds	\$979.00
Bath	February 2009	Misappropriated funds	All charges incurred during the February 2009 statement period were paid using misappropriated funds	\$2,795.00
Fencing supplies	August 2010	Misappropriated funds	All charges incurred during the August 2010 statement period were paid using misappropriated funds	\$1,425.60
Firefighter's pump	August 2010	Misappropriated funds	All charges incurred during the August 2010 statement period were paid using misappropriated funds	\$384.00
Shed payment	February 2010	Untraceable funds	All charges incurred during the February 2010 statement period were paid using untraceable funds	N/A
Fencing supplies	August 2011	Untraceable funds	The first repayment of August 2011 charges constituted untraceable funds. This item was repaid by that first repayment and therefore repaid with untraceable funds.	N/A
Fencing supplies	January 2011	Misappropriated funds	The January 2011 charges were repaid with both misappropriated and untraceable funds. This item was repaid using misappropriated funds.	\$982.83
Firefighter's pump	April 2012	Misappropriated funds	All charges incurred during the April 2012 statement period were paid using misappropriated funds	\$350.00
TOTAL (MISAPPROPRIATED FUNDS ONLY):				\$62,789.64

[144] In summary, the plaintiff has proved the fourth defendant made the following payments using misappropriated funds:

- \$48,871.54, for the purchase of various chattels;
- \$14,150, for the purchase of a ride-on mower;

- US\$24,000, for the purchase of two horses;
- \$168,349.21, towards the construction of the house on the Mt Pleasant land;
- \$62,789.64, for other improvements to the Mt Pleasant land.

[145] The total of the above payments is \$294,160.39 and US\$24,000.

Was the fourth defendant a volunteer?

[146] The fourth defendant relied on two bases for the conclusion she was not a volunteer. Neither basis has been established on the evidence.

[147] A consideration of the fourth defendant's conduct and the collateral evidence does not support the fourth defendant's evidence that she received funds pursuant to an agreement with the first defendant.

[148] The fourth defendant, throughout the course of the arrangement, regularly withdrew \$1,000 cash advances in a pattern which was not consistent with the existence of a term that she receive \$1,000 per week by way of retainer. If the agreement was as the fourth defendant asserts, it is inexplicable the first defendant would allow the fourth defendant to have undertaken those transactions.

[149] There is another aspect of the alleged agreement which is inconsistent with the fourth defendant's conduct. The fourth defendant said she was required to first seek and obtain the first defendant's approval for the payment of her expenses. A consideration of the transactions entered into by the fourth defendant throughout the relationship reveal a persistent and consistent pattern by the fourth defendant of regularly paying her expenses. The regularity of these payments is inconsistent with the assertion the fourth defendant first required the first defendant's approval to pay any expenses. Whilst the fourth defendant said she spoke to the first defendant daily, sometimes two or three times per day, the nature of the expenses met would have required significant discussion on each such occasion as to specified items. I find such a scenario devoid of any credibility.

[150] The magnitude of the payments received by the fourth defendant is also inconsistent with the suggested agreement. The fourth defendant received well in excess of \$1,000 per week in cash on a regular basis, her expenses often exceeded \$10,000 per week and she received over \$200,000 to acquire and improve the real property at Mt Pleasant. She also received substantial sums for the purchase of other property.

[151] These transactions are consistent with a relationship of affection, in the nature of a 'mistress relationship'. They are not consistent an agreement for a retainer of \$1,000 a week and to meet expenses in return for services rendered, particularly when the fourth defendant says the first defendant, in entering into the agreement, said she would have to expect "a little drop in pay".

- [152] A suggestion the fourth defendant was receiving these funds as part of a formal arrangement reached by agreement was also inconsistent with the contents of her email communications to the first defendant. Her emails contained reference to the fourth defendant being the first defendant's "girlfriend" and a reference to her love for him. Whilst the fourth defendant sought to explain these communications as being part of an arrangement whereby she was to provide "the girlfriend experience", I found that explanation lacked any credit. Her reference to Mt Pleasant being the first defendant's property "by proxy" was also inconsistent with the payments being received pursuant to the alleged agreement.
- [153] A consideration of the objective evidence supports a conclusion that the fourth defendant received these funds from the first defendant as a consequence of the development of a relationship of affection. The consistency and frequency of the payments obtained by the fourth defendant from the first defendant was entirely consistent with a relationship where one partner provided funds to another without regard to any limitations on the provision of those funds (such limitations would be consistent with a formalised arrangement), or any requirement that the payment be in exchange for services rendered.
- [154] I do not doubt the fourth defendant entered into the relationship with the first defendant in the belief it would provide for her a lifestyle which allowed her to pursue her interests, including the development of a horse stud, without the need to continue working as an escort. That belief is not inconsistent with a conclusion the relationship between the fourth defendant and the first defendant was one of affection, as opposed to being part of a formal agreement.
- [155] The fourth defendant conceded that when she ceased work as an escort she did not know whether the first defendant would in fact fund her lifestyle. Her response to this line of questioning indicated what I am satisfied was the true nature of her relationship: "I had an impression of him as a well-to-do gentleman, stable, et cetera. So I hoped he would. ... it would also give me the opportunity to go back to university ... make something more of my life, so to speak."⁹⁶
- [156] I find the fourth defendant received the moneys obtained from the first defendant not as part of any agreement entered into between the fourth defendant and the first defendant for the provision of sexual and other services in return for a weekly retainer and the payment of her expenses. The relationship was not entered into pursuant to a formal agreement by which the fourth defendant would provide sexual and other services to the first defendant in exchange for a retainer of \$1,000 per week and payment of her living expenses. The payments received by the fourth defendant were received as a consequence of a relationship of affection.
- [157] The fourth defendant has also not established she received the funds from the first defendant on the basis she provided sexual and other services for reward. Whilst I accept the fourth defendant entered into a sexual relationship with the first defendant in circumstances where she ceased operating as an escort, those services were provided as part of a relationship of affection, not on the basis the fourth defendant was to receive payment for those services. The other services alleged to have been provided by the

⁹⁶ T4-4/26 – 29.

fourth defendant also were provided as part of that relationship, not for monetary payment.

- [158] The services provided were classically in the nature of matters arising in the course of a relationship of affection. The provision of “advice” and “counselling” is a daily occurrence in relationships of affection. It includes personal and work stressors, clothing and hobby interests. It also can include the baking of items for a person in the relationship and their work colleagues. There was nothing unusual in the particular advice and services provided by the fourth defendant which placed them outside of the normal type of advice and services provided in such a relationship. The fourth defendant had no specialist qualifications. The advice given was generalist, not specialist, advice.
- [159] A similar conclusion arises in relation to the alleged advice in respect of horses and the first defendant’s properties. There is no suggestion that advice contained any specialist aspects. It was the advice of an individual with a longstanding interest in horses, as to the livestock to be acquired and the set-up of a property. No evidence was called to suggest the advice was other than the opinion of an informed individual. It did not fall into the category of specialist, professional advice.
- [160] I find the sexual services and other advice and services provided by the fourth defendant to the first defendant in the course of their relationship was provided as part of the relationship, not for reward. The moneys received by the fourth defendant from the first defendant were not received on account of the provision of those services for reward. The fourth defendant received those funds as a volunteer.
- [161] Even if I had been satisfied the fourth defendant entered into the alleged agreement with the first defendant, I would have found enforcement of that agreement to be contrary to public policy. The agreement was for sexual and other services in the nature of a ‘mistress relationship’. The claimed services were delivered by a person without formal qualifications. The observations of Brereton J in *Ashton v Pratt (No.2)* are apposite:
- “Those arrangements were not made to facilitate continuation of an existing cohabitation, but to *establish* the ‘mistress relationship’. The evidence does not reveal a relationship or consideration, beyond ‘meretricious sexual services’. In my view, on the current state of the authorities, the arrangements were contrary to public policy and illegal in the relevant sense.”⁹⁷
- [162] Further, I would not have been satisfied any such agreement was entered into with an intention to create a legally enforceable contract. To adopt the observations of Bathurst CJ in *Ashton v Pratt*: “... the nature of the arrangement, its imprecision ... and the inherent improbability that a person in the position of [the first defendant] would bind himself to make significant payments in consideration of a promise that was essentially unenforceable,” lead to the conclusion the parties did not intend to create legal relations.⁹⁸
- [163] I also would not have been satisfied any such agreement, even if entered into between the fourth defendant and the first defendant with the intention to create legal relations, was

⁹⁷ [2012] NSWSC 3 at [52].

⁹⁸ (2015) 88 NSWLR 281; [2015] NSWCA 12 at 298 [91].

sufficiently certain to constitute an enforceable agreement. The terms as enunciated by the fourth defendant lacked sufficient specificity to allow either party to sue in the event of breach. How, for example, was a court to determine whether the number of melting moments provided by the fourth defendant complied with the term that she bake items for the first defendant. Similarly, how was a court to determine whether the advice given in relation to the first defendant's properties, livestock and clothes was in accordance with the agreement. The lack of certainty rendered the agreement too incomplete to constitute a binding agreement.

Indefeasibility Relief

- [164] The relief sought by the plaintiff includes the Mt Pleasant property. The fourth defendant contends the plaintiff is not entitled to that property due to indefeasibility of title. However, the plaintiff's claim is a personal claim at law. It is unaffected by indefeasibility of title.⁹⁹ The plaintiff is entitled to a finding the fourth defendant holds the Mt Pleasant property, to the extent it was acquired or improved upon using misappropriated funds, on a constructive trust for the plaintiff.
- [165] The fourth defendant contends that in that event she is entitled to be compensated for loan repayments, interest amounts and other costs incurred by her in maintaining that property and other items acquired by her whilst they were subject to injunctive relief. Those costs were agreed between the parties as being \$271,842.00.
- [166] Whilst the plaintiff contends the costs were not incurred reasonably, I do not accept that contention. The fourth defendant was entitled to pursue this litigation. For good reason, she wished to retain those items in the event she was successful. Whilst the fourth defendant has ultimately failed in her defence of the claim, the plaintiff ought not to receive the benefit of the continued maintenance of these items for the period of the injunctive relief, which maintenance was undertaken at the fourth defendant's cost.
- [167] The fourth defendant is entitled to recover those sums expended by her, but only proportionally to the extent of the constructive trust in favour of the plaintiff.

Conclusions

- [168] The plaintiff has established that the fourth defendant received the sum of \$294,160.39 and US\$24,000 from the first defendant that was used by her to purchase real property and other assets. The plaintiff has also established those sums were misappropriated by the first defendant from the plaintiff.
- [169] The fourth defendant did not receive those sums pursuant to the alleged agreement or on account of services rendered for value. The fourth defendant received those sums as a volunteer. Equity provides that the fourth defendant ought to account to the plaintiff in respect of those sums.

⁹⁹ *Fistar v Riverwood Legion and Community Club Ltd* [2016] NSWCA 81 at [82].

Orders

[170] I shall hear the parties as to the form of orders and costs.

