IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-006279

BETWEEN	RONALD CYRIL THICKPENNY Plaintiff
AND	THE ESTATE OF BRENDON RONALD THICKPENNY BY ITS ADMINISTRATOR MARIYA LISA THICKPENNY (ALSO KNOWN AS MARIYA LISA PIVAC) Defendant

Hearing: 26 June 2009

Counsel: R E Lawn and C A Blucher for plaintiff
R J Collis and M C Bhanabhai for defendant

Judgment: 22 December 2009 at 2:30pm

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 22 December 2009 at 2:30pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Kumeu-Huapai Law Centre, PO Box 122, Kumeu 0841 for plaintiff
Dyer Whitechurch, PO Box 5547, Auckland 1141 for defendant

[1] This is a dispute over entitlement to the assets in the estate of Brendon Thickpenny (deceased). The plaintiff Ronald Thickpenny (Ronald) is the father of the deceased (Brendon). The defendant Mariya Thickpenny (Mariya) is Brendon's widow and the administrator of the estate (Brendon died without leaving a will).

[2] There are three aspects to Ronald's claim (pleaded in seven causes of action). First he contends that he is entitled to the majority share in the major asset in the estate, a residential property at Riverhead registered in Brendon's sole name. This claim is made on the grounds that the cash contribution came from money that Brendon was holding on his behalf, and that he was joint borrower under a bank loan taken out to purchase the property. Secondly, he says that the estate is liable to reimburse him for the greater part of an inheritance (from his mother) which he gave to Brendon to manage on his behalf. Thirdly, he seeks further provision from the estate under the Family Protection Act 1955.

[3] Ronald has applied for summary judgment on all causes of action other than his claim under the Family Protection Act.

[4] Mariya and Brendon's mother (the latter also has an interest in the estate) oppose summary judgment. They say that Ronald did not advance any money towards the purchase of the Riverhead property and it was never intended that Ronald would have an interest in it. They also say that it was never intended that Brendon would have to account for the inheritance money given to him by Ronald (it was in recognition of financial assistance and other support that Brendon had given Ronald over many years). More importantly for present purposes, however, they say that the claim is unsuitable for summary judgment as it cannot be determined without taking into account the history of dealings between Brendon and Ronald, and the parties' intentions in respect of the various transactions.

[5] It is necessary to consider these potential defences against various causes of action, and the following background.

Factual background

[6] Brendon died unexpectedly and tragically (as a result of an industrial accident) on 2 March 2006. He was living at the time at 24A Cambridge Road, Riverhead which had been purchased in his sole name in December 2002. He had married Mariya some four months before his death, after having previously lived in a de facto relationship with her. Ronald was living in a separate part of the Riverhead property.

[7] Ronald is currently aged 72 years. Brendon was his son by a first marriage to Sandra Bevan (who is an interested party by reason of her interest as a beneficiary of Brendon's estate). That marriage ended when Brendon was 5 years old. Ronald subsequently remarried Sandra Pitcon, now known as Sandra Kaska (Sandra). They separated in 1997. At that time they owned a property in Coromandel. Ronald continued living at that property until the latter part of 2001. He moved to the Riverhead property after Brendon purchased it in late 2002.

[8] After their separation Ronald and Sandra determined their joint interest in the Coromandel property by Sandra selling her half share to Brendon for $105,000. The purpose was to ensure Ronald had somewhere to live (it appears he was not able to buy Sandra's share himself). There is no evidence before the Court as to when this arrangement was reached, but the settlement occurred in May 2001. The purchase price appears to have been fully funded by a loan from Westpac Banking Corporation. The mortgage securing that loan was registered against both interests.

[9] At some time before this Brendon had owned a property at Whangaparaoa Road, Manly. There is a dispute as to when that property was sold, and the reason for its sale. Mariya contends that it and two boats were sold to allow Brendon to help Ronald with his matrimonial property settlement with Sandra. Ronald contends that the property was sold to the local council to allow widening of the road, and that Brendon did not make any money from the sale after clearing the mortgage on the property.

[10] Ronald has suffered from poor health (and has been in receipt of an invalid's benefit) for many years. In late 2001 it was decided that the Coromandel property would be sold and that Ronald would move to Auckland. The Coromandel property was sold. Although the solicitor who acted for Ronald and Brendon on the sale (Mr M Lawes) has given two affidavits dealing with other transactions, he has not given evidence specific about this transaction, particularly as to what happened to the sale proceeds. Both Ronald and Mariya say that is was sold for $200,000 in late April 2002. They appear to agree that the net proceeds of sale were paid to Brendon, but differ as to the entitlement to it. Ronald contends that the sum belonged to him but was given to Brendon to manage on his behalf. Mariya says that Ronald's interest was required to pay Sandra her matrimonial property entitlement.

[11] At about this time (April 2002) Ronald's health was such that he was not in a position to look after his own affairs. Ronald's doctor has stated in an affidavit that Ronald was very ill from February 2002 with a condition that required abdominal surgery. On 4 May 2002 Ronald signed an enduring power of attorney in favour of Brendon. Mr Lawes witnessed Ronald's signature. To the best of his recall he did so at North Shore Hospital.

[12] After leaving Coromandel, Ronald moved initially into a flat in Red Beach, Whangaparaoa, before going into hospital for a time. Mariya says that after Ronald was discharged from hospital he went to live with his first wife (Sandra Bevan), and that throughout this period Brendon paid the costs of the flat, medical costs and various other personal expenses for Ronald. Ronald says that he was meeting his living expenses from his invalid's benefit, and had medical insurance for his hospital bills.

[13] On 23 October 2002 Brendon signed an agreement to purchase 24A Cambridge Road, Riverhead for $205,000. He paid a deposit of $20,500. On 29 October 2002 Brendon and Ronald both signed a loan agreement with Westpac Trust for an advance of $155,250 for the purchase of Riverhead. Attached to the agreement was an application for loan finance which both Brendon and Ronald appear to have signed on 30 September 2002. Brendon signed a mortgage to Westpac, both on his own behalf and on behalf of Ronald (under the power of

attorney) on 19 November 2002. The sale was settled that day. The property was transferred into Brendon's sole name. The balance required to settle (in addition to the Westpac loan) was $31,271. Mr Lawes' records show that that sum was also paid by Brendon.

[14] Ronald went to live at the Riverhead property with Brendon. Work was done in renovation of the property, including provision of a separate flat for Ronald. Again there is a dispute as to the source of funds used for the renovations. Ronald contends that Brendon used the balance of his funds from the sale of the Coromandel property. Mariya contends that Brendon used his own funds.

[15] There is further dispute as to whether or to what extent Brendon supported Ronald financially after they moved into the Riverhead property. Mariya contends that Brendon paid all outgoings on the property (including the mortgage) and that Ronald made no contribution towards household expenses. Ronald says he paid his own way out of his invalid's benefit. He also says that Brendon was managing his money from the Coromandel property. I infer that Ronald accepts that Brendon may have used some of that money for joint expenses or Ronald's share of expenses.

[16] Mariya also says that she borrowed $50,000 against the security of another property when she and Brendon started living together at Riverhead, and this too was used in renovations. It is not clear when that occurred. It seems to be common ground that about the time of purchase of Riverhead, Brendon sold a boat. Mariya says the sale price was approximately $100,000. Ronald says it was $45,000.

[17] Ronald's mother died in 2005. Ronald and his brother were the residuary beneficiaries of her estate. Ronald's share in the estate was $296,125.63. Mr Lawes says that he met Brendon and Ronald in late June 2005 shortly after the mother's death. There was a discussion about putting the money into a trust, and wanting to pay off the house (which Mr Lawes took to mean the Riverhead property). He noted in his record of his attendance that Ronald was a party to the loan but not on the title for the property. He says that he advised them, after undertaking research, that there was potentially substantial gift duty payable if funds were transferred directly from the estate to Brendon.

[18] On 29 August 2005 Ronald instructed the solicitor handling his mother's estate to pay his share direct into Brendon's bank account. The payment was made on or about 7 September 2005. Mr Lawes says that he subsequently received a telephone call from Ronald confirming that the money had been paid into Brendon's account. He says that it was his impression, in light of the advice that he had given them previously, that the funds were being given to Brendon to manage on Ronald's behalf, and that this was consistent with his understanding of the arrangements that had been in place for some time (due to Ronald's health problems). Mr Lawes also says that about a month later he gave advice to Brendon concerning the establishment of a trust.

[19] Brendon's bank statements from 6 September 2005 until his date of death have been produced. They show the sum of $296,125.63 having been credited to the account on 7 September 2005 and that this amount had reduced to a credit balance of $13,601.33 as at the date of Brendon's death.

[20] The largest single item of expenditure was a bank cheque for $111,500 on 9 September 2005. Mariya contends that that was part of a total payment of $125,000 made for a launch that Ronald encouraged Brendon to buy to replace the boats that Brendon had sold to obtain money to assist Ronald in earlier years. Ronald says that he did not intend to gift this money to Brendon. The boat has been sold since Brendon's death for $130,000. The proceeds of sale are being held in Mariya's solicitor's trust account.

[21] There were four other substantial payments out of Brendon's account that same month (two by bank cheque and two by ordinary cheque) totalling nearly $50,000. Ronald accepts that two of these payments for a total of $16,650 were for purchase of a car and campervan for him. He also accepts that other payments made in the eighteen months leading up to Brendon's death were for items for himself, but contends that the majority of the money was not used for his benefit. It appears that a cash bequest to Brendon of $5,000 from his grandmother was paid into the account on the same day as Ronald's inheritance, and that Brendon's wages went into the account, and that property outgoings and living expenses were paid from it.

[22] The Riverhead property was valued by a registered valuer as at 23 February 2007 at $467,000 (exclusive of chattels). It is now mortgage free. The loan that was taken out to purchase it was repaid with the proceeds of a mortgage repayment insurance policy taken out with the loan.

Principles for summary judgment

[23] The principles that the Court applies in determining an application for summary judgment are well established, and can be found in the leading cases *Pemberton v Chappell* [1987] 1 NZLR 1, *Bilbie Dymock Corp. v Patel* (1987) 1 PRNZ 84 (CA), and more recently *Jowada Holdings Limited v Cullen Investments Limited* CA248/02 5 June 2003. The following are relevant to the present application:

a) The onus is on the plaintiff seeking summary judgment to show that there is no arguable defence, and the Court must be left without any real doubt or uncertainty in the matter;

b) Although the onus stays with the plaintiff, a defendant must put forward a factual basis for any defence being raised: summary judgment will not be avoided by raising a hypothetical defence;

c) The Court will not hesitate to decide questions of law, including difficult legal issues, where appropriate;

d) The Court will not attempt to resolve disputes over facts, or to assess the credibility of statements made in affidavits, that are essential to elements of the defence. However, the Court is not required to accept uncritically, as raising a dispute, unsupported assertions of fact, particularly where such assertions are contrary to incontrovertible fact or inconsistent with clear contemporaneous documents;

e) When called for by the facts of a case, the Court must balance the need for a robust and realistic attitude against the need to ensure that there is no prejudice to a defendant.

The pleading

[24] There is a theme of unconscionability running through Ronald's claim, linked to his claim to continuing ill health, and appointment of Brendon as his attorney in respect of property matters. There can be no question that he has tenable claims in some form. However, the issue is whether he has an unanswerable claim on any tenable claim. The starting point must be the matters he has pleaded.

[25] It has to be said that the Court has not been assisted by the generality of the pleading in the statement of claim. A plaintiff seeking summary judgment has to show that there is no arguable defence. In order to do so, the plaintiff must first show a clear legal and factual basis for the claim. It has been difficult to identify the precise legal bases of claim being advanced for the plaintiff, and as a consequence it is difficult to determine whether one or more of the possible causes of action have been established on the facts.

[26] The first, second and fourth causes of action focus on the loan taken out to purchase the Riverhead property and the fact that the Riverhead property was transferred into Brendon's sole name. The first two appear to conflate several possible claims, but seek the same remedy namely, an order vesting a 75.7317 per cent interest in the property into Ronald's name. This figure is the proportion that the total loan bears to the purchase price of the property.

[27] The first five paragraphs of the statement of claim identify the parties, and the enduring power of attorney (in respect of property) that Ronald gave to Brendon in April 2002. Ronald says that by doing so Ronald appointed Brendon his agent in respect of all of his property affairs.

[28] The pleading of the first cause of action starts in paragraph 6 with the allegation that Ronald was a joint borrower with Brendon (and, although not

expressly pleaded, by implication was jointly entitled to the loan proceeds). This suggests a claim based on a resulting or institutional constructive trust by virtue of contribution. The nature of trust is not expressly pleaded. Next it is pleaded that Brendon acted on Ronald's behalf in applying the loan proceeds to purchase of the property "but registered the title and beneficial ownership" in his sole name. It is then said that "to the extent that [Brendon] was acting as agent through the power of attorney" he was obliged to apply the money to Ronald's benefit not to his own exclusive benefit. The claim continues with reference to principles of tracing, including reliance on *Foskett v McKeown* [1997] 3 All ER 392, before asserting a proprietary interest in the property to the extent of the loan money. Although the pleading refers to use of the power of attorney (and duties owed as attorney) there is no separate claim in that respect.

[29] Counsel, in his submissions, referred to a further basis for claim in that the cash contribution to the purchase price was also Ronald's money (being derived from his share of the proceeds of sale of the Coromandel property). Counsel advised, however, that for the purpose of this application, Ronald would not be contesting Mariya's contention that the balance of the purchase price had been provided by Brendon.

[30] The second cause of action runs together several different equitable concepts (misuse of the power of attorney, unjust enrichment) said to give rise to a constructive trust. The nature of the constructive trust is not pleaded, but having regard to these claims it must be taken to mean a remedial constructive trust. Although that is a discretionary remedy, Ronald again seeks vesting of the same share of the property.

[31] The fourth cause of action pleads negligence but does not take matters further than the general equitable claims in the second cause of action.

[32] The third and fifth causes of action relate specifically to Ronald's inheritance from his mother. In the third cause of action the claim pleads that the money was advanced to Brendon to manage on Ronald's behalf (under the terms of the power of attorney). Two claims are advanced. First that Brendon held the money on trust for

Ronald, and that it can be traced into the Riverhead property. The second is that Brendon is liable to account for it on the principles of money had and received. In this cause of action Ronald seeks an order that the estate repay the money less the sum of $13,549.90, which he acknowledges he has had spent to his benefit.

[33] The fifth cause of action focuses on the part of Ronald's inheritance that was applied in purchase of a boat (approximately $120,150). This is essentially a claim for the proceeds of sale of the boat, currently held in the trust account of the solicitor for the defendant.

[34] The sixth cause of action relates to all money held by Brendon on Ronald's behalf (the loan proceeds and the inheritance). Ronald seeks recovery of all sums on the basis that Brendon has used them for his own benefit and has no entitlement to nor has made any claim for reimbursement for expenses pursuant to s 107 of the Protection of Personal and Property Rights Act 1988. This cause of action stands or falls on the same matters as the first five causes of action.

Competing arguments

[35] Counsel for Ronald predicated all his arguments on the basis that at all times Brendon was acting on his (Ronald's) behalf pursuant to the power of attorney, and in breach of fiduciary duties as a trustee of the funds. He submitted that the facts concerning the loan and the advance of his inheritance were clear and support either an institutional constructive trust to the extent of his ownership of the loan proceeds or a remedial constructive trust to the extent of breach of his fiduciary duties. He argued that Ronald was entitled to the value of the full amount of the loan (although only a joint borrower) on the grounds that he became liable for the full debt by way of survivorship. He argued that this gave Ronald an equitable proprietary interest in the Riverhead property (based on *Foskett v McKeown*).

[36] In terms of the negligence claim, he submitted that it was Brendon's duty to identify any ambiguity in Ronald's instructions in respect of the loan and title to the property: *Veljkovic v Vrybergen* [1975] VR 419.

[37] Turning to the third and fifth causes of action counsel for Ronald submitted that the funds were either held by Ronald on an institutional constructive trust, and could be traced into the property, or were applied in breach of trust or other fiduciary duty so as to give a clear entitlement to a remedial constructive trust. He submitted that the Court should take a robust approach to the alleged defence: *Eng Mee Yong v Letchumanan* [1980] AC 331. He pointed to the advice given by Mr Lawes as to possible gift duty, and submitted that it did not accord with any common sense that either Brendon or Ronald would have proceeded with a gift in place of potential duty of $61,880.87. He also said that there was no direct evidence to show that there was a gift of this nature.

[38] Finally, in response to the defendant's broad submission that the matter was not suitable for summary judgment because of the need to investigate further facts and resolve any disputes, counsel for Ronald responded that there was no one in a position to give contrary evidence to Ronald's evidence, and that it was unlikely that Mr Lawes would be able to add anything to his recollection of documents (either in relation to the mechanics of the loan advance or as to the payment of the inheritance).

[39] Counsel for Mariya did not address the various arguments in great detail. His submission fundamentally was that there was a conflict between the parties on critical issues (whether the parties intended Ronald to have an interest in the Riverhead property, and as to whether or not the inheritance was gifted) which needed to be determined having regard to the history of the transactions (the extent to which Brendon had supported his father) and the likelihood that Ronald would have gifted the inheritance (with an expectation that Brendon would look after him) rather than merely pass the funds to Brendon to manage on his behalf. He submitted that there was need to establish respective entitlements to the proceeds of sale of the Coromandel property (which in turn needed more information as to the matrimonial property settlement between Ronald and Sandra).

[40] He accepted that there might well be a constructive or resulting trust in relation to some funds, but said that the Court could not determine, on the evidence before it, whether the parties had intended that Ronald was to have an interest in

Riverhead. He said that Ronald's involvement in the loan had been explained (to allow Brendon to qualify for the necessary loan). He pointed out that the agreement was in Brendon's name only, and that Mr Lawes (who was acting for both at the time) had accepted that title should be in Brendon's name solely. He submitted that there was only an assumption that Ronald's money had gone into the sale price and on the figures before the Court it was at least arguable that Ronald would not be entitled to more than $50,000 out of the proceeds of sale of the Coromandel property, being a half share after repayment of the mortgage.

[41] As to the inheritance money, counsel for Mariya submitted that the issue of whether it was a gift or an advance or a custodial arrangement could only be determined in the context of the relationship. He argued that the instruction to transfer the money was equivocal at best and could well have been intended as repayment of earlier advances or reimbursement of loan or compensation for services. He also submitted that even if a constructive trust existed or was to be imposed, there was still need for an inquiry into what money was received on that basis and what money was disbursed to Ronald's benefit. He pointed to the evidence that a substantial sum (approximately $120,000) went into the purchase of the boat, said to be in recognition of Brendon's earlier sale of other boats to assist Ronald.

[42] As to the contention that the defences were mere assertion, he submitted that there was sufficient evidential support in the evidence of Mariya, and inferences that are available from the plaintiff's evidence and the documents, to support the defences being advanced.

Discussion

(a) The Riverhead property claim

[43] The essence of the argument advanced by counsel for Ronald was that Brendon undertook the acquisition of the Riverhead property and took out the loan whilst acting as Ronald's attorney. On that basis he contends that Brendon received the loan money on trust and applied it either in breach of that trust or in breach of his obligations under the power of attorney. To succeed in these contentions, Ronald

needs to prove that Brendon was in fact acting as his agent either in purchase of the property or taking of the loan so as to give rise to a trust or other fiduciary duty which would give him an equitable proprietary interest. I am not satisfied that this is the only conclusion to be drawn from the facts:

a) The agreement for sale and purchase was in Brendon's sole name.

b) Although Brendon held the power of attorney at the time, there is no evidence that the cash contributions to the purchase money were made from any money that Brendon may have been holding on Ronald's behalf (and counsel for Ronald did not advance this aspect of Ronald's case on this application).

c) Although the loan application and the loan agreement were made in both names, it is said that this was necessary to qualify for the loan. The bank required Ronald to be a party to the mortgage but did not insist on his name being on the title.

d) The mortgage and the related insurance certificate were the only documents that Brendon signed for Ronald under the power of attorney. By that time Ronald had already signed the loan agreement.

e) Mr Lawes expressly queried whether Ronald should also be on the title, and must have been satisfied with the instruction that he was not. Although this is equivocal, it still leaves open an argument supporting the defence that he was not to have an interest.

f) Mortgage repayment insurance was taken out on Brendon's life. This allows an inference that Brendon wished to ensure that Ronald had no exposure under the mortgage. That is consistent with Ronald simply assisting Brendon to qualify for the mortgage.

[44] Counsel for Ronald, throughout his submissions, submitted that an attorney should not be entitled to act under the power of attorney to obtain an advantage for himself or take a step contrary to the interests of the donor: *Powell v Thompson*

[1991] 1 NZLR 597,605. However, Ronald was clearly aware of the loan (he signed the application and the loan agreement), and it is at least possible that he was aware that a mortgage would have to be signed and that he acquiesced in use of the power of attorney for that purpose (*Powell v Thompson* at 615).

[45] It cannot be said, on the basis of these facts, that there is a clear breach of trust, or of fiduciary duty as attorney, which gives rise to an equitable proprietary interest in the land. Moreover, I consider that it must be at least arguable that any interest would be less than the full value of the loan. I do not accept the argument for recovery proportionate to the full amount of the loan on the facts before the Court. It was not disputed that the mortgage has been repaid. Although there is no evidence that this was from the mortgage repayment insurance, that is a matter that needs to be further investigated.

[46] I am also uncertain as to whether Ronald would have an equitable proprietary interest based on the principles in *Foskett v McKeown*. In that case the Court found that the plaintiff had an equitable proprietary interest in funds used to acquire property being claimed, arising out of an express trust. The House of Lords made it clear that it was confining its finding to the facts of that case (misappropriation of money held under an express trust). Until the claim is pleaded more specifically, it is difficult to ascertain whether or not it will be necessary for the Court to determine the intention of the parties with respect to the ownership of the property. For the purposes of this application I have to assume that it does. The application of that principle requires findings as to the nature of the trust and the basis upon which the funds were to be applied. That should be done after trial.

[47] In summary I am not persuaded that Mariya does not have an arguable defence to these causes of action.

(b) The inheritance claim

[48] Although counsel for Ronald argued vigorously that there was no adequate evidential basis for Mariya's contention that the inheritances were a gift, I am not persuaded that the Court can or should properly determine this point in a summary judgment application. The major difficulty in this case is, of course, that the

evidence available to the defence is very limited. Nevertheless, the Court must be satisfied that there is no substance to the contention that this money was gifted.

[49] Ronald supports his statement that it was put into Brendon's hands for him to manage with the evidence of Mr Lawes and the solicitor acting for the mother's estate. Mr Lawes says that it was his clear impression that neither Ronald nor Brendon wanted to incur gift duty. However, that does not necessarily mean that Ronald did not intend to gift all or part of the money to Brendon. It might mean no more than that they did not wish to do so formally. This is another inference from the evidence that Ronald took legal advice on the possibility of gifting. Similarly, the evidence of the solicitor for the estate is equivocal. He says that Ronald went to his offices and instructed him in person to pay the inheritance money into Brendon's account (giving a written authorisation). He says that there was no talk of the amount being gifted or loaned, but adds that he was given no explanation for Ronald's instructions. It is also significant that Mr Lawes was subsequently asked to give Brendon advice on establishing a trust. It is difficult to see how much can be taken out of this evidence but it is still consistent with Brendon receiving the money as a gift and wishing to protect it in some way. On the other hand it could be that he was considering doing it for Ronald. These are matters which should properly be explored in trial through examination of Ronald as to discussions surrounding the transfer of the money. In turn, a determination on the point will be assisted by more evidence as to the history of their relationship, exactly what Brendon did for Ronald, and Ronald's understanding as to how Brendon was to administer the funds. It is not for the defendant to prove the gift on this application. I consider that there is sufficient in the background to the relationship and to circumstances surrounding the payment to warrant the matter being determined in the ordinary course. This is not one of those cases where the failure to provide further evidence necessarily means that there is no basis to the contentions. Brendon's death is both the reason for the claim and the reason that the available evidence is limited.

[50] I will also mention, briefly the dispute over the payment made to purchase the boat. The payment was made two days after the funds were put into Brendon's account. I cannot accept that Ronald did not know of this when he went to the office of the solicitor for the estate and instructed him to put the money into Brendon's

account. Although not necessarily conclusive, this does allow the inference that at least this amount could have been intended a gift. Again it is a matter that needs to be explored with Ronald.

[51] Finally, I note that the family protection claim will need to go to trial in any event, and will almost certainly require evidential inquiries on the matters I have just traversed.

Decision

[52] The applications for summary judgment on the first to sixth causes of action are dismissed. I am not persuaded that there are no arguable defences.

[53] I reserve issues of costs pending determination of the claims.

[54] This is a matter, in my view, that would benefit from an early judicial settlement conference. Although I have denied summary judgment, I consider that Ronald has strong claims, although the value of the claims is uncertain. They are claims that the parties should be able to compromise or if they take a realistic attitude towards the issues. The costs of taking the matter to trial are not inconsiderable. I direct the Registrar to liaise with counsel at the first opportunity, and to allocate a judicial settlement conference (one day) at the first available opportunity in the new year.

[55] The Registrar is also to allocate a case management conference at 4:10pm on 4 February 2010 to give directions for interlocutory matters, and with a view to allocating a trial date. Memoranda are to be filed and served for that conference by counsel for the plaintiff by 1 February 2010 and by counsel for the defendant by 2 February 2010.

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Associate Judge Abbott