

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

**CIV 2007-404-001944**

BETWEEN	COMMISSIONER OF INLAND REVENUE Plaintiff
AND	DONALD EUGENE ALLEN First Defendant
AND	PAUL EUGENE PALMER Second Defendant
AND	SILVER FERN TRUSTEES LIMITED Third Defendant

Hearing: 23, 24, 25 and 27 November 2009

Appearances: M J Ruffin and M L Schwalger for the Plaintiff  
No appearances for the First and Second Defendants  
D A Wood and J Cuellar for the Third Defendant

Judgment: 16 December 2009 at 3:00pm

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**INTERIM JUDGMENT OF WYLIE J**

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This interim judgment was delivered by Justice Wylie  
on 16 December 2009 at 3:00pm  
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar  
Date:

*Solicitors/Counsel:*

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# Contents

Introduction .....	[1]
The Key Players	
<i>Mr Allen</i> .....	[6]
<i>Mr Palmer</i> .....	[12]
<i>Silver Fern Trustees Limited</i> .....	[16]
<i>The Silver Fern Trust</i> .....	[20]
The investigations/tax assessments.....	[25]
The Charging order/Mareva injunction .....	[32]
The Whenuapai property .....	[38]
The financial statements of the Trust.....	[64]
Re-opening the accounts.....	[74]
Issue 1: Whether a sum of \$200,000 paid by Mr Palmer by way of deposit for the purchase of a property at 46 Puriri Drive, Whenuapai was a loan to Silver Fern, and if so whether that loan has since been repaid.....	[79]
Issue 2: Whether the balance of the purchase price paid to settle the purchase of the Whenuapai property was a loan from Messrs Allen and/or Palmer to Silver Fern as trustee of the Trust or a gift from a company in Panama known as Fortune Management.....	[90]
Issue 3: Whether Silver Fern as trustee of the Trust owes any moneys to either Mr Allen, or to Mr Palmer, or to both of them, on account of certain motor vehicles and motorcycles that are shown in some versions of the financial accounts as being assets of Silver Fern. ....	[104]
Evidence.....	[122]
Interim judgment.....	[129]

## **Introduction**

[1] In these proceedings the Commissioner of Inland Revenue (“the Commissioner”) seeks to unravel a small part of the labyrinthian financial arrangements of the first defendant, Donald Eugene Allen (“Mr Allen”), the second defendant, Paul Eugene Palmer (“Mr Palmer”), and the third defendant, Silver Fern Trustees Limited (“Silver Fern”). Silver Fern is the sole trustee of the Silver Fern Trust (“the Trust”) and trust assets are held in its name.

[2] The Commissioner has judgment against Mr Allen in the sum of \$1,520,693, and against Mr Palmer in the sum of \$1,519,618. He asserts that there are debts owed to Mr Allen and/or Mr Palmer by Silver Fern, and he seeks a declaration from the Court to that effect. Two causes of action are raised – first debt, and secondly, resulting trust.

[3] A number of Silver Fern’s assets are subject to a charging order and a Mareva injunction. As at 30 September 2009, \$608,410 was held on fixed term deposit in the name of Silver Fern. In the event that the declarations are made, the Commissioner will be seeking that the existing charging order be made final so that he can either enforce against Silver Fern in the same manner as if he had judgment against that company, or issue a sale order to seize Mr Allen’s and/or Mr Palmer’s personal property, including debts owed to them by Silver Fern.

[4] Financial statements for the years 2002 to 2007 have been prepared for the Trust. There are various versions of those statements. Two different versions have been signed by Mr Allen. The statements purport to record the nature of various transactions which are said to have taken place. The Commissioner alleges that the financial statements are inaccurate in various respects and he asks the Court to re-open them.

[5] Three financial transactions in particular are challenged and the following issues are raised:

- a) Whether a sum of \$200,000 paid by Mr Palmer by way of deposit for the purchase of a property at 46 Puriri Drive, Whenuapai (“the Whenuapai property”) was a loan to Silver Fern as trustee of the Trust, and if so, whether that loan has since been repaid.
- b) Whether the balance of the purchase price paid to settle the purchase of the Whenuapai property was a loan from Messrs Allen and/or Palmer to Silver Fern as trustee of the Trust, or a gift from a company in Panama known as Fortune Management.
- c) Whether Silver Fern as trustee of the Trust owes any moneys to either Mr Allen, or to Mr Palmer, or to both of them, on account of certain motor vehicles and motorcycles that are shown in some versions of the financial accounts as being assets of Silver Fern.

### **The Key Players**

#### *Mr Allen*

[6] Mr Allen is an United States citizen. He came to New Zealand on 16 August 1999, and spent an increasingly large part of his time in this country. He worked as a motivational speaker and described himself as a pastor.

[7] While in New Zealand he, together with Mr Palmer, promoted an investment scheme supposedly involved in the purchase of offshore corporate structures, typically in Panama, through which high yielding investments were to be made. The investment scheme was fraudulent, but unfortunately significant funds were paid over by unwitting investors.

[8] On 16 April 2004, Mr Allen was found guilty of conspiracy to defraud members of the public following a Serious Fraud Office investigation into his activities between August 1999 and August 2001. He was also found guilty of using a document with intent to obtain a pecuniary advantage. On 11 June 2004, Mr Allen was sentenced to a term of imprisonment of 4 years and 3 months on the conspiracy charge, and a cumulative term of 21 months' imprisonment on the charge of using a document. Shortly thereafter, Mr Allen was served with a removal order by the New Zealand Immigration Service.

[9] On 15 March 2007, the New Zealand Parole Board granted Mr Allen parole effective as from 18 April 2007, or such earlier date as could be arranged by the New Zealand Immigration Service.

[10] On 18 April 2007, Mr Allen was deported from this country.

[11] Mr Allen was served with a copy of these proceedings while he was incarcerated in this country. He initially opposed various interlocutory steps taken by the Commissioner and appearances were entered on his behalf. He has not filed a statement of defence and he has taken no steps in relation to this substantive hearing.

*Mr Palmer*

[12] Mr Palmer is also an American citizen. He came to New Zealand on 16 August 1999 as well. He is a friend and associate of Mr Allen. The evidence established that he acted as the business manager for both his and Mr Allen's activities, and that he handled most of the monetary and financial transactions. At the time he had a partner, a Ms Inga Mork.

[13] On 23 May 2002, Mr Palmer was convicted in the United States District Court (Central District of Illinois, Urbana division) on charges of conspiracy to defraud the Inland Revenue Service and aiding and the filing of false and fraudulent tax returns. On 29 May 2003, Mr Palmer was sentenced to a term of 9 years' imprisonment, and was ordered to pay a fine of \$150,000, and restitution to the Inland Revenue Service of \$1,369,662.

[14] Mr Palmer is currently incarcerated in a correctional institution in the United States of America. He is due for release on 8 June 2010.

[15] Mr Palmer was also been served while he was incarcerated in the United States. He has taken no steps in the matter.

*Silver Fern Trustees Limited*

[16] Silver Fern was incorporated on 27 April 2001 by Mr Fletcher, a New Zealand solicitor. The initial directors of the company were Messrs Allen and Palmer. The shareholders on incorporation were also Messrs Allen and Palmer. They each held 50 shares.

[17] In early May 2001, Silver Fern settled the purchase of the Whenuapai property.

[18] Between December 2001 and February 2002, a number of returns were filed with the Companies Office which recorded changes in the shareholding and directorship of the company. By February 2002, the Companies Office records noted that Mr Allen was the sole shareholder and director.

[19] In April 2007, a Mr and Mrs Retimana became directors and the shares in the company were transferred from Mr Allen to Euro Trustee Corporation Limited. Companies Office records indicate that the sole director and shareholder of Euro Trustee Corporation Limited is Mr Fletcher. Mr Fletcher confirmed in evidence that the shares in Silver Fern are held by Euro Trustee Corporation Limited for the benefit of the “trustee appointor” of the Trust – namely Mr Allen. As at 24 September 2009, the directors of Silver Fern were Mr Allen, Mr Retimana and Mrs Retimana. The sole shareholder was Euro Trustee Corporation Limited.

*The Silver Fern Trust*

[20] The Trust was established pursuant to a deed prepared by Mr Fletcher dated 27 April 2001 (although notification to the Inland Revenue Department (“IRD”) and application for an IRD number were not undertaken until many months later). Initial drafts of the deed included reference to Mr Palmer but on his instructions, all references to him in the document were removed. The signed deed records that Mr Allen was the settlor, Silver Fern the trustee, and Fletcher Law Trustees Limited the “guardian”. Fletcher Law Trustees Limited is a company also controlled by Mr Fletcher.

[21] I have put the word “guardian” in [20] in quotation marks because I would not want it to be said that this judgment endorses such appointments. Mr Fletcher endeavoured to explain the concept in his evidence. I have reservations about it, but I did not hear argument in relation to the issue. It is unnecessary for me to comment further on it.

[22] The purposes of the Trust include the following:

- a) to settle the purchase of the Whenuapai property to provide a home in New Zealand for Mr Allen’s family while visiting or living in New Zealand;
- b) to provide certainty of succession to Mr Allen’s family with flexibility;
- c) to protect the family assets from predators;
- d) to protect the family assets from possible claims (potentially arising from Mr Allen’s activities in business, as a company director or senior manager);

- e) to maintain privacy and confidentiality of family and business information; and
- f) to provide confidentiality of ownership of certain assets.

[23] The beneficiaries of the Trust are essentially Mr Allen's family – defined in the deed to include Mr Allen.

[24] I observe that there are a number of curious features about the Trust. In that regard, I refer to the judgment of the Court of Appeal – *Allen v Commissioner of Inland Revenue* (2004) 21 NZTC 18,718 where William Young J noted at [16] as follows:

There are some odd, indeed faintly risible, features to the trust. In cl 1.1.2, Mr Allen, as settlor, records that he has no intention of defrauding creditors, a strange contention to see in the trust deed and one which might be thought to “protest too much”. Amongst the purposes of the trust (recorded in cl 1.3) is the protection of “family assets from predators”. “Predators” are not defined but presumably include creditors of Mr Allen. The trust is in very general discretionary form with very broad powers conferred on the trustee (including powers to restructure the trust's affairs and to vary the deed). The scheme of the trust is to provide benefits for Mr Allen's family but to distance, as far as possible, the assets of the trust from any contention that Mr Allen personally has any interest in them.

### **The investigations/tax assessments**

[25] On 16 February 2001, the director of the Serious Fraud Office authorised an investigation under the Serious Fraud Office Act 1990 into the affairs of both Messrs Allen and Palmer. *Inter alia*, the Serious Fraud Office executed a search warrant on the Whenuapai property. It also interviewed Mr Allen on three occasions pursuant to s 9 of the Serious Fraud Office Act. The first interview occurred on 16 October 2001, the second on 20 March 2002 and the third on 25 March 2003. Considerable information was gleaned by the Serious Fraud Office. I refer to some of that information below.



[26] The Commissioner commenced an investigation into the tax affairs of Messrs Allen and Palmer on 4 April 2002 following the disclosure of information by the Serious Fraud Office under s 36 of the Serious Fraud Office Act.

[27] As a result of the IRD's investigation, the Commissioner assessed Messrs Allen and Palmer for 50% each of their partnership income calculated for the 2000 and 2001 income tax years. Those assessments were issued on 8 April 2002.

[28] The Commissioner assessed Mr Allen's taxable income at \$878,780.70 for the 2000 income tax year. His income tax liability on that income was \$248,867.63. The Commissioner assessed Mr Allen's taxable income at \$2,143,731.71 for the 2001 income tax year. His income tax liability on that income was \$827,325.09.

[29] The Commissioner assessed Mr Palmer's taxable income at \$878,780.70 for the 2000 income tax year. His income tax liability on that income was \$248,867.40. The Commissioner assessed Mr Palmer's taxable income at \$2,143,731.71 for the 2001 income tax year. His income tax liability on that income was \$827,325.09.

[30] Mr Allen belatedly attempted to challenge the income tax assessments for the 2000 and 2001 income years. The attempt was dismissed by this Court on 10 August 2004 – *Commissioner of Inland Revenue v Taxation Review Authority* (2004) 21 NZTC 18,707 – by the Court of Appeal on 8 September 2005 – *Allen v Commissioner of Inland Revenue* (2005) 22 NZTC 19,473 and by the Supreme Court on 30 March 2006 – *Allen v Commissioner of Inland Revenue* (2006) 22 NZTC 19,827. Mr Palmer did not pay the tax assessed and on 3 April 2007, judgment was entered against him in favour of the Commissioner for \$1,520,693.36.

[31] Mr Palmer did not dispute or challenge his income tax assessments for either of the 2000 or 2001 income years. Nor did he pay the tax assessed. On 9 February 2004, judgment by default in relation to Mr Palmer was sealed. The judgment is for \$1,518,618.36.

### **The Charging order/Mareva injunction**

[32] On 11 April 2002, a charging order nisi on property other than land was granted by Rodney Hansen J. The charging order covered the following property:

- a) Any debt or sum of money due or accruing due to Mr Allen and Mr Palmer from Silver Fern, including money due or accruing due and standing to the credit of Mr Allen and Mr Palmer in the books or accounts of Silver Fern.
- b) All the shares held by Mr Allen in Silver Fern.
- c) All estate, right, title or interest of Mr Allen in the following two motorcycles, namely:
  - i) Harley Davidson motorcycle Reg No “55UKA”; and
  - ii) Harley Davidson motorcycle Reg NO “47UQM”.
- d) All estate, right, title or interest of Mr Palmer in the following three motorcycles, namely:
  - i) Honda motorcycle Reg No “33RRS”;
  - ii) Harley Davidson motorcycle Reg NO “44TSO”; and
  - iii) Harley Davidson motorcycle Reg No “56UKA”.

[33] On 12 April 2002, a Mareva injunction was placed over the net proceeds of the sale of the Whenuapai property, and over the following assets of Messrs Allen and Palmer:

- a) Harley Davidson motorcycle Reg No “55UKA”;
- b) Harley Davidson motorcycle Reg No “47UQM”;

- c) Shares in Silver Fern;
- d) Lincoln Town Car Reg No. "LIMOCO";
- e) Mitsubishi campervan Reg No "YI2262"; and
- f) Mercedes limousine Reg No "Y01518".

[34] On 19 December 2002, the Mareva injunction was varied to require that the net proceeds of the sale of the Whenuapai property be paid to the Registrar after allowing for the payment of certain deductions for the sale of the Whenuapai property, a weekly \$1,000 payment to Clarrisa Allen (Mr Allen's wife), and legal costs for related proceedings. The remaining proceeds, after the permitted deductions, were to be placed in an interest bearing deposit.

[35] The Mareva injunction and charging orders obtained by the Commissioner were the subject of interlocutory applications that resulted in a judgment of 9 April 2002 reported as *Commissioner of Inland Revenue v Allen & Ors* (2003) 21 NZTC 18,137.

[36] On 16 December 2003, the Mareva injunction was again varied so that \$855,280.33 of the net proceeds of sale of the Whenuapai property could be reinvested with the ASB in the name of Silver Fern in a fixed term deposit account through Fletcher Law solicitor's trust account. The sum of \$1,000 was to be paid per week to Clarissa Allen and legal fees were to be paid from the funds, subject to the Commissioner's review of the invoices.

[37] On 12 August 2004, the Court of Appeal dismissed an appeal of the judgment of 9 April 2003 – *Allen & Anor v Commissioner of Inland Revenue* (2004) 21 NTC 18,718. The charging orders and Mareva injunction were upheld.

## **The Whenuapai property**

[38] Two of the financial transactions in issue in these proceedings arise out of the purchase of the Whenuapai property. It is therefore necessary to outline that transaction and subsequent dealings with the property in more detail.

[39] On 30 August 2000, the then owners of the property entered into an agreement for sale and purchase with purchasers described as “Mork Allen Palmer and/or Nominee”. The purchase price was \$1.9 million plus GST (if any). The agreement called for a deposit of \$200,000 to be paid to Hobsonville Reality Limited’s trust account. The balance of the purchase price was to be paid in cash on the possession date, which was 5 September 2000. Settlement was on 31 March 2001, or earlier by mutual consent, but not before 5 January 2001. The agreement for sale and purchase was signed by Mr Palmer.

[40] On 31 August 2000, Hobsonville Reality Limited received the sum of \$200,000 from “ANZ St Heliers for M. Palmer”. There is a corresponding debit on the same day against an account in Mr Palmer’s name with the ANZ Bank in Taupo. The evidence disclosed that both Mr Palmer and Mr Allen had signing authority on this account, and that both transacted on it at various times.

[41] A solicitor, a Mr Dillon, acted for Messrs Allen and Palmer and initially for Ms Mork in relation to the purchase of the Whenuapai property. His instructions came largely from Mr Palmer. It was Mr Dillon’s understanding that the deposit was paid by Mr Palmer.

[42] The law firm, Buddle Findlay, acted for the vendors.

[43] Possession was given and settlement was due on 31 March 2001. Buddle Findlay sent a settlement statement as at 2 April 2001 – being the first working day after 31 March 2001. The balance required to settle as at that date was \$1,858,215.98 (including GST).

[44] On 29 March 2001, Mr Dillon sent a letter to Messrs Allen and Palmer and Ms Mork requesting a bank cheque to enable him to attend to settlement.

[45] In the event, settlement could not occur, because Mr Dillon did not receive funds from his clients.

[46] In early April 2001, Mr Dillon was advised in the course of a telephone discussion with Mr Palmer that Silver Fern was to be nominated to complete the purchase. In the course of the same discussion, Mr Palmer also advised Mr Dillon that Ms Mork was no longer involved.

[47] On 12 April 2001, Mr Dillon wrote to Buddle Findlay enclosing a transfer, and notice of sale, which recorded that the purchaser was to be Silver Fern.

[48] Mr Dillon still did not have funds to complete the purchase, but on 18 April 2001, he received, probably from Mr Palmer, an unsigned letter from an entity in Panama known as Banco Disa, directing the payment of NZ\$1,860,000 to his trust account from an account of "Fortune Management". Mr Dillon did not, however, receive the monies. On 20 April 2001, he received, again probably via Mr Palmer, a further letter from Banco Disa advising that it had not been able to send confirmation of the transfer, and enclosing a copy of an instruction sent by Banco Disa to Citibank N.A. recording that US\$770,970 had been sent by Banco Disa to Citibank N.A..

[49] Mr Dillon was also sent a facsimile by Mr Palmer referring to a telephone conversation between Mr Palmer and Citibank N.A.. The facsimile was dated 27 April 2001, and it recorded that payment of NZ\$1,860,000 had been effected by the bank, but that the monies had been returned because the account number was invalid.

[50] On 30 April 2001, Mr Dillon received confirmation from the ASB Bank that \$72,340.17 had been credited to his trust account. Mr Dillon issued a receipt on 30 April 2001 recording that that sum had been received from "Fortune Management" to the credit of Silver Fern, as "settlement funds".

[51] On 1 May 2001, Mr Dillon received further advice from the ASB Bank confirming that NZ\$1,860,000 had been credited to his trust account by order of “Fortunr Management Banco Disa” via Citibank N.A.. Mr Dillon issued a further trust account receipt dated 1 May 2001 recording that that sum had been received from Fortune Management for the credit of Silver Fern, as “settlement funds”.

[52] An amended settlement statement was prepared by Buddle Findlay, and settlement was concluded on 3 May 2001. Mr Dillon subsequently accounted to Silver Fern, c/- of the Whenuapai property. The transfer of the property to Silver Fern was produced to the Land Registry on 3 May 2001, and entered on the register on 25 May 2001.

[53] The total amount required to complete the purchase was \$2,076,497. In addition, \$35,000 was paid to P Glamuzno Contractors Limited, probably for work on the property. A refund of \$61 was later received from Buddle Findlay with the result that the total capital cost of the purchase was \$2,111,436.

[54] In late 2001, Mr Allen sought loan finance from the ASB Bank. He approached a Mr Sadler, who was a bank employee, and asked for funding of \$1.2 million to renovate the Whenuapai property. Mr Allen outlined the nature of the proposed renovations to Mr Sadler, and provided personal information to Mr Sadler so that a personal statement of financial position, and income and expenditure statement could be completed. That documentation was subsequently signed by Mr Allen. Mr Allen stated that he owned the Whenuapai property, as well as four houses in the United States and 10 motor vehicles. He stated that his yearly income was US\$1.5 million. Mr Allen told Mr Sadler that the Whenuapai property was owned by Silver Fern, and that he was the sole director and shareholder of that company. He did not disclose that Silver Fern held the property as trustee of the Trust. Mr Allen also told Mr Sadler that he had money offshore.

[55] In January 2002, Mr Sadler met with Mr Allen again and asked him for proof of his income. Mr Allen was initially adamant that he did not want to give Mr Sadler any written proof of his income. He specifically asked whether or not the government could subpoena the bank’s records. Ultimately, after Mr Sadler insisted,

Mr Allen provided two letters. Both were on the letterhead of Fortune Development Systems Inc, and were signed by a Mr Quiroz and a Mr Mendosa, as the president and secretary respectively of that company. The letters confirmed that they acted for Mr Allen and that they managed his financial affairs and those of a number of related companies. They certified that through his business activities Mr Allen had an approximate annual income of US\$1 million.

[56] Attached to one of the letters were two Banco Disa statements which, *inter alia*, recorded various transactions involving Mr Palmer. Mr Sadler did not specifically ask Mr Allen if the statements related to his own bank account, and Mr Allen did not volunteer any information in this regard. Mr Allen told Mr Sadler that Mr Palmer was his son, and he showed him a number of bank statements from accounts held by him and Mr Palmer with the ANZ Bank. He told Mr Sadler that he and Mr Palmer had between \$8m and \$10m on term deposit with the ANZ Bank.

[57] The ASB Bank agreed to lend to Mr Palmer the sum of \$750,000, available immediately on an interest only basis, and a further \$450,000, available on a progress payment basis, against demonstrated improvements to the property. The loan was to be to Mr Allen. As a condition of the loan, Mr Allen was required to give a first registered mortgage over the Whenuapai property.

[58] On 14 February 2002, Silver Fern passed a resolution approving the mortgage over the Whenuapai property in favour of the ASB Bank. It also agreed to enter into an unconditional all obligations guarantee and indemnity in relation to the loan to Mr Allen.

[59] The mortgage in favour of the ASB Bank was subsequently registered over the Whenuapai property.

[60] The amount of \$750,000 was paid into Mr Fletcher's trust account. He deducted various payments from that sum and then paid the balance of \$714,889.05 into Mr Allen's loan account with the ASB Bank. Effectively, Mr Allen thereafter had an overdraft facility.

[61] On 7 March 2002, following a news article on television, and an article in Consumer Magazine, the ASB Bank became aware of adverse publicity surrounding Mr Allen. It froze the loan at a maximum level of \$700,000. As at that date, some \$694,000 had been drawn down on the facility by Mr Allen. It seems that none of the moneys were used to improve the Whenuapai property.

[62] In or around April 2002, Mr Allen, as a director of Silver Fern, entered into an agreement to sell the Whenuapai property for \$2 million. Settlement occurred in January 2003. The gross sale proceeds were \$2 million. The net realisation was \$1,932,192. There was a loss on the sale of \$179,379.

[63] The loan to the ASB Bank in favour of Mr Allen was repaid on the sale by Silver Fern as trustee of the Trust. The amount repaid to the ASB Bank was \$751,517.35.

#### **The financial statements of the Trust**

[64] The financial statements for the Trust were prepared by a Mr Robertson who is a chartered accountant. Sometime in the latter part of 2005 he was contacted by Mr Fletcher and asked to prepare accounts for the Trust. Mr Robertson sent a letter of engagement to Mr Fletcher on 22 October 2005, and thereafter took on the Trust as a new client.

[65] No accounts had been prepared since the Trust was established, and the information necessary for the preparation of the financial statements was provided to Mr Robertson by Mr Fletcher in November 2006.

[66] Mr Robertson then prepared draft financial statements for the year ended 31 March 2003 and forwarded them to Mr Fletcher by letter dated 17 January 2007. The letter contained the following query:

We have treated monies from Fortune Management of \$72,340.17 on 30-4-01 and \$1,860,000 on 1-5-01 as settlements on the trust. Can you please confirm that this is correct?



Mr Fletcher advised that the way in which the monies had been treated in the draft financial statements was in accord with his understanding, which in turn was based on a discussion he had had sometime previously with Mr Palmer.

[67] Two days later, on 19 January 2007, Mr Robertson sent a further letter to Mr Fletcher enclosing draft financial statements for the years 2002 to 2006. The letter recorded, as points of interest:

- a) that the Whenuapai property had been purchased and that “this was financed by ...”. The sentence was left unfinished; and
- b) that there was a loan (the deposit) from Mr Palmer of \$200,000, and that that loan remained “up to today”.

The assets and liabilities of the Trust were described as follows:

At 31 March 2006 assets are:	
Loan D E Allen	1,152,366
ASB oncall	19,761
ASB Term Deposit	<u>744,761</u>
	1,897,127
Liabilities are loan to Gene Palmer	200,000
Equity is	1,697,127

(It is noteworthy that the schedule does not add up. It appears that the \$19,761 figure has been double counted. Further the \$200,000 Palmer loan was a liability of the Trust. It should have been recorded as a loan from Mr Palmer and not to Mr Palmer.)

[68] In any event, Mr Fletcher drew a line between the loan to Mr Allen and the loan from Mr Palmer and wrote the words “set off” beside that line. Mr Fletcher instructed that that set off should be recorded in the accounts and Mr Robertson acted accordingly. In the financial statements for the year 2003, the loan from Mr Palmer was off set against the loan to Mr Allen. This was reflected in the financial statements for the following years.

[69] In an email dated 2 February 2007 sent to Mr Robertson, Mr Fletcher stated as follows:

As a result of my discussion with Don [Allen] today I think we should add each of the vehicles referred to in the charging order, as assets of the trust at cost – because they were all transferred to the trust in mid 2002, with a reduction in the loan advances to Don – for the relevant cost sums (unfortunately we have no source documents for purchases) but all purchases occurred in the first year – the figures below are Don’s best recollection ...

The cost sums (originally funded by Gene Palmer – so add to Gene’s loan and repay from Don’s money) appear to be ...

Mr Robertson prepared one set of the financial accounts in accordance with these instructions.

[70] Financial accounts were prepared for the year ended 31 March 2002 and they were signed by Mr Allen. They showed that the sum of \$1,932,340 received by Mr Dillon to settle the purchase of the Whenuapai property had been treated as a “Trust settlement”. They recorded as a then current liability of the Trust the loan from Mr Palmer of \$200,000.

[71] Two versions of the accounts were prepared for the year ended 31 March 2003. Both versions were signed by Mr Allen.

a) In the first version, the “Trust settlement” had gone and instead the loss on the sale of the Whenuapai property was recorded. The first version also recorded that the loan from Mr Palmer had been set off against a loan to Mr Allen, and that as a result the amount of the loan to Mr Allen was reduced to \$670,874.

b) The second version showed as assets of the Trust a number of motor vehicles and motorcycles with a book value of \$528,000. The loan to Mr Allen was shown as being reduced to \$142,874.

[72] The loan by the Trust to Mr Allen had arisen first because of the repayment to the ASB Bank of the moneys borrowed by Mr Allen personally, and secondly

because the Trust had paid a large number of Mr Allen's bills. On Mr Fletcher's instructions, these moneys were treated as an interest free advance to Mr Allen.

[73] There are also two versions of the accounts for each of the years 2004, 2005, 2006 and 2007. One version recorded the motor vehicles and motorcycles as an asset of the Trust, and the other version made no reference to the motor vehicles and motorcycles. The amount of Mr Allen's loan from the Trust varied over the years. Both versions of each set of financial statements were signed by Mr Allen.

### **Re-opening the accounts**

[74] The Commissioner seeks in effect that I should re-open the accounts.

[75] On the facts of this case, I have no difficulty with that suggestion. Where there are settled accounts which have been agreed between parties, they may generally be relied upon by way of defence against an alleged obligation to account or to account further – *Halsbury's Laws of England* (4th ed, reissue, 2003) vol 16(2) Equity at [452]; *Laws of New Zealand Equity* at [253].

[76] Here there are no settled accounts. Indeed there are two sets of signed accounts, and the Commissioner has never accepted either set. Moreover, there is clear authority for the proposition that even settled accounts can be re-opened where an item has been omitted or some other error has occurred – see, for example, *The British Mexican Petroleum Company Limited v Jackson (H.M. Inspector of Taxes)* [1932] 16 T.C 570 per Lord McMillan at 593. And see *Halsbury's Laws of England* (4th ed, reissue, 2003) vol 16(2) Equity at [453]. Further accounts can be re-opened where they can be impeached for fraud or mistake – see *Heywood v Parfitt* HC CHC M406/90 12 July 1991 Tipping J; *Moir v Moir* HC CHC CIV 2004-409-002501 22 May 2006 Fogarty J.

[77] I bear in mind that the accounts the Commissioner seeks to re-open were created retrospectively in 2007. They were created after the tax assessments, the judgments and the Court orders. I have no doubt that every attempt was made by

Mr Allen in preparing the accounts to maximise the advantage to him and to Mr Palmer.

[78] I now turn to consider each of the transactions challenged by the Commissioner.

**Issue 1: Whether a sum of \$200,000 paid by Mr Palmer by way of deposit for the purchase of a property at 46 Puriri Drive, Whenuapai (“the Whenuapai property”) was a loan to Silver Fern, and if so whether that loan has since been repaid.**

[79] It is clear that the monies paid by Mr Palmer by way of deposit for the purchase of the Whenuapai property were a loan. Indeed this is conceded by Silver Fern in its statement of defence. Such concession was inevitable. The monies were drawn by Mr Palmer from his ANZ Bank account. They were receipted in his name. Mr Dillon understood that Mr Palmer had paid the deposit. There is no documentary evidence suggesting that the \$200,000 was a gift or a settlement on the Trust. Mr Palmer was not the settlor of the Trust. There is nothing to suggest that gift duty was paid on the moneys advanced. The statement of financial position prepared for the Trust as at 31 March 2002 records under “Current Liabilities” – “Loan – G Palmer – \$200,000”. Those accounts were signed by Mr Allen.

[80] In its statement of defence Silver Fern contends that the loan advance from Mr Palmer was repaid by the Trust when it repaid the ASB Bank loan advances made to Mr Allen, because Mr Allen had applied some of the funds received from the ASB Bank loan to repay investors’ advances to Mr Palmer.

[81] Mr Wood, on behalf of Silver Fern, refined this assertion and advanced three propositions in support. He submitted:

- a) that the liability of Silver Fern for the deposit had been extinguished as a consequence of Mr Allen paying out that sum on behalf of Silver Fern – thus clearing the debt;

- b) that the debt had been extinguished in part by payments made to Mr Palmer by Mr Allen; and
- c) that Silver Fern did not need to be concerned about any actions of other parties, and it need only expect that once a debt due by it had been gratuitously paid, it had no further liability for that debt to any other party.

[82] Mr Wood relied upon various statements made by Mr Fletcher when he gave evidence for the Commissioner. Mr Fletcher appeared under a subpoena. He was asked about the alleged set off. He stated, in broad terms, that Mr Palmer borrowed the moneys from the ASB Bank, and that the moneys were applied to repay the \$200,000 loan by Mr Palmer to the Trust. He stated that Mr Palmer did not see himself as “having any moneys owed to him by the Trust”. He also stated as follows:

In conceptual terms I don't think that Gene Palmer recorded in his mind that he had advanced money to the Trust by way of loan. As far as he was concerned, that was now part of the Trust.

Mr Fletcher instructed Mr Robertson to remove the debt by way of journal entry in the accounts consequent upon this understanding. The journal entry for this transaction was “For repayment of Palmer Loan ex ASB funds”.

[83] The difficulty with these assertions is that they are not borne out by any documentation, or by the evidence. Mr Fletcher accepted that there were no file notes referring to the matter. The Serious Fraud Office analysed the payments made by Mr Allen out of the ASB Bank loan account. The payments totalled \$668,778.88. There was no payment in the sum of \$200,000 to Mr Palmer. In my judgment it cannot be asserted that the \$200,000 loan by Mr Palmer to the Trust was repaid in full by Mr Allen.

[84] I now turn to the question of whether or not the loan was repaid in part.

[85] Mr Wood relied upon two matters in this regard:

- a) following completion of the Whenuapai property settlement, Mr Dillon had surplus funds totaling \$17,631.65 in his trust account. He paid this amount to Mr Palmer; and
- b) the analysis of payments made by Mr Allen from his ASB Bank loan account disclosed payments to four individuals:
  - i) a Jennifer Halleran in the sum of \$23,400;
  - ii) a Murray Christie in the sum of \$25,800;
  - iii) a Geoff Garaway in the sum of \$11,700; and
  - iv) a George Langford in the sum of \$23,000.

Mr Wood cross-examined a Mr Osborn, an employee of the Serious Fraud Office, in relation to these payments and individuals. It transpired that Ms Halleran and Mr Langford had invested moneys with Messrs Allen and Palmer. Mr Osborn did not know why payments had been made by Mr Allen to those individuals. Nor was he able to assist the Court in relation to the payment made to Mr Garaway. Mr Christie was involved in promoting the fraudulent investment schemes and there is no explanation for the payment to him. The suggestion made by Mr Wood was that Mr Allen was meeting obligations Mr Palmer had to repay those investors and that these payments reduced the amount of the loan.

[86] There are two additional factors in this regard, not referred to by Mr Wood, though nevertheless relevant:

- a) When Mr Fletcher drew down the ASB Bank loan advance, he deducted the sum of \$34,850.95 before paying the balance back into Mr Allen's ASB Bank loan account. The sum of \$30,000 was

transferred to a separate matter number in the trust account in the name of Messrs Allen and Palmer as “security for costs” in respect of the Serious Fraud Office investigation.

- b) In the course of one of the s 9 Serious Fraud Office interviews Mr Allen was asked about the moneys that he had borrowed from the ASB Bank. The relevant part of the interview is as follows:

Osborn: Now that the money that you say you borrowed in order to pay investors or people who Gene owed money to. Was that as a, was that to be repaid from the ASB money that you obtained.

Allen: That’s my pay [inaudible] yes.

Osborn : How much of that do you say you’ve paid back.

Allen: Oh not really that much. I think, although maybe about \$30,000 or so.

Osborn: Ok.

Allen: Not much.

[87] I deal with each item in turn.

- a) In my judgment, the payment of \$17,631.65 by Mr Dillon to Mr Palmer following settlement of the agreement for sale and purchase for the Whenuapai property should not be treated as being a payment in reduction of the \$200,000 loan. This was one of the matters queried by Mr Robertson. He was told, presumably by Mr Fletcher, to put the sum on the “Allen loan account”. In the 2002 accounts, the current assets of the Trust included a loan to Mr Allen of \$20,514, which presumably must include this sum.
- b) Nor in my view should the payments made by Mr Allen to Ms Halleran and to Messrs Christie, Garaway and Langford be treated as being payments in reduction of the loan. The payments total \$83,100. This is considerably more than the \$30,000 Mr Allen said he had paid on Mr Palmer’s behalf in the Serious Fraud Office interview. On the

evidence only Ms Halleran and Mr Langford were investors. The total amount paid to them by Mr Allen was some \$46,400 – again substantially more than the \$30,000 referred to by Mr Allen. Moreover there is no evidence that they were owed money by Mr Palmer. The payments were made by Mr Allen, and there is nothing to suggest that the payments were made to repay debts, let alone debts due by Mr Palmer. Similarly, there is no evidence of Mr Palmer authorising the Trust to set off the loan from him against the loan to Mr Allen. No discharge of the obligation, either in whole or in part, was signed by Mr Palmer, and there is nothing in Mr Fletcher’s file notes of his attendances on Mr Palmer and/or Mr Allen supporting the version of events now advanced.

- c) As noted, Mr Allen told the Serious Fraud Office that “maybe about \$30,000” had been paid to people to whom Mr Palmer owed money. This figure ties in with the amount retained by Mr Fletcher in his trust account to meet the costs involved in the Serious Fraud Office investigation. Presumably the moneys were used for that purpose. The Serious Fraud Office investigation commenced in February 2001. The moneys were set aside by Mr Fletcher in February 2002. As far as I can glean from the New Zealand Immigration Service visitor records produced in evidence, Mr Palmer left the country in August 2001 and he did not return. He was facing his own difficulties in the United States. In the circumstances, it seems unlikely that any part of the \$30,000 related to Mr Palmer’s costs in relation to the Serious Fraud Office investigation.

[88] There is no evidence that there was any debt between Mr Allen and Mr Palmer, and unless there was a debt, then in my view the treatment in the financial statements is incorrect.

[89] In my view, there is no substance to the claimed set off. The accounts for each of the years 2003 and following should reflect that there is a debt owing by the



Trust to Mr Palmer, which includes the sum of \$200,000 paid by Mr Palmer as the deposit on the purchase of the Whenuapai property.

**Issue 2: Whether the balance of the purchase price paid to settle the purchase of the Whenuapai property was a loan from Messrs Allen and/or Palmer to Silver Fern as trustee of the Trust, or a gift from a company in Panama known as Fortune Management.**

[90] The Commissioner asserts that the balance of the consideration paid by Silver Fern, \$1,932,340, for the purchase of the Whenuapai property was a loan to Silver Fern as trustee of the Trust from Messrs Allen and Palmer in proportion to their contributions, and that this loan remains unpaid.

[91] Silver Fern contends that the balance of the consideration was received by Silver Fern as trustee of the Trust as a cash gift or settlement from an entity in Panama.

[92] The way in which the funds were received and receipted by Mr Dillon is recorded at [48] to [51]. The funds were receipted as “settlement funds”. However, Mr Dillon, in giving evidence, explained that this referred to settlement of the purchase of the Whenuapai property, and not settlement on the Trust.

[93] The funds were treated as a settlement on the Trust because Mr Fletcher instructed Mr Robertson to deal with them in this way. Mr Robertson had no other material before him to suggest that these instructions may not have been accurate, and he proceeded accordingly in preparing the financial statements. However, in the course of giving evidence, Mr Robertson stated that if had he been advised that Mr Allen had told the Serious Fraud Office that the moneys had come from him and Mr Palmer, he would have made further enquiry. He also stated that if the funds were not a settlement by Fortune Management Services Inc. and were moneys advanced by Messrs Allen and Palmer to the Trust, he would change the accounts to record the moneys as being a loan advanced by Messrs Allen and Palmer.

[94] This accorded with the evidence of Mr Jordan, the forensic accountant called by the Commissioner. In the absence of other evidence, he concurred with

Mr Robertson's initial accounting treatment, but he noted that he had not seen anything confirming that the funds were a settlement on the Trust.

[95] It is clear that the funds originated from an entity known as Fortune Management which was based in Panama.

[96] While evidence was adduced both by Mr Osborn from the Serious Fraud Office and by Mr Bruce from the IRD regarding Fortune Management, the position in relation to that entity remains relatively murky. The evidence established that there was a company known as Fortune Management Services Inc. which was incorporated in Panama on 21 December 2000. It also disclosed that Fortune Management Services Inc. was associated with a trust known as the Los Picacho Trust, and a foundation known as the Los Picacho Foundation. All of these entities seem to have had common officers – Messrs Quiroz and Mendosa.

[97] It is also clear from the evidence that Messrs Allen and Palmer were closely associated with these various entities. For example:

- a) The Los Picacho Foundation sent an undated letter to Fortune Management Services Inc. setting out the foundation's views on how discretions should be exercised. The letter included the following sentence:

During the lifetime of Palmer Paul Eugene, it is our wish that the income and capital of the trust be accumulated for their benefit, but we may write to you on another date requesting that you give your consideration to making distributions of either income or capital or both.

- b) The board of Fortune Management Services Inc. resolved to appoint Mr Palmer, c/- of the Whenuapai property, as "Comptroller" to the company, with full negotiating and/or signatory authority for the purposes of committing the company to participate and/or to be obligated to any and/or all financial transactions. They also resolved that the company's financial transactions should be actioned by Banco Disa.

- c) Fortune Management Services Inc. authorised its president to enter into a contract with Mr Palmer as Comptroller, such contract to be on the best terms and conditions that the president could obtain from Mr Palmer.
- d) On 18 December 2000, Mr Palmer transferred \$106,862.61 to a Panamanian bank via the ANZ. The customer message on the international transaction authorisation referred to Fortune Management Services Inc.
- e) In the course of the telephone discussion on 11 April 2001 between Mr Palmer and Mr Fletcher, there was a reference to “one of your Panama companies”.
- f) Mr Dillon, in a letter to Buddle Findlay dated 23 April 2001, referred to “my client’s Panama bank”.
- g) As noted above at [48] to [49], it is probable that Mr Palmer made available to Mr Dillon the bank documentation from Banco Disa and Citibank N.A. in relation to the transfer of the moneys. Banco Disa wrote direct to Mr Palmer and apologised to him for the delays.
- h) When the Serious Fraud Office executed the search warrant on the Whenuapai property, they found a file. Mr Palmer’s name was on the cover, along with the name Fortune Management Services Inc.
- i) In responding to a notice sent to him by the Serious Fraud Office on 2 March 2001, Mr Allen stated that he was a director of Fortune Management Services Inc., and of other companies, namely Fortune Development Systems Inc., Glow Inc, and PPPProfit Inc. These are all registered in Panama. He stated that Fortune Management Services Inc. had a bank account with Banco Disa and he gave the account number.

- j) Bank account numbers given on various documents match, e.g. the account numbers given by Banco Disa at the time of the transfer of the moneys for settlement of the purchase of the Whenuapai property tie in with bank account numbers on the documentation supplied to Mr Allen in support of his application to the ASB Bank for loan finance.
- k) In a file note dated 14 December 2001, Mr Fletcher recorded a discussion he had with Mr Palmer and Mr Allen. They were seeking to finalise the best means of putting together a proposal to borrow money from the ASB Bank. The ASB Bank wanted an assurance that the Trust had a revenue stream. The file note records:

At this stage the understanding is that the revenue is coming from their offshore seminar company based in Panama.

- l) Fortune Management Services Inc. provided bank statements in support of Mr Allen's loan application. Those bank statements recorded various transactions with Mr Palmer. The company also certified that Mr Allen had an income of approximately US\$1 million. Those letters were sent at Mr Allen's instigation and were clearly intended to provide assurance to the ASB Bank about Mr Allen's financial position.
- m) The bank account number on the bank statements provided by Fortune Management Services Inc. was the same number as Mr Allen had given to the Serious Fraud Office in his response dated 2 March 2001.
- n) In papers filed in the United States Court proceedings against Mr Palmer, it was recorded that he had control of various credit cards issued by Panamanian banks, including credit cards issued by Fortune Management Services Inc., and Fortune Developments Systems Inc.
- o) In an affidavit filed on 18 December 2002, Mr Allen stated that he believed that Fortune Management Services Inc. had been set up by

Mr Palmer. While he also asserted that he had no account and no money anywhere offshore in his own name which he could access by any means. He did not seek to respond to an allegation that the money for the purchase of the Whenuapai property had come from a bank account which he controlled in Panama, and he did not give any other explanation for the source of the funds for the purchase of the Whenuapai property by Silver Fern on behalf of the Trust – see *Commissioner of Inland Revenue v Allen & Ors* (2003) 21 NZTC 18,137 at [121].

- p) Notwithstanding the statements noted immediately above, there is evidence that Mr Allen had a Fortune Development Systems Inc. credit card. Mr Allen had acted as surety for Mr Palmer who had been arrested in the United States. The following exchange occurred in the first of the Serious Fraud Office interviews:

Osborn: Well what are you aware of. What occurred in respect of that.

Allen: [inaudible] occur I'm aware of, I called a Bondsman.

Osborn: Mmm.

Allen: um when I was in ah Los Angeles because I didn't know what was going on, and to get Mr Palmer from Los Angeles, I believe Los Angeles to America there is money that had to be paid and, but I believe it was paid out of Fortune Development Card I think.

Osborn: What card is that.

Allen: That's one of the, the gold cards from offshore.

Osborn: Is that like a credit card.

Allen: Yeah.

Osborn: So was money paid to the Bondsman.

Allen: I believe so. The money was paid to a bail Bondsman and also to an [inaudible] Government for [inaudible] to secure that he

would appear I think. I'm not sure how all that worked.

Osborn: Mmm. The Bondsman of my understanding would generally guarantee the bond to be paid to the Government.

Allen: Yes I think that's what he said.

Osborn: And what was offered to the Bondsman... What did you offer to the Bondsman in order that he would give that guarantee.

Allen: Ahhh my credit card.

Osborn: Did he just take it like a swipe of the credit card.

Allen: No I gave him the number of the card over the phone and I guess it was good enough so they accepted it.

- q) The Serious Fraud Office's analysis of Silver Fern's ASB Bank account showed the transfer of funds from Fortune Management Services Inc. of \$23,736.06.

While none of these matters are decisive in themselves, collectively they compel the conclusion that Messrs Allen and Palmer and their financial affairs were inextricably intertwined with Fortune Management Services Inc. and probably Fortune Development Systems Inc.. It has to be remembered that Mr Palmer was largely responsible for the financial affairs of both men, see [12] above.

[98] There is but limited evidence to the contrary. Mr Wood referred to two pieces of evidence in particular:

- a) in March 2002 letters were sent to Mr Allen on behalf of Fortune Management Services Inc., PPPProfit Inc., Fortune Development Systems Inc., and Glow Inc. recording that neither Mr Allen nor Mr Palmer were directors in those companies. I note however that these letters were almost a year after the event; and
- b) Mr Fletcher stated in evidence that he understood that the funds had come from a Panamanian foundation which was "somehow directly or

indirectly associated with Mr Gene Palmer that existed for the benefit of the church and the work of the church that Don [Allen] was associated with". I note, however, that this statement is inconsistent with contemporaneous correspondence from Mr Fletcher referred to below.

[99] In my judgment there is strong evidence linking Messrs Allen and Palmer to Fortune Management Services Inc.. There is also good evidence linking them personally to the moneys received to complete the settlement. I refer to the following:

- a) In correspondence sent by Mr Fletcher to Mr Allen on 22 February 2002 Mr Fletcher recorded:

We are aware that you provided almost all of the funding for the Trust to purchase the Whenuapai property ...

When asked what this referred to when giving evidence, Mr Fletcher stated:

I have no idea. It's probably referring to the fact that the whole of the purchase price had been paid in cash for the purchase of the property.

I note that there was nothing in the evidence to support that Mr Allen took issue with the contents of the letter.

- b) In an interview with a Ms Pettifer of the Serious Fraud Office on 16 October 2001, Mr Allen was asked about the purchase of the Whenuapai property. The exchange went as follows:

Pettifer: The Whenuapai property in Puriri Road where did the \$1.9m come to purchase that property, where did it come from.

Allen: I think offshore investments.

Pettifer: Who's offshore investments.

Allen: I think it was my and Eugene's.

Pettifer: So it's combined money.

Allen: Sometimes.

Pettifer: Well you paid \$1.9m approximately \$1.9m for the property how much of that \$1.9 million is yours.

Allen: Probably half.

- c) The treatment of the settlement balance, the \$17,631.65 paid by Mr Dillon to Mr Palmer and recorded in the accounts as being an advance by the Trust to Mr Allen (see [85]a) above), is consistent with Messrs Allen and Palmer treating the funds sourced from Fortune Management as their own.

[100] There was nothing in the evidence to suggest that there was any gift by Fortune Management Services Inc., or that it settled the funds on the Trust. The Company's constitution was produced in evidence. The purposes for which it was established do not support the suggestion that there was a gift or settlement. The company was established, in broad terms, to transact and carry on financial investments and brokerage. There is no logical reason why the company would have settled \$1,932,340 on a trust in New Zealand controlled by Mr Allen for the benefit of Mr Allen and his family. Mr Allen was the settlor of the Trust, not Fortune Management Services Inc..

[101] Given the absence of any commercial justification for a gift or a settlement by Fortune Management Services Inc., and given the deep involvement of Messrs Allen and Palmer in the affairs of Fortune Management Services Inc., on the balance of probabilities, it seems to me that the moneys were in effect a payment by Fortune Management Services Inc. to Messrs Allen and Palmer, to enable them to meet their obligations under the agreement for sale and purchase. They in turn advanced the moneys to Silver Fern so that it could complete the purchase of the Whenuapai property on behalf of the Trust. This is consistent with Mr Allen's statement to the Serious Fraud Office and broadly consistent with Mr Fletcher's understanding of the matter recorded in his letter of 22 February 2002 to Mr Allen. The transaction was truncated by Mr Dillon, but its underlying nature was not changed.



[102] It is rather more difficult to say what share of the funds belonged to Mr Palmer and what share belonged to Mr Allen. The only evidence is Mr Allen's assertion in the course of the Serious Fraud Office interview that "probably half" of the money was his. I am reluctant to apportion the funds between Messrs Allen and Palmer on such slender evidence. In my view the moneys should be treated as a joint advance to the Trust by both Mr Allen and Mr Palmer.

[103] In my judgment, the accounts should be re-opened to record a further debt in all years in the sum of \$1,932,340.11 owing by the Trust to Messrs Allen and Palmer jointly.

**Issue 3: Whether Silver Fern as trustee of the Trust owes any moneys to either Mr Allen, or to Mr Palmer, or to both of them, on account of certain motor vehicles and motorcycles that are shown in some versions of the financial accounts as being assets of Silver Fern.**

[104] I have set out in [69] the circumstances in which the motor vehicles and motorcycles were transferred to the Trust. I have also noted how these transfers have affected some versions of the financial statements – see [71] and [73].

[105] The Commissioner claimed that there is a debt owing by the Trust to Mr Allen and Mr Palmer in proportion to their contributions to the purchase of the motor vehicles and motorcycles which remains unpaid, and which can be attached to the net proceeds of sale held in the name of Silver Fern. He said that most of the vehicles and cycles were paid for by Mr Palmer, that they are now assets of the Trust and that there should be a further debt owing by the Trust to Mr Palmer at cost value minus the cost price of the Harley Davidson registration number 47UQM.

[106] Silver Fern denies that there has been any loan. It says that the vehicles and cycles have never been properly transferred to it, and that it holds them as a bare trustee.

[107] The best evidence in relation to the motor vehicles and motorcycles was the evidence of Mr Fletcher. The base facts can be summarised as follows:

- a) Honda Motorcycle registration number 33RRS. This vehicle was purchased for \$9,205 on 28 January 2000. The funds came from Mr Palmer's bank account and it was registered in Mr Palmer's name. It remains registered in Mr Palmer's name.
- b) Mitsubishi Rosa campervan registration number YI2262. This vehicle was purchased for \$40,010 on 2 May 2000. The funds came from Mr Palmer's bank account. It was registered in the names of an Aurel Merceanu and Mr Palmer. On 29 November 2001, it was transferred to Silver Fern. It was apparently stolen and on 24 April 2006, it was sold to an entity known as Buses Direct Limited for \$15,500. There is no evidence as to who signed the transfer of ownership papers. It was registered in the name of Buses Direct Limited and subsequently in the names of a Mr and Mrs Stewart. Mr Fletcher has endeavoured to ascertain the whereabouts of the vehicle. The Commissioner is concerned simply with the debt he says was created by the transfer of the vehicle to Silver Fern in November 2001.
- c) Mercedes Benz registration number YO1518. This vehicle was purchased for \$37,505 on 19 May 2000. The moneys came from Mr Palmer's bank account. It was registered in the name of Aurel Merceanu in June 2000. On 29 November 2001, it was registered in the name of Silver Fern. There is no evidence before me as to who signed the notice of change of ownership form. Insurance was taken out in the names of Mr and Mrs Allen.
- d) Ford Lincoln registration number LIMOCO. This vehicle was purchased for \$85,005. The moneys came from Mr Palmer's bank account. On 17 August 2000, it was registered to Aurel Merceanu. On 29 November 2001, it was registered to Silver Fern. Again there

is no evidence as to who signed the change of ownership form. The insurance was taken out in the names of Mr and Mrs Allen.

- e) Harley Davidson Motorcycle registration number 44TSO. This vehicle was purchased on 28 September 2000. It was registered in Mr Palmer's name. On 28 January 2003, it was transferred to Silver Fern. The change of ownership form was signed by Mr Palmer.
- f) Harley Davidson Motorcycles, registration numbers 56UKA and 55UKA. These vehicles were purchased for \$80,000 in total on 4 January 2001. The moneys came from Mr Palmer's bank account. Motorcycle 55UKA was initially registered in Mr Allen's name. On 28 January 2003, it was transferred into the name of Silver Fern. The change of ownership form was signed by Mr Allen. Motorcycle 56UKA was initially registered in Mr Palmer's name. On 20 January 2003, it was transferred to Silver Fern. The change of ownership form was signed by Mr Palmer.
- g) Harley Davidson Motorcycle registration number 47UQM. This vehicle was purchased on 27 February 2002 for \$45,000.40 (less a trade in of \$23,000). The vehicle was initially registered in Mr Allen's name. On 28 January 2003 it was transferred to Silver Fern. The notice of change of ownership form was signed by Mr Allen.

[108] It is apparent from the evidence that all vehicles were transferred to the Trust on Mr Allen's instructions. The transfer was in breach of the Court orders then outstanding. The reasons claimed for the transfer were recorded in a memorandum filed with the Court dated 22 July 2003. The memorandum asserted that there were difficulties in maintaining insurance for the vehicles owned by Messrs Allen and Palmer, that it was considered best for all concerned if one insurance policy covered all vehicles and that this could best be completed in the name of Silver Fern. It was also suggested that the transfers provided for ease of administration in respect of registration and warrants of fitness.

[109] While technically there was a breach, the Commissioner accepted that the transfers from Messrs Allen and Palmer to the Trust, when all were bound by the Court orders, did not have any adverse impact on his interests. The Court therefore took no action in relation to the breach, other than to remind Messrs Allen and Palmer and Silver Fern of the need for scrupulous compliance with the terms of the orders then in place. See the Minute of O'Regan J dated 25 July 2003.

[110] The vehicles were transferred to the Trust for the sum of \$528,000. That figure was simply a guesstimate by Mr Allen. The transfers were effected by journal entry.

[111] It was common ground between both Mr Ruffin for the Commissioner and Mr Wood that the journal entries, and therefore the accounts, were wrong. It was accepted by both that the cost value of the vehicles should have been used. I accept that this is correct and that as a result, the financial statements need to be re-opened. I am not however convinced that all the vehicles should have been transferred to the Trust. I am mindful of Mr Wood's submissions that there were no loan agreements entered into by the Trust, and that there is no evidence that Mr Palmer knew anything about a number of the transfers.

[112] There is nothing to suggest that Mr Palmer intended to gift the vehicles and cycles which belonged to him, or which he had paid for, to the Trust. The question then becomes whether he agreed to transfer all or some of the vehicles and cycles and to take back a loan at their cost value?

[113] There is evidence of a transfer in relation to two of the motorcycles. Mr Palmer did sign notices of change of ownership forms in relation to the Harley Davidson Motorcycle registration number 44TSO, and the Harley Davidson Motorcycle registration number 56UKA. This suggests that he intended that ownership of those motorcycles should pass to the Trust. The Trust did not pay for them. There is nothing suggesting that Mr Palmer intended to gift the motorcycles. As a result, in my judgment, there should be a further debt to Mr Palmer based upon their cost value. There is no evidence as to the cost value of motorcycle registration number 56UKA. It was purchased along with motorcycle 55UKA. Both vehicles

were similar but they were not identical models. In the circumstances, and doing the best I can, I attribute one half of the total purchase price for both vehicles to motorcycle registration number 56UKA, and direct that it should be treated as having a cost value of \$40,000.

[114] The Honda Motorcycle registration number 33RRS remains registered in Mr Palmer's name. There is no evidence that Mr Palmer authorised or approved the transfer to the Trust. This motorcycle should not be treated as an asset of the Trust, but rather should remain as an asset belonging to Mr Palmer. It will still be subject to the Court orders which are in place.

[115] Similarly the Mitsubishi Rosa campervan was purchased by Mr Palmer. There is no evidence as to who Mr Merceanu was, although the evidence is clear that the funds for the purchase came from Mr Palmer. There is nothing before me to indicate who signed the change of ownership form in favour of Silver Fern. The Commissioner is concerned with the debt created at the time of the transfer. There is, however, no evidence that Mr Palmer authorised or approved the transfer. In the circumstances, I do not consider that that vehicle should have become or be treated as an asset of the Trust, or that the debt created by the transfer to the Trust should be recorded in the Trust's financial statements.

[116] The Mercedes Benz registration number YO1518 was transferred to the Trust pursuant to a change of ownership form on 29 November 2001. There is no evidence as to who signed the change of ownership form. The vehicle was registered in the name of Aurel Merceanu. As recorded above, there was no evidence before me as to who Aurel Merceanu was, though it does seem clear that the moneys for the purchase of the vehicle came from Mr Palmer. In the circumstances, I do not consider that that vehicle should be treated as an asset of the Trust, or that the debt created by its transfer to the Trust should be recorded in the Trust's financial statements.

[117] The same applies to the Ford Lincoln registration number LIMOCO.

[118] Mr Allen signed notices of change of ownership in respect of the Harley Davidson Motorcycles, registration numbers 55UKA and 47UQM, and he told Mr Fletcher to transfer them to the Trust. These motorcycles should be shown as assets of the Trust, and there should be a debt for their cost value owing by the Trust to Mr Allen.

[119] The Trust insured all of the vehicles, at least in some of the years. To the extent that the Trust has paid for the insurance of vehicles which should not have been treated as having been transferred to it, I suspect that there will need to be an adjustment in the financial statements. There will also need to be adjustments to the amount of the loan from the Trust to Mr Allen, because some versions of the financial statements for the Trust have offset the journal entry values for all vehicles against this loan.

[120] I note that the vehicles have not been depreciated over the years in any versions of the financial statements. However this is irrelevant for present purposes. Those vehicles which I have held should be treated as assets of the Trust should come in at their cost price, and there will need to be corresponding entries to record the Trust's liability to whoever transferred the vehicle to it. Depreciation will not affect that liability.

[121] As a result of my findings, there will need to be alterations to the financial statements. There will be further debts owing by the Trust to both Mr Allen and Mr Palmer, and there will be other consequential alterations which will need to be made.

## **Evidence**

[122] I have referred in this judgment to a number of admissions made by Mr Allen while he was being interviewed by the Serious Fraud Office.

[123] Mr Wood objected to the admissibility of the interviews. He submitted that the interviews were inadmissible hearsay pursuant to s 18 of the Evidence Act 2006.

He pointed out that the Commissioner made no attempt to explain why Mr Allen was not available as a witness.

[124] Mr Ruffin relied on s 34 of the Evidence Act. He submitted that subpart 1, dealing with hearsay evidence, does not apply to evidence of admissions offered in a civil proceeding that is given orally by a person who saw, heard or otherwise perceived the admissions being made. He submitted that the comments which I have referred to in this judgment were admissions made by Mr Allen, in terms of the definition contained in s 4 of the Evidence Act. He noted that Mr Allen is a party to the proceedings, that the statements were made by him, and that they are adverse to his interest in the outcome of the proceedings. He noted that the statements were made to Ms Pettifer and Mr Osborn, both of whom gave evidence of the admissions before me. He submitted that the admissions could be used against Silver Fern as a third party (in the sense noted in s 34(3)), because the circumstances relating to the making of the admissions were such that there is a reasonable assurance that the admissions were reliable.

[125] I heard evidence from Mr Osborn and Ms Pettifer. Both were present at the interview. They gave evidence as to the circumstances in which the interviews occurred, and how they were recorded.

[126] All or the interviews had been transcribed, and the interview transcript for the initial interview held on 16 October 2001 had been verified. The remaining two transcripts had not been verified, and unfortunately the original interview tapes were destroyed.

[127] In the circumstances, I am satisfied that the circumstances in which the interviews were undertaken and the admissions that were made provide reasonable assurance that the admissions are reliable.

[128] I accept Mr Ruffin's arguments in relation to the passages cited in this judgment. The balance of the interviews do not contain admissions as such, and that material is hearsay. There is no evidence to suggest that Mr Allen, as the maker of the statement, is unavailable as a witness. Nor did Mr Ruffin seek to argue that

undue expense or delay would be caused if Mr Allen were required to be a witness. I therefore exclude the interviews, except insofar as I have cited the admissions made by Mr Allen in the course of the interviews, in this judgment.

### **Interim judgment**

[129] I issue this judgment as an interim judgment at the request of both parties.

[130] I have made various factual findings in relation to payments made to or for the benefit of the Trust, and the transfer of some of its assets. The accounts will need to be re-opened, and adjusted to reflect the findings I have made.

[131] I direct the Commissioner to prepare and file amended accounts, together with a memorandum setting out what further orders, if any, are sought in the context of the present proceedings. The memorandum and the amended accounts are to be served and filed on or before Friday 12 February 2010. Any response from Mr Wood on behalf of Silver Fern is to be filed within 20 working days of the date of service. I will then issue a final judgment confirming the accounts, and dealing with any other matters raised on the papers, unless I require the assistance of counsel. In the event I require the assistance of counsel, I will arrange a further hearing through the Registrar.

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Wylie J