IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2017-485-001027
[2021] NZHC 3096

BETWEEN	THE VINTAGE AVIATOR LIMITED First Plaintiff
	PETER ROBERT JACKSON, FRANCES ROSEMARY WALSH and PHILIPPA JANE BOYENS (as trustees of Film Property Trust) Second Plaintiff
AND	EUGENE JOHN DEMARCO including as trustee of the Airtight Trust (a bankrupt) First Defendant
	OLD STICK & RUDDER CO LIMITED Second Defendant (in liquidation)

Hearing:	29–30 July 2021
Appearances:	B Scott, T Smith and J Henderson for the Plaintiffs G Neil and R Hindriksen for the Official Assignee as assignee and liquidator of the First and Second Defendants)
Judgment:	18 November 2021

JUDGMENT OF GRICE J

This judgment was delivered by me on Thursday 18 November 2021 at 2.30 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:……

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Introduction

[1] Mr DeMarco, a United States citizen resident in New Zealand, has a passion for vintage aircraft. He was employed for many years as the production manager of The Vintage Aviator Ltd (TVAL), a company established by Sir Peter Jackson and Dame Fran Walsh to restore and to manufacture reproductions and replicas of World War I aircraft. Mr DeMarco was given a large degree of autonomy by his employer.

[2] Mr DeMarco sold three of his employer's aircraft, retaining the proceeds of sale. As a result of that Mr DeMarco was convicted on charges of theft by a person in a special relationship following a jury trial in the High Court at Wellington on 5 December 2019.[1]

[3] Mr DeMarco received a cumulative sentence of two years and five months' imprisonment.[2]

[4] The plaintiffs initially filed proceedings relying on the factual matters which had given rise to the convictions. Subsequently, having obtained the records of investigation from the Serious Fraud Office (SFO), further claims were lodged, and the pleadings amended. The further claims allege that Mr DeMarco had sold TVAL's property, including aircraft parts and other items, and had failed to account to TVAL for the proceeds of sale. He also used his employer's property for gain without its authority and exposed his employer to liability, again, without authority and against its express instructions.

[5] Mr DeMarco was also charged in relation to his sale of an aircraft (P-40)[3] to Mr Wulff. The dealings that Mr DeMarco had with Mr Wulff concerning the P-40 also involved a Corsair vintage aircraft. These aircraft were subject to security charges in favour of the Film Property Trust (the FPT). That is the second plaintiff. It is a trust also associated with Sir Peter Jackson and Dame Fran Walsh.

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1 Mr DeMarco was, in the same trial, convicted on other charges of obtaining by deception involving a sale of an aircraft to Mr Wulff.

2 *R v DeMarco* [2019] NZHC 3209 ["Sentencing Decision"] at [51].

3 A Curtiss P-40E Kittyhawk aircraft with nationality and registration mark combination ZK-RMH and serial number 41-25158 (the P-40).

[6] Mr Wulff also brought civil proceedings which were to be heard at the same time as the present claims. However, due to Mr DeMarco's adjudication in bankruptcy and liquidation of the second defendant immediately before this trial was due to commence, the proceedings involving Mr Wulff have been dealt with separately.[4]

Procedural background

[7] Both defendants were legally represented by Mr Fraser up until the adjudication and liquidation. There had been a number of interlocutory applications including a successful application striking out the defendants' counterclaim and parts of the statement of defence,[5] as well as a successful debarring application and unsuccessful application by the defendants for stay of the interlocutory determinations and leave to appeal.

[8] Mr DeMarco was adjudicated bankrupt on 14 July 2021 on an unrelated matter.[6] Mr DeMarco and the second defendant, of which Mr DeMarco was the sole shareholder, had earlier been debarred from defending these proceedings, in particular, by calling witnesses and cross-examining. This was due to their failure to provide adequate discovery and subsequent noncompliance with an "unless" order. On the day of Mr DeMarco's adjudication, an application by the defendants to stay these proceedings pending appeals against the debarring order was heard and the decision reserved.[7] In the course of that oral argument Mr DeMarco also sought a stay pending the determination of appeals against his convictions (filed substantially out of time) and against orders striking out Mr DeMarco's counterclaim and parts of the statement of defence.[8]

[9] The applications for stay were dismissed.[9]

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4 *Wulff v DeMarco* CIV-2018-485-417.
5 *The Vintage Aviator Ltd v DeMarco* [2021] NZHC 847 ["The Strike Out Judgment"].
6 *Re DeMarco, ex parte Anderson* [2021] NZHC 1757. This was unsuccessfully appealed: *DeMarco v Anderson* [2021] NZCA 476.
7 *The Vintage Aviator Ltd v DeMarco* [2021] NZHC 1476 ["The Debarring Judgment"].
8 The Strike Out Judgment, above n 5.
9 *The Vintage Aviator Ltd v DeMarco* [2021] NZHC 2467.

[10] Leave to continue the proceedings following the bankruptcy of Mr DeMarco was granted.[10] The second defendant was put into liquidation on 27 July 2021. The Official Assignee, as liquidator, agreed to the continuation of the causes of action against the company.[11]

[11] The order debarring the defendants from defending the claim for their failure to comply with discovery obligations and the unless order meant the defendants were entitled to appear and make submissions but not to call evidence or cross-examine the plaintiffs' witnesses.

[12] The plaintiffs' evidence was filed in affidavit form with the witnesses available by audio visual link if required for further questions. Counsel appointed by the Official Assignee appeared and made submissions on behalf of the first and second defendants.

[13] The key issues in contention at the hearing were legal. They focused on whether there was validity of and/or extent of, a charge or a proprietary interest in favour of the plaintiffs over a Corsair vintage aircraft owned by one or other of the defendants. As events transpired, the effect of such a charge would be to take that property out of the defendants' bankrupt estate or the liquidation and so diminish the amount available for distribution to creditors in the bankruptcy/liquidation.

The trial and convictions

[14] Mr DeMarco was sentenced on the theft and deception charges on 5 December 2019. Clark J's sentencing notes summarised the relevant offending against TVAL as follows:[12]

> **Overview of offending**
>
> [4] You are a United States citizen, resident in New Zealand. You have a passion for piloting vintage aircraft. For many years you were employed as the Production Manager of The Vintage Aviator Ltd, a company established by Sir Peter Jackson and Ms Fran Walsh to manufacture reproduction and

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10 Insolvency Act 2006, s 76(2). *The Vintage Aviator Ltd v DeMarco* [2021] NZHC 1911 ["Judgment granting leave to continue proceedings"].

11 Pursuant to s 248(1)(c) of the Companies Act 1993.

12 Sentencing Decision, above n 2, at [4]–[10] (footnotes omitted).

replica World War I aircraft. You managed the production of aircraft, test flying and arranging sales. As a senior member of staff and trusted employee, you enjoyed a large degree of autonomy.

[5] The first set of offending relates to the sale of three aircraft owned by Vintage Aviator. In April 2016, you were contacted at Vintage Aviator by Mr Reg Field who was inquiring about purchasing two aircraft from The Vintage Aviator to donate to New Zealand Warbirds Association (Warbirds).

[6] As matters progressed, it was decided that Mr Field would instead donate the funds to Warbirds and Warbirds, using Mr Field's funds along with other donations, would purchase three aircraft from The Vintage Aviator.

[7] The total price you quoted for the three aircraft was just over $2.1 million. This was $622,000 more than the price The Vintage Aviator would have typically charged for these aircraft. For convenience, when I refer to the price that The Vintage Aviator would typically charge for its planes, I will use the term "list price". Believing it was purchasing the three planes from The Vintage Aviator, Warbirds agreed to pay the $2.1 million for the aircraft.

[8] You told Mr Corke, the CEO of The Vintage Aviator, that you were charging more than the list price, because Mr Field was a friend of yours and he wanted to pay extra to assist you financially and if he could not pay more than the list price he would not go through with the transaction.

[9] None of this was true. Mr Field was not a friend. He had never met you prior to travelling to The Vintage Aviator to select the aircraft. And he believed he was paying The Vintage Aviator's asking price. You invoiced Warbirds for the aircraft and directed it to pay the funds into the account of a company you controlled and owned, The Old Stick and Rudder.

[10] Between 1 July 2016 and 21 July 2017, Warbirds and Mr Parker transferred $2.1 million into your company's bank account. In November 2016, you arranged for the BE2 aircraft to be collected by Warbirds and taken to Auckland without the knowledge or consent of The Vintage Aviator. None of the funds transferred into your company's account was on-paid to The Vintage Aviator.

…

Amendment to statement of claim

[15] As a result of information obtained in the investigation by the SFO and further enquiries by the plaintiffs, they sought leave to amend their statement of claim by memorandum of 6 June 2021. On 2 July 2021 the amendment application was raised

at a pre-trial conference.[13] The plaintiffs noted that the amendments fell into the following categories:

(a) Two minor technical changes to the first two causes of action to plead a knowing receipt claim against the Old Stick & Rudder Co Ltd, on the same factual basis as the existing pleading.

(b) An amendment to the seventh cause of action to align the aircraft parts that TVAL alleged were wrongfully put in a trade container with TVAL's evidence.

(c) An amendment to the amounts claimed for the parts and aircraft materials subject to the seventh, 13th and 14th causes of action to align with the TVAL valuation evidence.

[16] The application for amendment was to be determined at the commencement of the trial.[14] The Official Assignee for the defendants indicated he did not oppose the amendments.

[17] The considerations applying to an application for leave were summarised by the plaintiffs as follows:[15]

> …
>
> 134.1 the merits of the proposed amended pleading;
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> 134.2 whether irreparable damage would be suffered by the applicant;
>
> 134.3 the timing of the application and magnitude of, and reasons for, delay;

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13 *The Vintage Aviator Ltd v DeMarco* HC Te Whanganui-a-Tara | Wellington CIV-2017-485-001027 (re setting aside subpoenas and other matters), 2 July 2021.

14 At [4].

15 Referring to *Monster Energy Co v Ox Group Global Pty Ltd* [2016] NZHC 2124 at [28]; citing *Elders Pastoral v Marr* (1987) 2 PRNZ 383 (CA) at 385; *Fordham v Xcentrix Communications Ltd* (1996) 9 PRNZ 682 (HC); *Tewsley Street Properties Ltd v Wright Stephenson Properties Ltd* (1993) 7 PRNZ 58 (HC); *Body Corporate 325261 v McDonough* [2014] NZHC 1821 at [12]; and *Clode v Sullivan* [2016] NZHC 529 at [15]. See also *Oraka Terchnologies Ltd v Geostel Vision Ltd* [2015] NZHC 991 at [17]; and *Lyttelton Port Co Ltd v AON New Zealand* [2019] NZHC 726 at [23].

134.4 the risk of significant prejudice to other parties;

134.5 the effect on public resources reflected in the impact on case management and the timetable to trial;

134.6 the importance of the principle that the parties should have every opportunity to ensure that the real controversy goes to trial so as to secure the just determination of the proceeding;[16] and

134.7 the overarching requirement is to exercise the discretion in the interests of justice.[17]

135 Overall, the requirement for leave reflects the purpose of the close of pleadings date: to ensure that pleadings and interlocutory matters are completed so that parties can concentrate on preparing for trial.[18]

[18] In the proposed amendment to add a plea of knowing receipt to the second defendant's claim,[19] it is alleged that Mr DeMarco's knowledge of the fraud is attributable to the second defendant as Mr DeMarco was its sole shareholder and director. The plaintiff says the second defendant is liable for knowing receipt of the funds for the Warbirds fraud if it is not liable as agent of TVAL. The amendment is sought in case the Court is not satisfied that the second defendant acted as TVAL's agent in order to ensure that the conduit for Mr DeMarco's fraudulent actions is held liable.

[19] The further amendments sought were based on the facts upon which the criminal convictions had been entered. Those facts would establish the constituent elements of a claim for knowing receipt which are:

(a) the disposal of money or property in breach of fiduciary duty or breach of trust;

(b) the beneficial receipt of that money or property; and

(c) knowledge on the part of the recipient that payment to it was in consequence of a breach of fiduciary duty, or was in breach of trust.

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16 *Thornton Hall Manufacturing Ltd v Shanton Apparel Ltd* [1989] 3 NZLR 304 (CA) at 309; and *Clode v Sullivan*, above n 15, at [16].

17 *Chilcott v Goss* [1995] 1 NZLR 263 (CA); and *Clode v Sullivan*, above n 15, at [16].

18 *RHH Ltd v Anderson (No 3)* [2018] NZHC 2045 at [9].

19 See above at [15](a).

[20] The amendments to the seventh, 13th and 14th causes of action were designed to reflect the details of the allegedly misappropriated parts and materials and their value. These are not significant changes.

[21] The proposed amendments do not raise the need for any further evidence, nor did they affect the conduct of the hearing. The evidence had been served and the claims were argued on the basis of the amended pleading.

[22] Notice of the amendments was given some months ago. The Official Assignee has raised no objection at the hearing. Nor did he seek to file an amended statement of defence as a consequence. There is no apparent prejudice caused by allowing the amendments. In my view it is in the interests of justice to grant leave for the proposed amendments.

[23] Accordingly, leave is granted for the filing of the fifth amended statement of claim containing the proposed amendments.

[24] The plaintiffs do not pursue the eighth, 12th and 17th causes of action. Leave to discontinue those causes of action is granted.

Position of the Official Assignee

[25] The Official Assignee's position, as administrator in the bankruptcy of Mr DeMarco and as liquidator of OSRC, was that while he accepted some of the claims made by TVAL in relation to the first, second and fourth causes of action, he contested the third cause of action. As to the fourth cause of action, the Official Assignee denied that any subrogated equitable charge sought by the plaintiffs could be for more than $720,000. He also disputed the terms said by the plaintiffs to be incorporated into that equitable charge.

[26] The Official Assignee confined his submissions to the matters he contested in relation to the first to fourth causes of action. He abided the decision of the Court and took no part in the argument in relation to the fifth to 18th causes of action. The defendants had filed statements of defence and a written opening before the

involvement of the Official Assignee. I refer to matters raised in those, where relevant, in the course of my judgment.

[27] I first deal with the contested first to fourth causes of action before moving onto the fifth to 18th causes of action (excluding the eighth, 12th and 17th causes of action).

Background to first to fourth causes of action

[28] The current shareholders of TVAL are Sir Peter Jackson, his partner Dame Fran Walsh, and business partner, Philippa Boyens. The directors are Sir Peter Jackson and Dame Fran Walsh.

[29] Mr DeMarco was an experienced engineer and pilot of World War I aircraft. These aircraft were an interest of Sir Peter Jackson's. This interest led to the establishment of TVAL and its decision to employ Mr DeMarco. He was one of TVAL's first employees and assisted in the growth of the business. For all intents and purposes, he was in control of TVAL's day-to-day operations. However, he was not employed as a Chief Executive apparently due to his having some earlier convictions in the United States. Mr Corke was the Chief Executive. Nevertheless, Sir Peter Jackson said Mr DeMarco had the trust and confidence of him and the directors of TVAL.

[30] Mr DeMarco had met Sir Peter Jackson in 2001. Mr DeMarco had extensive contacts in the vintage aircraft business. As well as working in the construction and repair of vintage aircraft, he traded in vintage aircraft and parts, buying and selling them, including on behalf of TVAL.

[31] The second plaintiff, the Film Property Trust (the FPT), is a trust of which Sir Peter Jackson and Dame Fran Walsh are the current trustees. It is involved in this proceeding because it made a secured loan to a vintage aircraft owning trust, the Airtight Trust (ATT), which was in financial trouble in 2011. Mr DeMarco had brought it to Sir Peter Jackson's attention. The security for that loan was a Corsair vintage aircraft and a P-40 vintage plane owned by the ATT. The P-40 was sold, while subject to the security charge, by Mr DeMarco to Mr Wulff without the consent of the

FPT. The Corsair was transferred to the second defendant in 2012 without the consent of the FPT.

[32] The loan was finally repaid, and the security discharged in 2016. Subsequently TVAL discovered that part of the money to repay the FPT loan had been obtained by Mr DeMarco from funds wrongly appropriated from the payments he had received on the sale of TVAL's aircraft to the Warbirds' interests.[20]

[33] Mr DeMarco's interest in the ATT had come about because of his involvement with Mr James Slade. Mr Slade was a trustee of the ATT, which had been established by trust deed dated 30 March 2004. Mr Slade and three others were originally named as the four trustees. Mr Slade was the primary beneficiary. He also held the power of appointment and removal of trustees.

[34] The ATT had a hangar at Hood Aerodrome in which TVAL stored a number of its vintage aircraft. When the ATT went into financial difficulties, to avoid the risk the hangar would not be available to store the aircraft, the FPT offered to purchase the hangar for $650,000 in 2011. This left a shortfall required in order for the ATT to pay its financier Pacific Dawn Ltd (PDL) of around $600,000. The FPT lent the ATT $607,000 to cover the outstanding liability and to discharge the PDL loan together with a further US $9,000 to help ATT pay other outstanding liabilities such as insurance and Civil Aviation Association practicing fees. The security for the loan was the Corsair and P-40, then owned by the ATT.

[35] Mr Corke was the Chief Executive of TVAL. At the time he was a partner in a large accountancy firm. He was not on the TVAL premises on a full-time basis and largely left the day-to-day operations to Mr DeMarco.

[36] Mr Corke said that the amount required for the ATT to settle the PDL loan as at 5 December 2011 was a total of $1,250,109.23. On 5 December 2011 the FPT (through its trustees) and the ATT entered into a term loan agreement and a specific security deed in respect of the loan for the balance owing after purchase by the FPT of

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[20] See above at [14].

the hangar. The security deed effected the security over the Corsair aircraft,[21] and the P-40.

[37] In addition to the security interest in the aircraft the ATT provided negative undertakings to the FPT, agreeing that, except with the prior written approval of the FPT it would not dispose of the secured property or allow it to be charged or to deteriorate. The terms were set out in the term loan agreement and specific security deed. The amount secured extended to interest, costs of recovery if incurred, and any amount that the secured creditor could not recover due to inability to recover secured money. The latter is referred to as the "irrecoverability" clause.

[38] According to the loan terms, the ATT trustees, Messrs Slade and DeMarco had full and unlimited personal liability for the repayment of the monies owing to the FPT and for compliance with all obligations of the contract.

[39] After the loan money was advanced, the ATT sold its assets. The relevant ATT trustee minute records that its assets were to be sold to the second defendant, Old Stick & Rudder Co Ltd (OSRC), for US $500,000. Mr DeMarco also signed an undated sale and purchase agreement for the sale by the ATT of the Corsair and the P-40.

[40] An email discovered, which on its face is from the Inland Revenue Department to "Paul Dodd", whose role is unclear, advises that the ATT "was ceased as at 31 March 2021". There was no minute or resolution of the trustees produced or discovered recording the winding up of the trust, nor any evidence of final accounts or other documentation to confirm that the ATT was wound up.

[41] Unbeknownst to the FPT, OSRC entered into an agreement with Mr Oliver Wulff. Mr Wulff claims to have acquired 500 of the 1,000 issued shares in OSRC from Mr DeMarco, as well as ownership of the P-40, for US $500,000. That transaction is the subject of proceedings brought by Mr Wulff scheduled to be heard

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[21] A Chance Vought Goodyear GF-1D Corsair aircraft with nationality and registration mark combination ZK-COR and serial number 32823 (the Corsair).

following this hearing.[22] The US $500,000 was paid by Mr Wulff to OSRC on 20 March 2012. The plaintiffs make no claim on the P-40. Their view is that it is now owned by Mr Wulff. The plaintiffs have waived any rights to the P-40.[23] The Official Assignee considers that Mr Wulff now either has the legal and beneficial ownership of the P-40 or OSRC holds it on a bare trust for him.

[42] The Official Assignee takes the view that Mr DeMarco now owns the Corsair. To the extent that OSRC holds legal title to it, it does so on a bare trust for Mr DeMarco.

Repayment of the FPT loan

[43] The FPT loan to the ATT was not repaid in September 2012 when it was due. The FPT then became entitled to the repayment of the principal sums, together with interest at the penalty rate of interest of 16 per cent per annum running from the interest commencement date of December 2011 (day unspecified).

[44] By 2015 the FPT loan was still not repaid. The FPT was anxious it be repaid and Mr Corke and Mr Stephens, the FPT's lawyers, were attempting to assist Mr DeMarco to obtain finance from the ANZ to repay the FPT loan. In the end Mr DeMarco did not accept the ANZ loan. The ANZ had offered "tide over" refinancing (involving Mr DeMarco's existing home mortgage) of $560,000. Mr DeMarco accepted a loan offer from the BNZ and used those funds to pay part of the FPT loan on 1 July 2016.

[45] As it turned out, the other funds used by Mr DeMarco to repay the FPT loan amounted to $720,000 derived from the proceeds of sale of the three TVAL aircraft to Mr Field and the Warbirds' interests in a transaction referred to by the plaintiffs as "the Warbirds fraud". The TVAL aircraft that Mr DeMarco sold were:

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22 *Wulff v DeMarco* CIV-2018-485-417. The Wulff proceedings were to be heard at the same time as these proceedings, although the proceedings were not consolidated, they have been managed together. However, when the Official Assignee took over the conduct of the proceedings, negotiations with the separate plaintiffs were undertaken resulting in the matters being heard separately.

23 In a memorandum dated 11 August 2021.

(a) a BE2;

(b) a TVAL Albatros; and

(c) a Sopwith Pup.

[46] Mr DeMarco had entered agreements to sell those three aircraft (two of which were yet to be built) on behalf of TVAL. TVAL had signed off on the prices to be charged for those types of aircraft. TVAL did not know that Mr DeMarco had inflated the sale price to be paid by the purchaser in the Warbirds fraud. In the end OSRC was paid a total of $2,105,879 by Warbirds toward the price of the planes. This was the full purchase price for the BE2, 85 per cent of the purchase price of the TVAL Albatros, and $200,000 for the purchase price of the Sopwith Pup. None of that money was paid to TVAL as it should have been. After TVAL had discovered the transaction, Mr DeMarco/OSRC refunded the prospective purchaser (referred to as NZ Warbirds) the money it had paid toward the Albatros and Sopwith Pup between October 2017 and July 2018. The TVAL Albatros and Sopwith Pup were retained by TVAL. However, Mr DeMarco/OSRC retained the funds from the sale of the BE2, which remained with Warbirds.

[47] The plaintiffs provided evidence from Mr David Osborn, a forensic accountant, who had reviewed the documents. He said that:

(a) On 1 July 2016, the FPT received $1,104,114.51 in repayment of the FPT Loan.

(b) On 1 July 2016, the day Mr DeMarco and/or OSRC received $1,765,042.00 from NZ Warbirds for two of the three TVAL aircraft, Mr DeMarco paid $720,000 (via his lawyers) of that which was combined with other monies to repay his indebtedness to the FPT.

(c) The source of the $720,000 (the diverted funds) was the money that Mr DeMarco received for the sale of the TVAL aircraft: a BE2, an Albatros and a Sopwith Pup, in the Warbirds fraud.

(d) the balance of the sum of $1,104,114.51 required to repay the FPT Loan was funded through loans to Mr DeMarco from the BNZ, totalling some $390,000.

[48] The payment to the FPT included interest that had been calculated at 12 per cent rather than the penalty rate to which the FPT was entitled, of 16 per cent per annum. The FPT nevertheless, accepted the repayment as full settlement of the loan.

[49] The repayment of the FPT loan is evidenced by the trust account records of Mr Stephens. The records show the money was received into Mr Stephens' trust account on behalf of the FPT and then paid out to it, or at its direction.

[50] Sir Peter Jackson confirmed in his evidence that the funds received in the repayment of the FPT loan led to the FPT security over the two vintage aircraft being released. He says that on 1 July 2016 he received acknowledgement from Mr Stephens that the monies for the repayment of the FPT loan had been received into the FPT trust account in repayment of the FPT loan. The repayment monies were then paid into the FPT's bank account.

[51] The security over the Corsair and P-40 was released by the FPT on 4 July 2016. The plaintiffs acknowledged that the repayment of the FPT loan operated to discharge the "security interests" over the aircraft.

[52] Two years later, as soon as TVAL became aware that some of the money that had been paid by Warbirds to the DeMarco interests to purchase TVAL's planes had been used to repay a significant portion of the FPT loan, it "re-registered" security over the larger and more valuable of the two planes, the Corsair, in TVAL's name as security holder. This was on 10 June 2018. The verification statements confirming the registration of the financing statements on the Personal Property Securities Register (PPSR) are in evidence.

[53] Updated valuations in a letter of 27 November 2015, referred to in Mr Corke's evidence, indicated that the P-40 was then valued at approximately US $1.75 million and the Corsair at approximately US $2 million.

The Warbirds fraud

[54] The facts that I have recounted in relation to the Warbirds fraud and the repayment of the FPT loan give rise to the following causes of action:

(a) The first and second causes of action brought by TVAL, which relate to the receipt by Mr DeMarco/OSRC of the proceeds of the Warbirds fraud in breach of their respective fiduciary duties and, in the case of OSRC, knowing receipt of those funds in breach of Mr DeMarco's breach of fiduciary duties. An account is sought from Mr DeMarco and OSRC in respect of the benefit they obtained from those funds.

(b) The third (tracing) and fourth (subrogation) causes of action are alternatives:

(i) The third cause of action brought by the FPT claims that as a result of the use of the proceeds of the Warbirds fraud, the FPT loan was not repaid as the funds received by the FPT are held in trust for TVAL. Therefore, the FPT is entitled to enforce the FPT loan (including interest accrued) and the security over the Corsair owned by OSRC which secured the FPT loan.

(ii) In the alternative, the fourth cause of action brought by TVAL claims that if the FPT loan was repaid using the proceeds of the Warbirds fraud, TVAL is entitled to an equitable charge by way of subrogation to the security over the FPT loan and to recover the amount by which Mr DeMarco has been enriched by his use of the Warbirds proceeds, including by avoiding having to pay interest accruing under the FPT loan.

[55] The Official Assignee indicated that he:

(a) accepts that Mr DeMarco/OSRC is liable for a breach of fiduciary duty or breach of trust to TVAL;

(b) accepts that TVAL is entitled to an account from Mr DeMarco/OSRC for the non-refunded portion of the monies that were misappropriated from it, being the inflated purchase price paid by NZ Warbirds for the BE2 aircraft of $937,500, including GST;[24]

(c) accepts that TVAL is entitled to an account for the interest that Mr DeMarco/OSRC received or would likely have received, on the refunded portion of the monies that were misappropriated from it, being the monies that were paid to the defendants in the Warbirds fraud for the Albatros aircraft and the Sopwith Pup aircraft from the date of receipt to the date of their repayment.

[56] In relation to the third cause of action, the Official Assignee does not accept that the FPT is entitled to any of the relief it seeks which, in general terms, seeks to pay the part of repaid funds that was misappropriated from TVAL to TVAL and resurrect its charge over the Corsair for the principal amount of the diverted funds.

[57] As to the fourth cause of action the Official Assignee:

(a) accepts that TVAL has an equitable charge over the Corsair aircraft as a result of subrogation for up to the amount of $720,000, (the diverted funds);

(b) does not accept that the equitable charge in favour of TVAL can be for more than the sum of $720,000;

(c) does not accept that the equitable charge is on terms which mirror (or are substantially similar to) the discharged FPT Specific Security Deed/term loan agreement.

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[24] The sum exclusive of GST is $815,000. For some unexplained reason NZ Warbirds paid Mr DeMarco $937,500 when the price agreed was $937,250. Therefore, Mr DeMarco had use of the $937,500.

[58] The plaintiffs have waived any claim over the P-40.

The evidence

[59] Evidence of Mr DeMarco's convictions was adduced by way of a certificate of convictions. The plaintiffs relied on s 47 of the Evidence Act 2006 which provides:

> (1) When the fact that a person has committed an offence is relevant to an issue in a civil proceeding, proof that the person has been convicted of that offence is conclusive proof that the person committed the offence.

[60] In relation to s 49, being the use of convictions as evidence in criminal proceedings, the Supreme Court in *Va'afuti v R* noted that the section:[25]

> [18] …provides a convenient way of proving offences which have already been established to the criminal standard of proof. It prevents the criminal justice system being vexed by collateral challenges to concluded determinations of criminal responsibility, with potential inconsistent outcomes …
>
> [19] … there is no doubt that s 49 has the purpose and will have the effect in many cases of restricting a defence that might otherwise be available.

[61] In this case the effect of s 47 is that Mr DeMarco is "not able to challenge in this proceeding the factual findings that are implicit in the jury's verdicts".[26]

[62] Mr DeMarco's amended statement of defence was struck out on 21 April 2021 because of its inconsistency with his convictions.[27]

[63] The certificate of conviction established that Mr DeMarco was convicted of the offences referred to above. The convictions were based on the facts set out in the summary by the sentencing Judge at [14] above. The certificate is conclusive proof that Mr DeMarco committed those offences. The jury's factual findings are implicit in its verdicts and are illustrated by the question trail, which was produced. This provides proof of the factual basis for the first to fourth causes of action.

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25 *Va'afuti v R* [2017] NZSC 142 at [18]–[19].

26 *Commissioner of Police v Filer* [2013] NZHC 3111 at [25].

27 The Strike Out Judgment, above n 5, at [23]–[29] in relation to striking out the paragraphs of the amended statement of defence that had contravened s 47.

The Warbirds sales

[64] Evidence was given by Sir Peter Jackson, a director and trustee of the trust which owns TVAL's shares, James Corke, an accountant and the Chief Executive of TVAL, and Mr Osborn, a forensic accountant, also gave evidence on the matters giving rise to these proceedings.

[65] In April 2016, Mr DeMarco was contacted at TVAL by Mr Reg Field, who enquired about purchasing two aircraft from TVAL to donate to the New Zealand Warbirds Association.

[66] Ultimately Mr Field decided he would donate the funds for the purchase to the Warbirds Association, which would use them to purchase two aircraft. Shortly afterwards, an arrangement to buy a third aircraft from TVAL was agreed to. This aircraft was to be purchased by the Kittyhawk Partnership, a partnership controlled by Frank Parker, President of Warbirds. I refer to the two purchasers as the Warbirds.

[67] The sales to the Warbirds resulted in TVAL starting construction on the three WWI aircraft bought. These were:

(a) an RAF BE2e aircraft with the registration mark "ZK-PXA" (the BE2e);

(b) an Albatros D.Va aircraft with the registration mark "ZK-ALB" (the TVAL Albatros); and

(c) a Sopwith Pup with the registration mark "ZK-AFS" (the Sopwith Pup).

[68] In April 2016 when the sales were proposed by Mr DeMarco, the aircraft all had existing internal list prices. These list prices were not made public but had been set previously when TVAL had been considering engaging a broker to sell TVAL aircraft.

[69] Instead of providing the TVAL list prices, Mr DeMarco told Warbirds that TVAL's prices for the aircraft were:

(a) $815,000 plus GST for the BE2e, as compared to the actual TVAL list price of $645,000 plus GST (an additional net mark-up over the list price of $170,000);

(b) $990,670 plus GST for the TVAL Albatros, as compared to the actual TVAL list price of $765,000 plus GST (an additional net mark-up of $225,670); and

(c) $585,500 plus GST for the Sopwith Pup, as compared to the actual TVAL list price of $440,000 plus GST (an additional net mark-up of $145,500).

[70] The combined additional mark-up in excess of the set list prices on the three aircraft was $541,170 plus GST.

[71] Mr Corke's evidence is that Mr DeMarco had represented to him that:

(a) the person funding the Warbirds' purchase wanted to help Mr DeMarco financially by paying more money than TVAL's usual list prices for the aircraft;

(b) it was a condition of the purchases that Mr DeMarco kept anything above TVAL's list price; and

(c) the purchaser would not purchase the Warbirds aircraft without the purchaser paying the increased amount and Mr DeMarco getting all money the purchaser paid above TVAL's list price.

[72] Mr Corke sought Sir Peter Jackson's approval for the proposed sale by emailing the latter's personal assistant, Matt Dravitzki, on 13 May 2016. In that email Mr Corke explained:

(a) That Mr DeMarco had told him that he could sell a BE2 for $645,000 and a Sopwith Pup for $440,000, which were in line with the TVAL list prices and represented cost plus 20%.

(b) That the sale was to an individual who would be purchasing the planes for the purpose of donating them to Warbirds.

(c) That the "twist in the tail" was that the purchaser wanted to pay over $1,600,000 for the aircraft as he wanted to help Mr DeMarco financially and the purchaser would not do the deal if he was not able to pay that amount above the TVAL list price to help DeMarco personally.

(d) That Mr DeMarco had shown Mr Corke a cheque from the purchaser.

(e) That Mr Corke would invoice OSRC for the normal amount and Mr DeMarco could have any increased amount as that was the intent of his friend.

(f) That this "extra amount" would help Mr DeMarco repay the FPT Loan.

(g) That Mr Corke needed Sir Peter Jackson's approval for this sale to occur.

[73] Sir Peter Jackson responded (through Mr Dravitzki) by email the same day. He said that:

(a) If it helped get the FPT Loan repaid, TVAL should agree to Mr DeMarco's proposed sale.

(b) TVAL should only deal with the TVAL list prices. The email also said that anything extra should pass through TVAL's books, Mr Corke understood this to be a typo and that the message was that it should ***not*** pass through TVAL's books.

(c) Sir Peter Jackson was not in favour of Mr DeMarco making a commission on sales but, if Mr DeMarco wanted to discuss an exception to this rule, Mr Corke should say that Mr DeMarco can keep

a 5 per cent commission if he got a sale that was 25 per cent over the TVAL list price, rather than a lump sum of money.

[74] On the basis of this approval, and the understanding that had been conveyed by Mr DeMarco, Mr Corke authorised Mr DeMarco to proceed with the sale on behalf of TVAL. Mr Corke understood that no money would be paid for the planes until delivery of the aircraft. That would take some months, as the aircraft needed to be constructed.

Transfer of funds and aircraft

[75] Mr DeMarco arranged with Warbirds for the deposits for the purchases to be paid to his company, OSRC. Warbirds had understood that Mr DeMarco and OSRC would then hand over all of those monies to TVAL. Mr DeMarco failed to do so.

[76] Over the period July 2016 to July 2017 OSRC received a total of $2,105,879.50 for the TVAL aircraft, being:

(a) $968,379.50, or 85 per cent of the $1,139,270.50 inflated list price for the TVAL Albatros;

(b) $937,500, which was $250 above the $937,250 inflated list price for the BE2e. There is no explanation for the extra $250 payment; and

(c) $200,000, or 30 per cent of the $673,325 inflated list price for the Sopwith Pup.

[77] Mr DeMarco did not disclose the receipt of these funds to TVAL nor did he or OSRC pay any money to TVAL in respect of the aircraft. Instead Mr DeMarco did the following:

(a) On 1 July 2016, he used $720,000 of those funds, along with refinance/loan funds from the BNZ, to repay the debt to the FPT on 1 July 2016.

(b) On 1 July 2016, he set up a $1 million term deposit account at the BNZ.

(c) He left $46,789.99 in the OSRC account. This was subsequently used for costs that appeared to relate to travel for Mr DeMarco, costs of immigration lawyers in the US, the purchase of a motorbike and associated equipment, and costs in relation to other vehicles.

[78] Mr DeMarco arranged for TVAL to deliver the BE2e to Warbirds in November 2016.

Discovery of fraud

[79] In around June 2017 Sir Peter Jackson saw a photograph on the internet showing the BE2 in Warbirds' possession. He recognised the plane as a TVAL plane. He had not been advised of any payment and had not approved delivery of the plane.

[80] Following this discovery TVAL's then-Chief Operating Officer, Dominic Shaheen, contacted Warbirds. He discovered that Warbirds had paid the inflated purchase price directly to OSRC.

[81] Sir Peter Jackson notified the Serious Fraud Office, which opened an investigation in August 2017. It subsequently laid charges in May 2018.

Breach of fiduciary duty and/or knowing receipt (first and second causes of action)

[82] TVAL pleads that:

(a) Mr DeMarco owed TVAL a fiduciary duty as a senior employee (the first cause of action);

(b) Mr DeMarco and OSRC owed TVAL a fiduciary duty as agents in arranging the sale of three TVAL aircraft to Warbirds (the second cause of action);

(c) Mr DeMarco and OSRC breached their respective fiduciary duties to TVAL by:

(i) failing to account to TVAL for the Warbirds' payments in respect of the three TVAL aircraft; and

(ii) procuring a commission of $195,500 in respect of the BE2 and attempting to procure a commission of $259,520.50 in respect of the TVAL Albatros and $166,759 in respect of the Sopwith Pup (all amounts inclusive of GST), without the informed consent of TVAL.

[83] The plaintiffs plead in the alternative that, if OSRC did not itself owe a fiduciary duty as agent, OSRC is liable for knowing receipt of the relevant funds.

[84] In each case, TVAL seeks an account of the benefits obtained by Mr DeMarco and/or OSRC as a result of the breach of fiduciary duty.

Did the relationship between Mr DeMarco and TVAL give rise to fiduciary duties?

[85] In relation to the Warbirds sale, TVAL pleaded that Mr DeMarco and OSRC were TVAL's agents and owed TVAL fiduciary duties in that capacity. The defendants did not plead to this allegation, on the basis that it was a matter of law.

[86] There is no single formula or test in determining whether a relationship outside specific recognised categories, such as lawyer/client relationships, is such that the parties owe each other obligations of a fiduciary kind.[28]

[87] The Supreme Court has used what has been termed the "legitimate entitlement" approach to determine the existence of a fiduciary relationship.[29] The

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28 *Chirnside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [75] per Tipping J.

29 At [80]. Prior and subsequent cases have referred to the "legitimate expectation" test. See: *Liggett v Kensington* [1993] 1 NZLR 257 (CA) at 281 per Gault J; *MacLean v Arklow Investments Ltd* [1998] 3 NZLR 680 (CA) at 691; and *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169 at [31].

"legitimate entitlement" approach looks at whether the circumstances give rise to a situation where one party is entitled to repose and does repose trust and confidence in the other.[30]

[88] In this case Mr DeMarco was a senior employee of TVAL. It is apparent from the evidence at least Sir Peter Jackson reposed trust and confidence in him, but at the same time imposed express conditions on any dealings Mr DeMarco had with third parties on behalf of TVAL in relation to any substantial deals.

[89] The Chief Executive of TVAL was not present on the premises on a day-to-day basis to oversee Mr DeMarco's activities. However, he noted that Mr DeMarco was the primary liaison person with Sir Peter Jackson concerning the vintage aircraft.

[90] It is well-recognised that "top management" owe a "larger, more exacting duty" similar to that owed to a corporate employer by its directors.[31] Directors exercising authority on behalf of a company will generally be found to have "fiduciary obligations of loyalty and fidelity" to the company.[32]

[91] TVAL says Mr DeMarco's employment relationship with TVAL had the requisite characteristics to give rise to a fiduciary duty, including that:

(a) Sir Peter Jackson gave instructions to Mr DeMarco on TVAL's operations, as well as potential aircraft or part purchases or trades, and trusted him to implement those directions.

(b) Mr DeMarco was permitted to communicate with potential buyers and sellers in the name of TVAL on matters on which Mr DeMarco had been instructed to act as TVAL's agent.

(c) Within TVAL, staff were reliant on Mr DeMarco as the conduit for Sir Peter Jackson's directions, with the result that:

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30 *Chirnside v Fay*, above n 28, at [80].
31 *Canadian Aero Service Ltd v O'Malley* [1974] SCR 592 at 606.
32 *Pounamu Properties Ltd v Brons* [2012] NZHC 590 at [32] and [47].

(i) TVAL's own CEO, Mr Corke, was reliant on Mr DeMarco to give effect to Sir Peter Jackson's instructions;

(ii) Mr DeMarco's degree of authority meant that the accounts team would process invoices on the assumption that they had been approved by Sir Peter Jackson; and

(iii) Mr DeMarco largely controlled the overall operations of the company and directed spending on a day-to-day basis.

[92] The important relationship here is the one between TVAL and Mr DeMarco. Sir Peter Jackson, while having interests in TVAL and the authority to act on its behalf in his dealings with Mr DeMarco, is not a party to this action in his personal capacity.

[93] TVAL was aware of Mr DeMarco's previous convictions, which was the reason he was not appointed Chief Executive. He was a senior employee but neither an officer nor a director of TVAL. In common with most employees, Mr DeMarco would have owed specific fiduciary obligations, such as loyalty, to an employer. However, in this case, even given Mr DeMarco's relationship with Sir Peter Jackson, Mr DeMarco was in the same position as any ordinary employee in terms of his obligations to his employer.

[94] As I noted, TVAL put in place specific arrangements with Mr DeMarco when it came to allowing him to deal on its behalf in high value transactions. I am satisfied that Mr DeMarco owed specific fiduciary duties to TVAL arising from his agency for TVAL in particular matters. He was acting in such a capacity in relation to the sale of the TVAL aircraft to the Warbirds.

Findings on fiduciary relationship

[95] The employee/employer relationship is not generally regarded in general terms as a fiduciary relationship except in some respects.[33]

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[33] Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thompson Reuters, Wellington 2009) at [17.1] and [17.3.7].

[96] In this case Mr DeMarco was not a director, officer or Chief Executive of TVAL. He, presumably, reported to the Chief Executive who, by definition, was primarily responsible overall for the TVAL operations.

[97] There are some types of fiduciary duties in general terms owed by an employee to an employer, including a duty of loyalty and confidentiality. However, a breach of a commercial contract will not result in a breach of fiduciary obligations even where the party involved is expected to "honestly and conscientiously do what it had by contract promised to do".[34]

[98] I do not consider a fiduciary relationship in general terms by virtue of the employment relationship between Mr DeMarco and TVAL has been established. That is not to say that for some purposes he did owe fiduciary obligations to TVAL.

[99] The taking of a secret commission is regarded as a breach of fiduciary duty of an employee. A fiduciary relationship will exist where an employee is entrusted with employer's property for the employer's benefit or for purposes authorised by the employer, and not otherwise.[35]

[100] In an agency relationship the principal is entitled to repose trust and confidence in the agent. Agency will normally attract fiduciary obligations including the maintenance of openness and fairness to the principal; undivided loyalty; and to keep the principal's property separate.[36]

[101] The duties will vary according to the terms of the agency contract.[37] However, a secret commission received by an agent will be a violation of an agent's fiduciary duty.[38]

[102] In this case the Warbirds transactions, which included the sale of the vintage aircraft to Warbirds by Mr DeMarco and the keeping of the secret commission and the

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34 *Equity and Trusts in New Zealand*, above n 33, at 562.
35 At 546; citing *Reading v Attorney-General* [1949] 2 KB 232 (CA) at pages 236–237 per Lord Asquith.
36 *Equity and Trusts in New Zealand*, above n 33, at 535.
37 At 535.
38 At 536.

funds from the sale of the aircraft, were breaches of his fiduciary obligations as agent to TVAL.

[103] The relationship between a principal and an agent is inherently fiduciary.[39] An agent owes fiduciary duties to a principal, subject to the express or implied terms of the contract controlling the parties' relationship.[40]

[104] The relationship of principal and agent may be created by the conferring of authority by the principal on the agent expressly, or impliedly from the conduct or situation of the parties.[41] In this case from the question trail, the jury must be taken to have found in respect of charge three that:

(a) Warbirds agreed with Mr DeMarco to purchase the BE2 and the Albatros from TVAL; and

(b) "when Mr DeMarco agreed to sell the BE2 and the Albatross [sic] to New Zealand Warbirds, he knew he was doing so on behalf of The Vintage Aviator Limited".

[105] Similarly, in relation to the delivery of the BE2 to Warbirds, the question trail indicates that the jury must be taken to have found that:

(a) Mr DeMarco had control over the BE2;

(b) there was a requirement by TVAL that Mr DeMarco would obtain approval from TVAL before delivering the BE2 to Warbirds;

(c) Mr DeMarco knew this; and

(d) Mr DeMarco arranged the delivery of the BE2 intentionally without obtaining approval from TVAL.

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39 *Chirnside v Fay*, above n 28, at [73] per Tipping J.

40 Peter Watts and FMB Reynolds *Bowstead and Reynolds on Agency* (20th ed, Sweet & Maxwell, London, 2014) at [1-014]; and *Kelly v Cooper* [1993] AC 205 (PC) at 214.

41 *Bowstead and Reynolds on Agency*, above n 40, at [2-001].

[106] I do not consider the employment relationship generally gave rise to higher fiduciary obligations to TVAL as might have been the case if Mr DeMarco was the Chief Executive Officer or director. TVAL had expressly not appointed him to such a position. He was a mere employee.

[107] However, I am satisfied that Mr DeMarco acted as TVAL's agent in relation to the Warbirds sale. Mr DeMarco was instructed to deal with TVAL's property (the three aircraft) and purported to enter into a binding contract for TVAL with Warbirds for the sale and purchase of those aircraft. He also received, via OSRC, funds that Warbirds believed it was paying to TVAL via OSRC.

OSRC and TVAL

[108] I now turn to the obligations owed by OSRC to TVAL.

[109] TVAL pleads that OSRC also acted as TVAL's agent and owed TVAL fiduciary duties in relation to the Warbirds sale. OSRC was a vehicle for Mr DeMarco's operations. He was, and remains, the sole shareholder. He was also, until his New Zealand criminal convictions, the sole director.

[110] While purporting to engage with Warbirds on behalf of TVAL, OSRC acted as Mr DeMarco's conduit for the funds received from Warbirds. It received the payments from Warbirds and made payments to third parties, including the FPT, as described above.

[111] Mr DeMarco held out OSRC's transactions were as agent for TVAL as follows:

(a) On 11 May 2016, Mr DeMarco presented Mr Corke with a proposed commission agreement, appointing Mr DeMarco and another company controlled by him, Dairy Air Ltd, a "non-exclusive sales agent" for TVAL.

(b) On the same day, Mr DeMarco prepared an addendum agreement said to be in relation to the aircraft sales to Warbirds, in which the broker was listed as Mr DeMarco, Dairy Air Ltd or OSRC.

(c) On 2 June Mr DeMarco again requested that the agreements drafted by him be signed. At a subsequent meeting with Mr Corke on 8 June Mr Corke signed the agreements on behalf of TVAL. Mr Corke's recollection is that Mr DeMarco did not sign the agreements at the meeting, although it appears that he subsequently did sign them.

(d) In July 2015, Mr DeMarco explained to his accountant that OSRC "will be acting as broker" for the sale of the aircraft, and thereby obtaining a commission on the sale.

[112] Mr Corke says that he did not consider the broker arrangements involving OSRC had been agreed. Instead, he believed that he had agreed with Mr DeMarco that there would be a sale in which OSRC would act as an intermediary in relation to the Warbirds sale. OSRC would (in a simultaneous and back-to-back arrangement), purchase the aircraft at the TVAL list price and on sell the aircraft to Warbirds at the inflated price. Mr Corke said this was intended to:

(a) ensure that TVAL received only its list price for the aircraft; and

(b) provide for Mr DeMarco to receive the difference between the list prices and the inflated prices that Mr Corke understood Warbirds insisted on paying to Mr DeMarco, to assist his financial position.

[113] Whatever the specific details were, the underlying substance of the arrangements was that:

(a) Mr DeMarco had been authorised to enter into a sale and purchase arrangement using OSRC;

(b) the transaction entered into by Mr DeMarco and OSRC on behalf of TVAL would cause TVAL property to be disposed of, ultimately to Warbirds; and

(c) OSRC on behalf of Mr DeMarco would take the benefit of the difference between the TVAL list price and the price that Mr DeMarco

represented to Mr Corke that Warbirds was prepared to pay in order to benefit Mr DeMarco.

[114] The plaintiffs have submitted it is not necessary for this Court to resolve the difference between Mr Corke's understanding and that of Mr DeMarco, or determine which particular mechanism gave effect to the transaction.

[115] I accept that submission. The conduct of the parties in the circumstances was such that Mr DeMarco undertook a role as TVAL's agent in respect of the Warbirds sale, effected through OSRC on the basis that OSRC also had the status of TVAL's agent.

[116] For completeness, I would have found the claim based on knowing receipt by OSRC was made out.

[117] The elements of a claim for knowing receipt are:[42]

(a) disposal of money or property in breach of fiduciary duty or breach of trust;

(b) beneficial receipt of that money or property; and

(c) knowledge on the part of the recipient that payment to it was in consequence of a breach of fiduciary duty or was in breach of trust.

[118] The pleaded (and admitted) facts established that:

(a) OSRC received a total of $2,105,879 for the TVAL aircraft on behalf of Mr DeMarco;

(b) Mr DeMarco was in breach of his fiduciary obligation of loyalty to TVAL by disposing of the sale proceeds for his own benefit;

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[42] *Equiticorp Industries Group Ltd (In Statutory Management) v R* [1998] 2 NZLR 481 (HC) at 540. See also *Scott v ANZ Bank New Zealand Ltd* [2020] NZHC 906, [2020] 3 NZLR 145 at [101].

(c) Mr DeMarco knew that the disposal of money was in breach of his fiduciary obligation; and

(d) Mr DeMarco's actual knowledge is properly attributed to OSRC. This is because OSRC had knowledge that the payment to it was in breach of Mr DeMarco's fiduciary duty by virtue of the knowledge of its director and shareholder, Mr DeMarco.

[119] A company is a legal person and for a company to be liable for knowing receipt, knowledge of a person or group of people must be attributed to the company. The long-established rule of attribution is the "directing mind and will" test as stated by the House of Lords in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd*.[43]

[120] The modern view of attribution, described by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission*, is that the "directing mind and will" test of attribution is one example of a "special rule of attribution" rather than the general rule of attribution.[44] According to Lord Hoffmann in *Meridian*, a special rule of attribution will need to be fashioned if, as here, the company's constitution does not explicitly deal with attribution and the principles of agency do not apply. Fashioning the relevant special rule of attribution requires asking:[45]

> Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act etc. of the company?

[121] In *Stone & Rolls v Moore Stephens*, the House of Lords attributed the knowledge of a sole director/shareholder to the company, in the context of a third-party claim.[46] The Court of Appeal had followed *Meridian* and fashioned a special rule of attribution, which the House of Lords noted when dismissing the appeal:[47]

> [73] … The essence of the case is that it is one in which the sole directing mind and will of the company procured it to enter into fraudulent transactions with banks. It was the company that dealt with the banks and, so it seems to

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43 *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 (HL) at 713.
44 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC).
45 At 507.
46 *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39, [2009] 1 AC 1391 (HL) at [56], [136] and [205].
47 At [169]–[174]; citing the Court of Appeal decision *Moore Stephens v Stone & Rolls Ltd* [2008] EWCA Civ644, [2009] AC 1391.

> me, clear that, as between the company and the banks, the principles of attribution require the dishonesty of the company's sole human agent to be imputed to the company. Mr Sumption's submissions satisfied me that this is a case in which such an imputation should be made and that the company should therefore itself be liable for the frauds.

[122] In that case the sole shareholder/director, who also took a management role in the company, was found to be the controlling mind and so the criminal offending was attributed to the company.[48]

[123] In this case I am satisfied the actions of Mr DeMarco, who was the "directing mind and will of the company" can be attributed to OSRC. Mr DeMarco's knowledge of the fraud is properly attributable to OSRC, as its sole shareholder and director. On the facts OSRC would be liable for knowing receipt of the funds from the Warbirds fraud.

A trust over the proceeds of sale of the Corsair?

[124] Based on the breach of fiduciary obligations owed to TVAL by Mr DeMarco and OSRC as agents, the proceeds of the sale of the TVAL aircraft to Warbirds were subject to an institutional constructive trust. This is in accordance with accepted principles that a fiduciary is accountable for any benefit or gain acquired through breach of their duty. It will be, in most cases, appropriate for the Court to declare that the "ill-gotten gains are subject to an institutional constructive trust with the principal".[49] The Court merely confirms the trust which has come into being.

[125] I now consider the effect of the existence of that trust over the proceeds of sale received by Mr DeMarco/OSRC.

Tracing and subrogation

Third and fourth causes of action

[126] The third and fourth cause of action are pleaded in the alternative.

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[48] A similar position was adopted in New Zealand by the Supreme Court in *Cullen v R* [2015] NZSC 73, [2015] 1 NZLR 715.

[49] *Intext Coatings (in liq) v Deo* [2017] NZHC 2754, [2017] NZAR 47 at [53]; citing *Shannon Agricultural Consulting (in liq) v Shannon* [2015] NZHC 113 at [27].

[127] The third cause of action is a claim by the FPT. It says it received the repayment money funds subject to the prior equitable interest of TVAL and so the loan to the FPT has not been repaid. TVAL can therefore recover those funds from the FPT. This would leave the FPT loan unpaid and allow it to have recourse to its Specific Security Deed and term loan to enforce the terms of those against Mr DeMarco/OSRC. It could therefore regain the security over the Corsair for all amounts outstanding under the terms of the loan.

[128] In summary, the FPT's argument is that $720,000 of the funds paid to the FPT are held by it subject to a constructive trust for TVAL. These funds can be traced by TVAL into the funds paid to the FPT and TVAL is entitled to recover those funds as it has a proprietary interest in those funds. That proprietary interest takes priority over the legal interest in the funds acquired by the FPT on the repayment of the loan.

[129] The Official Assignee takes a different view. He says he accepts there was a constructive trust over the $720,000 in the hands of Mr DeMarco/OSRC. However, he says once that $720,000 was paid to the FPT and accepted by it in repayment of the loan, the security was discharged. The funds cannot be traced into a debt repayment. The Official Assignee points to the general rule that tracing a proprietary interest ends when the funds are used to pay a debt.

[130] The plaintiff accepts that proposition as a general legal position but argues that it does not apply to the payment of funds to the FPT in this case. It says that in this case the tracing sought is into the property of a *creditor*, not into the assets of the *wrongdoer* or even an *innocent debtor*.

[131] The plaintiff pointed to the judgment in *Federal Republic of Brazil v Durant International Corp*[50] as authority for the proposition that a debt is an asset in the hands of a creditor and so can provide a basis for traditional tracing into the creditor's assets.

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50 *Federal Republic of Brazil v Durant International Corp* [2015] UKPC 35, [2016] AC 297 at [29].

[132] The FPT also noted that a third-party receiving trust property may raise the defence of a bona fide purchaser for value.[51] But, it says in this case that defence does not apply for the following reasons:

(a) The FPT is not a purchaser for value, having provided no consideration for the payment. The steps it took were in recognition of the pre-existing contractual commitments and were dependent on Mr DeMarco/OSRC providing funds that were not subject to pre-existing equitable interest of TVAL.

(b) The FPT does not raise the defence, in any event. Instead, it seeks a declaration that it holds the funds subject to the prior equity.

(c) As the FPT does not raise the affirmative defence of bona fide purchaser for value, the defendants as the wrongdoers cannot themselves raise or rely on the defence. As wrongdoers they cannot take advantage of their own wrongdoing.[52]

[133] For the purposes of this analysis it must be borne in mind that TVAL is a separate entity from the FPT, which is a trust and the FPT plaintiffs are the trustees, despite some common involvement in that company and the trust by Sir Peter Jackson and Dame Fran Walsh.

[134] TVAL is a corporate legal entity separate from its shareholders. Its shareholders from 6 November 2015 were Mr Corke, Mr Stephens and Sir Peter Jackson (jointly). Currently the shareholders are Sir Peter Jackson, Dame Frances Walsh and Philippa Boyens as trustees for the 1914-19 Aviation Heritage Trust. They hold the shares in TVAL beneficially for the beneficiaries of that trust.

[135] The FPT received the repayment of the loan and held those monies beneficially for the beneficiaries of the 1914-19 Aviation Heritage Trust. The discretionary

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51 *Foskett v McKeown* [2001] 1 AC 102 (HL) at [127]–[130].
52 *Steele v Serepisos* [2006] NZSC 67, [2007] 1 NZLR 1 at [133].

beneficiaries apparently include Sir Peter Jackson and Dame Frances Walsh. The trust deed was not produced in evidence.

[136] The phrase adopted by counsel for the FPT that the diverted funds were used for "Peter to pay Peter", meaning that the FPT and TVAL were the same with Sir Peter Jackson's interest in those entities being the common denominator, does not properly describe the position at law.

Analysis: sale of the assets of the ATT to OSRC

[137] Before moving to the tracing and subrogation claims in detail, the effect of the sale of the ATT's assets including the secured Corsair and P-40 to Mr DeMarco/OSRC requires consideration.

[138] The ATT sold its assets, including the Corsair and P-40, to OSRC in March 2012 for a total sum of US $500,000. This was recorded in the trustee minutes of the ATT dated 2012. The minutes record the sale for $500,000 of the Corsair, the Kittyhawk, a De Havilland Chipmunk and a 1952 Jaguar XK120. An undated sale and purchase agreement for the sale of those assets was executed. The possession date was recorded as 15 March 2012. A condition was that the purchaser be satisfied that the charge holder of the two aircraft would agree to the transfer of the existing debt to its name on terms and conditions to its satisfaction prior to settlement.

[139] The Civil Aviation Authority change of possession of aircraft forms for the Corsair and P-40 are dated 14 March 2012. These were signed by Mr DeMarco as trustee for the ATT. They record the transfer of the aircraft to OSRC as legal owner.

[140] The FPT did not approve the transfer of ownership of the Corsair and P-40 from the ATT to OSRC as was required under the Specific Security Deed. On 28 March 2012 after ownership had been transferred from the ATT to OSRC Mr DeMarco had emailed a trustee of the FPT advising that he was in the process of transferring the assets from the ATT as a going concern to OSRC. Mr DeMarco told the trustee that effectively OSRC was buying the assets of the ATT. Mr DeMarco said he had negotiated with James Slade (the other ATT trustee) and reached agreement that Mr DeMarco would pay US $500,000 to buy Mr Slade out. OSRC would then

own the two aircraft that were secured under the FPT loan. Mr DeMarco said in the email that the security agreement and PPSRs would need to be changed from the ATT to OSRC. There was no further correspondence.

[141] Mr DeMarco then entered into an agreement with Mr Oliver Wulff in which Mr DeMarco agreed to transfer 500 ordinary shares in OSRC to Mr Wulff. In addition, the agreement provided that Mr DeMarco would take ownership of the Corsair and Mr Wulff would take ownership of the P-40. A security interest was to be registered against the P-40 for US $500,000 to signify Mr Wulff's interest. Mr Wulff said this was because there was no register of ownership for aircraft and so the security interest registration was to protect his ownership interest in the aircraft. Mr DeMarco and Mr Wulff agreed that no further charges or loans were to be made against the assets of OSRC which had purchased the aircraft.

[142] There was also a side agreement between Mr Wulff and Mr DeMarco that gave Mr DeMarco a right of first refusal if Mr Wulff sold the P-40. It also dealt with how the sale proceeds above US $500,000 would be divided. Mr DeMarco was to operate the P-40. Arrangements as to payment of operating expenses and division of income was set out in the side agreement.

[143] In return for the shares and the P-40 Mr Wulff was to pay US $500,000. He did so by a payment at Mr DeMarco's direction, to OSRC. The payment narrations record the money was "for the purchase of the P-40". A claim by Mr Wulff for rectification of the share register (if it exists) to record that he owns 500 of the 1,000 issued shares in OSRC as well as effecting the transfer to him of the P-40 subject to the terms of the side agreement, are the subject of the proceedings brought by Mr Wulf to which I have referred earlier.[53]

[144] The Official Assignee is of the view that Mr Wulff is entitled to a 50 per cent shareholding in OSRC and that he has full ownership (both legal and beneficial) of the P-40 subject to any security interests of TVAL and the FPT.

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53 *Wulff v DeMarco*, CIV-2018-485-417.

Analysis: effect of sale of assets on the FPT security over the Corsair and P-40

[145] The plaintiffs' primary position is that the ATT obligations under the FPT loan were novated to OSRC when the ATT assets were sold to OSRC. Although the consent of all parties is necessary for a novation Mr Scott points out this may be inferred from conduct and need not be express.[54] He cites *Tszyu v Fightvision Pty Ltd*,[55] as support for the proposition that the terms of informal conversations "as well as the overwhelmingly consistent pattern of conduct of the parties" would be sufficient in this case to indicate consent to a novation.

[146] The plaintiffs say there are a number of factors that support the proposition that OSRC assumed responsibility for the obligations under the FPT loan. These include an email to Mr Stephens' law firm which was acting for the FPT reporting on a telephone conversation in which Mr DeMarco said that the loan to ATT was going to be transferred to OSRC. In addition, Sir Peter Jackson instructed Mr Corke and Mr Stephens to demand repayment of the FPT loan when it was overdue, and they proceeded on the basis that Mr DeMarco and OSRC had responsibility for the loan and Mr DeMarco raised no objection to that assumption. In addition, the repayment of the FPT loan was received from OSRC's/Mr DeMarco's lawyers from a trust account in the name of OSRC held by the law firm.

[147] The plaintiffs also point to comments by Mr DeMarco to Mr Corke at the time of the Warbirds sale to the effect that Mr DeMarco intended to use the interest that OSRC had accrued against it on the FPT loan as a loss to reduce the tax liability that OSRC had incurred as a result of the profit retained on the Warbirds sale. Similar representations were also made to Mr DeMarco's accountant.

[148] The plaintiffs say that Mr DeMarco, having repeatedly represented that OSRC was liable for the FPT loan, had acted consistently with that assumption, so cannot now resile from that position.

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54 *Hela Pharma AB v Hela Pharma Australasian Ltd* CA165/03, 17 February 2005 at [63]; citing *Chatsworth Investments Ltd v Cussins (Contractors) Ltd* [1969] 1 WLR 1 (CA), and *Tito v Waddell (No 2)* [1877] Ch 106, [1977] 3 All ER 129 at 277–278

55 *Tszyu v Fightvision Pty Ltd* [1999] NSWCA 323, [1999] 47 NSWLR 473 at [83]–[86].

[149] Novation requires the consent of all parties concerned. A new contract is substituted for the one that has already been made.[56] An intention must be clearly shown that the original debt is to be extinguished otherwise the novation fails for want of consideration.[57] In this case, while there was an indication that it was intended that OSRC would take responsibility for the contract, an agreement to that effect, or the meeting of minds, which is required to establish novation, is not apparent. At best there was advice to one trustee which was never acted upon. On the facts I think novation of the loan agreement is not established.

[150] Nevertheless, Mr DeMarco is liable personally by virtue of his role as trustee of ATT. A trustee entering into a contract on behalf of a trust is personally liable unless there is a provision in the transaction limiting the trustee's liability.[58] The addition of the word "trustee" as a description does not by itself operate as limitation of liability of the "trustee". The trustee enters transactions on behalf of the trust in their personal capacity and this liability continues after dissolution of the trust. A trust does not have a separate legal personality and cannot enter transactions in its own name for the purposes of dealing with trust property. It relies on the legal personality of the trustees and they are personally bound as they would be had they entered the contract on their own account.[59]

[151] In my view Mr DeMarco remains personally liable for the obligations assumed under the FPT loan irrespective of the dissolution of ATT. Those obligations have not been discharged.

Tracing (third cause of action)

[152] Tracing describes the rules by which to determine whether one form of property interest is property to be regarded as substituted for another.[60]

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56 *Lambly v Silk Pemberton Ltd* (1976) 2 NZLR 427 (CA) at 434.

57 *Liversidge v Broadbant* (1859) 157 ER 978 cited in Jeremy Finn, Stephen Todd and Matthew Barber *Burrows Finn and Todd on the Law of Contract in New Zealand* (6th ed, LexisNexis, Wellington, 2018) at [17.1.9].

58 *Octavo Investments Pty Ltd v Knight* [1979] HCA 61, [1979] 144 CLR 360 at 367, and *Muir v City of Glasgow Bank Liquidators* (1879) 4 APP CAS 337 (HL).

59 *Crummer Trustees Number 83 Ltd v Bank of New Zealand* [2015] NZHC 2165, [2015] NZCC LR 23 at [45].

60 *Federal Republic of Brazil v Durant International Corp*, above n 50, at [17].

[153] I have found that Mr DeMarco/OSRC were constructive trustees holding the $720,000 (diverted funds) for TVAL.[61] The diverted funds were then used to pay part of the amount owing to the FPT.

[154] In *Intext Coatings (in liq)*, Fitzgerald J summarised the general approach to the effect of repayment of a debt on the ability to trace was as follows:[62]

> *Equitable tracing (traditionally) ends at repayment of debt*
>
> [70] Equitable tracing has traditionally been viewed as coming to an end when a claimant's money is traced into the repayment of a debt.[63]
>
> [71] The fact that repayments made under a mortgage are repayment of a debt rather than the acquisition of property (or a contribution to the purchase price of property) gives rise to the concept of "backward tracing". This is tracing from repayment of the debt into the asset that was acquired (at some earlier point in time) with the original loan.
>
> [72] Whether there can ever be such "backward tracing", and if so in what circumstances, has been the subject of consideration by academics. For example, Professor Chambers in "Tracing Unjust Enrichment" observes as follows:[64]
>
> > If it is also possible to trace value back through the payment of debts over much longer periods of time, then the payment of a mortgage could be traced into the purchase of the mortgage asset. However, established law does not permit this. In *Calverley v Green* the High Court of Australia said that it was 'understandable but erroneous to regard the payment of mortgage instalments as payment of the purchase price of the home'.

[155] The funds in that case had been wrongfully taken by a director from her company before liquidation. The High Court concluded that mortgage payments funded by the ill-gotten gains were merely payments of a debt. The fact that the equity in the mortgaged house was reducing did not give rise to an interest in the property over which the mortgage was secured.[65]

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61 See above at [129].

62 *Intext Coatings (in liq) v Deo*, above n 49, at [70]–[72].

63 *Re Diplock* [1948] Ch 465 (CA) and *Re Registered Securities Ltd (in liq)* [1991] 1 NZLR 545 (CA).

64 Robert Chambers "Tracing and Unjust Enrichment" in Jason W Neyers, Mitchell McInnes and Stephen GA Pitel (eds*) Understanding Unjust Enrichment* (Hart Publishing, Oxford and Portland, Oregon, 2004) 263 at 297.

65 *Intext Coatings*, above n 49, at [100].

[156] In reaching that conclusion the High Court noted that the concept of "backward tracing" had been recognised but only in reasonably limited circumstances.[66] Fitzgerald J went on to say:[67]

> [75] The Privy Council described the issue as follows:[68]
>
> > The doctrine of tracing involves rules by which to determine whether one form of property interest is properly to be regarded as substituted for another. It is therefore necessary to begin with the original property interest and study what has become of it. If it has ceased to exist, it cannot metamorphose into a later property interest.
>
> [76] Having reviewed academic debate on the issue of backward tracing, the Privy Council observed:[69]
>
> > More particularly the plaintiffs submit, as Professor Smith argues, *that money used to pay a debt can in principle be traced into whatever was acquired in return for the debt.* That is a very broad proposition and it would take the doctrine of tracing far beyond its limits in the case law to date. *As a statement of general application, the Board would reject it.* The courts should be very cautious before expanding equitable proprietary remedies in a way which may have an adverse effect on other innocent parties. If a trustee on the verge of bankruptcy uses trust funds to pay off an unsecured creditor to whom he is personally indebted, in the absence of special circumstances it is hard to see why the beneficiaries' claim should take precedence over those of the general body of unsecured creditors. [Emphasis added.]

[157] The Privy Council recognised backward tracing but said that to establish that right required "a close causal and transactional link between the incurring of a debt and the use of trust funds to discharge it".[70]

[158] Fitzgerald J, in *Intext Coatings (in liq)*, rejected earlier cases which had described the paying down of a mortgage loan as allowing the defendants to trace into the mortgaged asset. She commented that the enrichment of the debtor "resulted from the reduction in their debt secured by the mortgage", not the acquisition of a valuable asset.[71]

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66 Citing the Privy Council decision in *Federal Republic of Brazil v Durant International Corp*, above n 50.

67 *Intext Coatings*, above n 49, at [75]–[76].

68 *Federal Republic of Brazil v Durant International Corp*, above n 50, at [17].

69 At [33].

70 *Intext Coatings*, above n 49, at [77]; citing *Federal Republic of Brazil v Durant International Corp*, above n 50, at [34].

71 *Intext Coatings*, above n 49, at [93], disagreeing with the findings in *Torbay Holdings Ltd v Napier* [2015] NZHC 2477, [2015] NZAR 1839.

[159] The FPT says a chose of action between the FPT and its bank came into existence when the funds were paid and held by the FPT's bank. This followed the transfer of those funds to the FPT's bank account by the FPT's solicitor who had settled the debt repayment transaction.[72] The FPT said that a chose of action arose between the FPT and its bank for the $720,000, (the diverted funds). As that chose in action was an asset it could be the subject of tracing.

[160] The FPT points to comments in the judgment of *Federal Republic of Brazil* as authority that a debt is an asset in the hands of the creditor and so can provide a basis for traditional tracing into the creditor's assets.[73] In this case the FPT does not argue that this is a case of "backward tracing" in the traditional sense. It says that it was a creditor not a debtor nor the wrongdoer. It also says it does not raise the defence that it received the money bona fide for value.

[161] The comments in *Federal Republic of Brazil*, to which the FPT points, cite an academic article that noted that "a debt is an asset in the hands of the creditor, so can provide a basis for traditional tracing in relation to the creditor's assets. But a debt has no asset value in the hands of the debtor; it is a liability which ceases to exist when it is paid".[74]

[162] As I have noted above the Privy Council in the *Federal Republic of Brazil* case warned against and rejected the expansion of the doctrine of tracing to:[75]

> [33] … as Professor Smith argues, that money used to pay a debt can in principle be traced into whatever was acquired in return for the debt. That is a very broad proposition and it would take the doctrine of tracing far beyond its limits in the case law to date...

[163] Whether the FPT's argument is based on "backward tracing" or traditional tracing, the difficulty is that the debtor (Mr DeMarco/OSRC) repaid the debt at the moment it passed into the FPT's trust account. The payment was accepted, and that payment discharged the liability under the loan documents and security. There is no

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72 Counsel did not go into detail about the financial position of the FPT, nor was there evidence as to the use to which the $720,000 was put following the repayment of the FPT loan in July 2015.

73 *Federal Republic of Brazil v Durant International Corp*, above n 50, at [29].

74 At [29]; citing Matthew Conaglen "Difficulties with tracing backwards" (2011) 127 LQR 432.

75 At [33].

asset which has a "sufficient transactional link" to enable the diverted funds to be traced into whatever was acquired in return for the debt.[76]

[164] The FPT contended that it did not give value for the repayment. That is not the case. The money was paid to the FPT in return for the discharge of the debt and the security. The FPT security was of real value and it provided that value when it released the security. Sir Peter Jackson acknowledged, in his affidavit, that the repayment was why the security was discharged.

[165] That the FPT has indicated it does not raise the affirmative defence of bona fide purchase for value takes the matter no further. The diverted funds were used in part payment of a debt. There is now nothing to trace into. Even if the FPT did voluntarily disgorge the proceeds as it proposes, it does not reverse the repayment of the debt. The FPT, in effect, is seeking to alter the legal effect of the transaction by agreeing that the diverted funds remained subject to a trust that remained extant and so the debt was never properly repaid.

[166] It is by operation of law that the payment of a debt prevents the tracing back into the funds of the FPT. The FPT took the diverted funds and other monies used to pay the debt free of any trust.

[167] In this case both the P-40 and the Corsair, which were the subject of the FPT charge, had been acquired many years earlier. Exactly how the aircraft was acquired by ATT was unclear, but it was not argued that the P-40 was acquired with the assistance of the FPT loan.

[168] The FPT argues that the position is no different to the situation if the FPT had identified that the funds were transferred to it in breach of trust, and it had refused payment and returned the funds to Mr DeMarco and OSRC. It says the returned funds would have remained subject to the constructive trust irrespective of whether they passed through the FPT's hands. Then TVAL would have been entitled to enforce a proprietary claim against those funds in the hands of Mr DeMarco/OSRC. The FPT

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[76] *Federal Republic of Brazil v Durant International Corp*, above n 50, at [32] and [33].

would remain entitled to enforce the outstanding FPT loan and security. However, that is not the situation. The FPT accepted repayment of the debt in July 2016.

[169] In summary the FPT lent money on commercial terms to Mr DeMarco/OSRC.[77] That loan was repaid to the FPT trust account held by its lawyer. The lawyer then paid the money on to the FPT by depositing it into its bank account. The subsequent use of the money in the bank account was not the subject of evidence. The trust account records for the repayment transaction were produced. The debt was a liability of the ATT and repaid on behalf of that trust by Mr DeMarco who was also a personal guarantor and/or OSRC. The liability to the FPT has now ceased to exist and there is nothing to trace into.

[170] The third cause of action (tracing) fails.

Subrogation to the security interests (fourth cause of action)

[171] In the fourth cause of action TVAL seeks to be subrogated to enable it to exercise the rights as lender under the FPT loan agreement and the Specified Security Deed.

[172] The legal concept of subrogation allows one party, in this case TVAL, to have the benefit of similar rights to a party (the FPT) who has been paid using the first party's money.[78] The learned authors in *Equity and Trusts in New Zealand* comment that the equitable remedy of subrogation is attractively described as an analogue of tracing.[79]

[173] Subrogation does not entitle the claimant to "step into the shoes" of the other party, but rather, the Court allows the claimant to claim rights "like" the original creditor.[80]

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77 Although the loan was initially advanced to Airtight Trust.
78 *Equity and Trusts in New Zealand*, above n 33, at 987.
79 At 987.
80 At 989.

[174] In *Intext Coatings (in liq)*, Fitzgerald J considered the application of subrogation in earlier cases. She said:[81]

> *Subrogation*
>
> [112] The term "subrogation" encompasses both contractual subrogation and the broader equitable subrogation. In its equitable sense, subrogation has been described as follows:[82]
>
> > [W]here A's money is used to pay off the claim of B, who is a secured creditor, A is entitled to be regarded in equity as having had an assignment to him of B's rights as a secured creditor .... It finds *one of its chief uses* in the situation where one person advances money on the understanding that he is to have certain security for the money he has advanced, and for one reason or another, he does not receive the promised security. In such a case he is nevertheless to be subrogated to the rights of any other person who at the relevant time had any security over the same property and whose debts have been discharged in whole or in part by the money so provided by him.
> >
> > [Emphasis added.]
>
> [113] Relevantly for current purposes, in *Boscawen v Bajwa*, Millett LJ held that there was no requirement for a mutual intention on the part of the creditor and the party seeking subrogation that the latter party's funds would be used to discharge the security and that they would receive the benefit of the security in return.[83]

[175] Her Honour noted that the remedy of subrogation was based in restitution and was an "equitable remedy to reverse or prevent unjust enrichment which is not based upon any agreement or common intention of the party enriched and the party deprived".[84]

[176] There is no requirement for the mutual intention on behalf of the creditor and the party seeking subrogation that the latter party's funds would be used to discharge the security and that they would receive the benefit of the security in return. Nevertheless, intention may be highly relevant as to whether any enrichment was unjust.[85]

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81 *Intext Coatings (in liq)*, above n 49, at [112]–[113].
82 *Burston Finance Ltd v Speirway Ltd* [1974] 1 WLR 1648 (Ch) at 1652.
83 *Boscawen v Bajwa* [1996] 1 WLR 328 (CA) at 339.
84 *Intext Coatings (in liq)*, above n 49, at [115]; citing Lord Hoffmann in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1998] UKHL 7, [1999] 1 AC 221 at [231].
85 *Intext Coatings (in liq)*, above n 49, at [113] and [116].

[177] I have found that the FPT loan was in part repaid by use of the diverted funds. Those funds were subject to a constructive trust in Mr DeMarco/OSRC's hands. The balance of the funds used to repay the FPT loan came from a BNZ loan taken out by Mr DeMarco/OSRC. The amount paid to the FPT to repay the debt and discharge the security interest was $1,104,114.51.[86]

[178] As described earlier, the FPT had lent the ATT $607,000 plus US $9,000 to pay off ATT's finance company loan and other liabilities.[87] On 5 December 2011 the trustees of the FPT and the trustees of ATT entered into the Term Loan Agreement and a Specific Security Deed.

[179] The FPT Term Loan Agreement included the following terms:

(a) Repayment of the principal sum was to be in one sum on September 2012, with the specific day left blank.

(b) Interest commencement date was December 2011, with the specific day left blank.

(c) The term expiry date was September 2012, again with the date left blank.

(d) The lower interest rate of 12 per cent per annum and the higher interest rate 16 per cent per annum. The principal sum, together with interest and monies outstanding, was to be repaid on the term expiry date.

(e) The security to be held was under specific security agreement providing for security over the Corsair and the P-40.

(f) Unless "alternative provisions" were set out interest was payable on the last day of the relevant interest period on the amount of the principal

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86 See above at [47](a).
87 See above at [34].

sum outstanding on the first day of an interest period at the higher interest rate.

(g) On that part of the monies owing in respect of which there was no agreement, liability for payment of interest on the last day of each month was at 2 per cent per annum above the taxpayer's "paying rate" as prescribed from time to time calculated with daily rests from the date in which the monies become owing.

(h) Interest at the lower rate was payable if interest was paid on the due date or within seven days of the due date for payment as specified in the annexure schedule.

(i) All costs expended by the lender in the exercise of the lender's rights and powers following a default to enforce the term loan were payable upon demand.

(j) Indemnity costs were payable upon demand. This included costs for legal services relating to the protection of the lender's security interest.

[180] The Specific Security Deed was signed by Mr Slade and Mr DeMarco (as trustees of the ATT), the grantor and by Mr M G C Stephens and Mr S B Bayliss (as trustees of the FPT). It gave security over the Corsair and the P-40 as follows:

> As security for payment or delivery of the Secured Money and compliance with the Secured Obligations, the Grantor grants to the Secured Creditor a security interest in all its right title and interest, present and future in the Secured Property together with all proceeds thereof.

[181] The Deed contained the following additional provisions:

(a) "Finance Documents" meant the Facility Agreement, which meant the term loan agreement dated on or about the date of Specific Security Deed between the Secured Creditor and the Grantor, and included any other agreement at any time evidencing or relating to the Secured Obligations and/or the Secured Property and any other agreement that

the parties agreed would be a Finance Document for the purpose of the Specific Security Deed (and in relation to any particular person means any such document to which that person is a party).

(b) The grantor would pay the secured monies as stipulated in the finance document.

(c) The grantor would pay interest on the secured manner at the rates and on the terms stipulated in the "facility agreement". If there was no such stipulation at the "specified rate" or if a default has occurred and is continuing, then at the specified rate plus a margin of five per cent per annum accruing on a daily basis. Interest was payable before and after judgment is obtained.

(d) The secured property was defined as: "all right, title and interest in and to the Aircraft, their tech logbooks, any other logbooks and documentation relating to the Aircraft and required to be kept by the Grantor under the civil aviation laws of New Zealand, as well as all the property assigned to the Secured Creditor under clause 2.3, and references to Secured Property include references to any part of such Secured Property and any proceeds of the foregoing, and includes any part of it".

(e) Except with the prior written consent of the secured creditor the grantor agreed not to dispose of the property.

(f) The secured creditor was entitled to appoint a receiver in the event of default.

(g) The indemnities given included an indemnity for all enforcement costs, including for irrecoverability as follows:

> 14.1..(e) … any obligation of the Secured Creditor to refund to the grantor or any other person any payment received by the Secured Creditor or any Receiver on account of any Secured Money, or any inability of the Secured Creditor or any Receiver to recover any

> Secured Money (or indebtedness which would have been Secured Money if it were recoverable), whether or not any transaction relating to the Secured Money is or was void, voidable, avoided or illegal and whether or not the Secured Creditor or any Receiver or Attorney was aware, or ought to have been aware, of any matter or circumstances relating to that transaction or giving rise to such illegality or such refundable, irrecoverable or void status.

(h) The grantor was not permitted to assign or transfer any rights or obligations under the document. The secured creditor was entitled to assign or transfer any of its rights and benefits under the Finance Documents with the consent of the grantor whose consent could not reasonably be withheld or delayed. Any transferee would be treated as a secured creditor.

(i) The secured creditor was not required to "marshal, enforce, apply, appropriate, recover or exercise; any security or other entitlement held by it; or any money or assets which it holds or is entitled to receive".

(j) The rights of the grantor to redeem the secured property and to be released from the Specific Security Deed or the security interest created under it were outlined in clauses 12.3 and 12.4 of the Specific Security Deed.

[182] On 5 December 2011 the FPT registered a financing statement in respect of the security interests over the P-40 and the Corsair on the PPSR.

Subrogation: what is covered by the equitable charge?

[183] I have found that Mr DeMarco was personally liable for the FPT loan. The security under the FPT loan is enforceable against OSRC.[88] This is because the FPT registered financing statements under the PPSR against the Corsair and the P-40 on 5 December 2011.

[184] The registration perfected the security under s 41 of the Personal Property Securities Act 1999. That section provides:

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[88] See above at [151].

41 When security interest perfected

(1) Except as otherwise provided in this Act, a security interest is perfected when—

(a) the security interest has attached; and

(b) either—

(i) a financing statement has been registered in respect of the security interest; or

Example

Person A registers a financing statement in respect of person B's car.

Subsequently, person A's security interest in person B's car attaches.

Person A's security interest is perfected.

(ii) the secured party, or another person on the secured party's behalf, has possession of the collateral (except where possession is a result of seizure or repossession).

Example

Person A's security interest in person B's hire purchase agreement (chattel paper) has attached.

Person A takes possession of the hire purchase agreement.

Person A's security interest is perfected.

(2) Subsection (1) applies regardless of the order in which attachment and either of the steps referred to in paragraph (b) of that subsection occur.

[185] When ownership of the Corsair and P-40 was transferred from ATT to OSRC on 14 March 2012, OSRC, as purchaser for value, took the collateral subject to the perfected security interests.[89] Section 19(1)(b) of the PPSA provides:

19 Meaning of knowledge

(1) For the purposes of this Act,—

…

[89] Personal Property Securities Act 1999, s 52.

(b) an organisation knows or has knowledge of a fact in relation to a particular transaction when—

(i) the person within the organisation with responsibility for matters to which the transaction relates has actual knowledge of the fact; or

(ii) the organisation receives a notice stating the fact; or

(iii) the fact is communicated to the organisation in such a way that it would have been brought to the attention of the person with responsibility for matters to which the transaction relates if the organisation had exercised reasonable care:

[186] OSRC took ownership of the aircraft as a party on notice of the prior security interest. That notice came about because Mr DeMarco was aware of the security interest by virtue of his role as trustee of the ATT. That knowledge was imputed to OSRC pursuant to s 19(1)(b) of the Personal Property Securities Act. Mr DeMarco, as director and shareholder, was a person within the organisation with responsibility for matters to which the transaction relates and had actual knowledge of the fact.

[187] In *Intext Coatings Ltd (in liq)*[90] the High Court found that the plaintiff company (in liquidation) was entitled to an equitable charge over a director's property due to the fact that mortgage repayments on the property had used company money in breach of a director's fiduciary duties to the company. The amount so paid was subject to an institutional constructive trust in favour of the company.

[188] The company was not entitled to trace the constructive trust funds into the property to claim an equitable proprietary interest in the director's equity in the property as the repayments of the mortgage were not a contribution to the acquisition of the property or to the purchase price of the property as outlined above. However, the Court found that Intext Coatings Ltd was entitled to an equitable charge over the property as a result of subrogation. The money had been used to discharge a secured mortgage debt which allowed equitable subrogation to the mortgage by the company. The funds would not have been so used absent the delinquent director's breach of fiduciary duty. She had been unjustly enriched as part of a secured debt owed by her

90 *Intext Coatings Ltd (in liq)*, above n 49.

to third parties had been discharged.[91] The charge was limited to the amount of the payments made from the company's funds by way of mortgage instalments.

[189] Similarly, Mr DeMarco/OSRC have used $720,000 of TVAL's funds to discharge a debt secured over the Corsair. I am satisfied that TVAL is entitled to an equitable charge over the Corsair as a result of subrogation.

[190] TVAL and the Official Assignee disagree on the amount and terms attaching to the subrogation.

[191] The Official Assignee does not accept that the equitable charge extends beyond the diverted funds of $720,000. He rejects the proposition that it includes any avoided interest under the FPT loan. In addition, the Assignee does not accept that the equitable charge should be granted on the same terms as the security deed, nor that TVAL is entitled to enforce the security as if the terms of the Specific Security Deed were transferred to it in their entirety.

[192] TVAL says the equitable charge in its favour is on the same terms as were contained in the Specific Security Deed and loan documentation. It says it is entitled to take the benefit of all the terms of those documents by way of subrogation and enforce the charge accordingly. That would lead to recovery of not only the $720,000 but to compounding penalty interest and the full costs of recovery as well as other monies.

[193] In summary, the issue is whether TVAL is entitled to be regarded in equity as notionally having taken an assignment of all the FPT's rights as a secured creditor under the terms contained in the loan documentation.

[194] TVAL says that it and the FPT should be treated for the purposes of subrogation as being the same body. Specifically, it says:

> 233 It is also significant that TVAL and the FPT are closely related entities involving substantially the same ultimate beneficial interests. The result of Mr DeMarco and/or OSRC's fraudulent scheme was therefore that:

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91 *Intext Coatings (in liq)*, above n 49, at [48]–[49].

233.1 the same ultimate beneficiaries were deprived of the agreed interest under the FPT Loan;

233.2 the deprivation of the interest only occurred due to repayment of Mr DeMarco's loan to the FPT; and

233.3 Mr DeMarco only repaid that loan because he had, in breach of his fiduciary duty not to profit, obtained funds which were the property of TVAL.

[195] The terms of the FPT loan and security deed were comprehensive. They were designed to prevent the FPT losing any money for costs of recovery or because its security was not otherwise enforceable. It says that TVAL should therefore be entitled to the benefit of all the terms of the FPT loan and security, including interest at 16 per cent compounding annually, which was the default rate under the FPT loan and the ability to recover full indemnity costs for steps taken to recover the debt, as well as any "irrecoverable" amounts under the loan.

[196] TVAL also said it was entitled to step into the shoes of the FPT insofar as other remedies were concerned under the loan and security documents such as appointing a receiver to recover property under the loan.

Analysis

[197] The principles of subrogation relevant here are:

(a) The earlier charge is not kept alive.[92]

(b) The plaintiff is not treated, for all purposes, as an actual assignee.[93]

(c) Intention may be highly relevant to whether or not any enrichment was unjust.[94]

[198] The subrogation remedy does not entitle the claimant to take over all the rights of the subrogated party, nor does it bring an assignment of rights by operation of law.[95]

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92 See below at [216].
93 See below at [216].
94 See above at [175].
95 *Equity and Trusts in New Zealand*, above n 33, at 989.

[199] TVAL accepts that subrogation does not operate as an assignment and it does not provide party A with party B's rights *simpliciter*. TVAL says the subrogation creates "a new and independent equitable charge which *replicates* the creditor's old interest".[96]

[200] TVAL says a principled approach must be taken to the application of subrogation. It is not based on a moral or overarching "fairness" approach.[97] TVAL says unjust enrichment principles allow subrogation to reverse the enrichment. In this case it says the enrichment to Mr DeMarco/OSRC is:

(a) avoidance of the FPT loan default interest rate at 16 per cent compounding annually; and

(b) avoidance of the FTP's other obligations and rights under the loan and security documentation including the right to indemnity costs and to recover amounts otherwise irrecoverable under the "irrecoverability" clause.

[201] TVAL submitted that some earlier authorities do establish that the new charge created is on the same terms as the secured debt to which it is subrogated. TVAL points to:

13.1 *Banque Financiere* per Lord Hoffman "the plaintiff must for all purposes be treated as an actual assignee of the benefit of the charge"

13.2 *Intext Coatings* "legal relations between the plaintiff and defendant are regulated 'as if' the benefit of the earlier charge had been assigned to the plaintiff"

13.3 *Trustees Executors v Steve G* "[the creditor] obtains a new and independent equitable charge with replicates the creditors' old interest".

[202] However, those cases do not support TVAL's primary submission that it is entitled to take advantage of all the terms including interest and recovery of irrecoverable monies and indemnity costs.

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96 *Trustees Executors Ltd v Steve G Ltd* [2013] NZHC 16 at [113] (emphasis added); citing Lord Hoffmann in *Banque Financière de la Cité v Parc (Battersea) Ltd*, above n 84, at 236.

97 *Intext Coatings (in liq)*, above n 49, at [43].

[203] The cases referred to were, in the main, cases where one bank's loan security had failed and that party was seeking to be subrogated to the charge of another secured commercial lender who had had the benefit of the security that the first bank thought it was getting.

[204] For instance, TVAL points to a judgment in *Western Trust & Saving Ltd v Rock*.[98] In that case the defendant's wife had taken the money her husband had given her to pay toward the mortgage over their home held by the Abbey National Building Society. The title to the property was registered and vested in the husband and wife jointly.

[205] When the mortgage fell into arrears the wife forged her husband's signature to refinance the mortgage through a new lender, the plaintiff Western Trust & Saving Ltd. It took what it thought was a valid first mortgage as security, which it was not. The husband acknowledged that the doctrine of subrogation applied in that the plaintiff became subrogated to the rights of the refinanced Abbey National Building Society. He had known nothing about the circumstances in which his wife had forged his signature to the new mortgage. The issue before the Court was whether the plaintiff was entitled to the interest payable under the Abbey National loan documents. The Court held that the plaintiff was entitled to interest at the rate prescribed in the Abbey National loan.

[206] TVAL points to the comments of Peter Gibson LJ in that case.[99]

> If the charge is preserved for the bank as if it were the equitable assignee of the charge, why should not the bank take the benefit of the rights under the charge, including the right to interest? Prima facie, the bank succeeds to the whole security, and that means to all the rights relating to capital and interest. Even without authority, I would have thought it obvious that the assignee would be entitled to that interest, unless of course there were special circumstances which made it inequitable for the assignee to take the same rate of interest as that to which the original owner of the charge was entitled. For example, in *Chetwynd v. Allen* [1899] 1 Ch 353 the contractual rate of the loan made by the assignee was less than the interest rate which was payable under the original mortgage paid off by the loan and so of course the lower rate was held to be applicable (*ibid* at p 359).

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98 *Western Trust & Saving Ltd v Rock* [1993] NPC 89 (EWCA).

99 At 5.

> There is no authority to suggest that interest should not be paid in the circumstances, and my Lord has referred to the authorities which strongly suggest that interest is payable. Mr Keegan, however, suggests that because subrogation is part of the law of restitution and one must find unjust enrichment in order to apply that remedy, Mr Rock ought to be excused from paying interest in the present case because, he says, it cannot be said he would be unjustly enriched. I do not agree. He would be unjustly enriched if his secured debt was paid off by an innocent lender without Mr Rock incurring the like obligations in respect of interest to the lender who has provided the discharge monies as he owed to the original owner of the charge.

[207] TVAL acknowledges that the cases it cited involved subrogation claims where the unjust enrichment was created by payment under mistake, rather than misuse of trust property. However, it submitted that the principles recognised by Peter Gibson LJ apply equally outside that context, such that, to quote from its submissions:

> 16.1 subrogation into security involves treating the claimant as if they were an assignee (a new charge that replicates the terms of the old charge);
>
> 16.2 if the old charge include a requirement for payment of interest, the claimant is subrogated into this requirement. If this did not occur, the property owner would be unjustly enriched by the discharge of the security;
>
> 16.3 that rule is departed from only if "special circumstances" require. One such circumstance is where the claimant was prepared to lend money on more favourable terms(i.e, lower interest rate). Claimaint [sic] cannot recover more than they were prepared to bargain for;
>
> 16.4 special circumstances **do not** exist where the money used to discharge the security is used in breach of trust of the innocent party. In that circumstance, the claimant did not consent to money being used to discharge security, and there is no bargain on more favourable terms to hold the claimant to.

[208] In *Western Trust & Saving Ltd*,[100] the proposition was that if the claimant's loan terms included an interest rate lower than that of the loan upon which the subrogation was sought, the lower interest rate would apply. Peter Gibson LJ limits his comments to the subrogation by one lender to another lender's security.[101] He does not say that where the funds of the party seeking subrogation were not the subject of an interest agreement that party becomes entitled to the interest chargeable under the commercial loan it subrogates to.

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100 *Western Trust & Saving Ltd v Rock*, above n 98.

101 See above at [206].

[209] TVAL also pointed out that Fitzgerald J cited with apparent approval a decision of the English Court of Appeal in *Filby v Mortgage Express (No. 2) Ltd*.[102] That was a case where the mortgage documents had been forged. The claimants were seeking to be subrogated to the rights of the Midland Bank because the debt to it had been discharged by the claimants' loan. The Midland Bank loan had been unsecured. Despite that the Court of Appeal found that the claimants were entitled to a right equivalent to the unsecured personal rights of Midland Bank, including the right to interest which would have accumulated over a period in excess of 13 years.

[210] However, *Filby* was not cited in *Intext Coatings (in liq)* with approval in relation to the claim for interest[103] as there was no discussion on that point in *Intext Coatings (in liq)* and the interest actually awarded by Fitzgerald J was interest at the prescribed rate under the Judicature Act 1908, not at the rate of interest that had been chargeable under the mortgage toward which the company's funds had been wrongfully paid. Nor was accumulated interest included in the amount of the equitable charge.

[211] TVAL pointed to further comments made by Fitzgerald J in the course of the *Intext Coatings Ltd (in liq)* judgment that "legal relations between the plaintiff and defendant are regulated 'as if' the benefit of the earlier charge had been assigned to the plaintiff". This is a reference to the comments which I have referred to earlier in *Banque Financière de la Cité v Parc (Battersea) Ltd*. In *Intext Coatings Ltd (in liq)* the liquidator on behalf of the company was seeking to recover mortgage payments made by a director of a personal mortgage.

[212] In this case TVAL was not, nor had it ever been, in the position of a lender to OSRC. It was a separate entity to the FPT. Therefore, the position in this case is different to that where the claimant is a lender whose security or loan has failed due to the wrongdoer's actions. Even in those cases the courts will adjust the interest rate to ensure that the claimant receives no more interest than it would have been entitled to under its own loan agreement.

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102 *Filby v Mortgage Express (No 2) Ltd* [2004] EWCA Civ 759.
103 *Intext Coatings (in liq)*, above n 49, at [131].

[213] In *Cheltenham & Gloucester PLC v Appleyard*,[104] Lord Neuberger referred to authority supporting the proposition that a subrogated lender cannot recover a greater rate of interest than "that he agreed to accept under the new mortgage".[105] In that case Lord Neuberger noted:

> Subrogation cannot be invoked so as to put a lender in a better position than that in which would [sic] have been if he had obtained all the rights for which he bargained …

[214] In *Philby v Mortgage Express Number 2 Ltd*,[106] another case referred to by TVAL, May LJ commented:[107]

> … [the claimant] is plainly correct to submit that in the present case the claimants are not seeking to be put in a better position than that they bargained for. If a person intending to make an unsecured loan is not precluded by that fact from claiming to be subrogated to the personal rights of the creditor whose debt is discharged if the contractual liability of the original borrowers proves to be unenforceable, a person intending to make a secured loan should be in no worse position.
>
> …
>
> The remedy does not extend to giving the claimant more than he bargained for…

[215] Similarly, in *Banque Financière de la Cité v Parc (Battersea) Ltd* Lord Hoffmann noted:[108]

> … BFC could not, on the basis of any terms agreed … assert by way of subrogation greater rights than they bargained for.

[216] Lord Hoffmann went on to say:[109]

> When judges say that the charge is "kept alive" for the benefit of the plaintiff what they mean is that his legal relationships with a defendant who would otherwise be unjustly enriched are regulated "as if" the benefit of the charge had been assigned to him. It does not, by any means follow that the plaintiff must for all purposes be treated as an actual assignee of the benefit of the charge, and, in particular that he would be so treated in relation to someone who would not be unjustly enriched.

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104 *Cheltenham & Gloucester PLC v Appleyard* [2004] EWCA Civ 291.
105 At [76]; citing *Chetwynd v Allen* [1899] 1 Ch 353.
106 *Filby v Mortgage Express (No. 2) Ltd* [2004] EWCA Civ 759.
107 At [40] and [62].
108 *Banque Financière de la Cité v Parc (Battersea) Ltd*, above n 84, at 235.
109 At 236–237.

…

> … nor is it available against Parc itself, so as to give BFC the rights of sale, foreclosure et cetera. Which would normally follow from BFC being treated as if it were an assignee of the RTB charge.

[217] The third case referred to by TVAL as supporting its position was *Trustees Executors Ltd v Steve G Ltd,*[110] which was a decision of Bell AJ dismissing applications to sustain a caveat on the basis of tracing and subrogation. The Associate Judge's comments that a claimant "obtains a new and independent equitable charge which replicates the creditors old interests" was merely referring to comments by Lord Hoffmann in *Banque Financière de la Cité v Parc (Battersea) Ltd*, to which I have referred earlier. The Associate Judge was discussing the effects of an equitable lien found not to exist in that case. He noted that such an equitable charge was enforceable using the judicial process. The Associate Judge did not contemplate that the terms of security which the charge replaced such as appointing a receiver would be incorporated in an equitable charge. He said:[111]

> [19] … An equitable charge gives the holder of the charge a right of realisation by judicial process – that is, by the court appointing a receiver appointed or ordering a sale. An equitable lien is different from an equitable charge because it arises by implication of equity, that is independently of the intentions of the parties. It remains a charge over property and may be enforced in the same way as an equitable charge – that is, by judicial process for a court-appointed receiver or an order for sale.

[218] Mr DeMarco/OSRC (or the estate in bankruptcy and in liquidation) would be unjustly enriched if they were entitled to retain $720,000 of TVAL's money. If the FPT loan had not been repaid to the extent of the diverted funds the bankrupt estate of Mr DeMarco would have been diminished by that amount. It is just to recognise that enrichment by way of allowing subrogation for that amount.

[219] However, I accept the Official Assignee's submission that the equitable charge cannot extend to "avoided interest" calculated under the provisions of the FPT loan. The amount of the charge created through subrogation is limited to the amount of the diverted funds that were applied in repayment of the secured debt. Apart from the fact

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110 *Trustees Executors Ltd v Steve G Ltd*, above n 96.

111 *LSF Trustees Ltd v Footsteps Trustee Co Ltd (in liq)* [2017] NZHC 2619, [2017] NZAR 1676 at [19] (footnotes omitted).

the avoidance of interest is speculative, as the FPT loan may have been paid off by some other means, including sale of the aircraft, the claimant is not entitled to interest at a rate above that which was chargeable by it on the diverted funds merely because it subrogates to a loan under which there was an agreement to pay interest.

[220] TVAL was taken advantage of by an agent/employee that it had put its trust in. However, beyond the diverted funds, the other creditors in the DeMarco bankruptcy/OSRC liquidation would not be unjustly enriched if TVAL were not entitled to interest at the commercial rate payable under the FPT loan. The FPT loan terms as to indemnity costs, "irrecoverable monies" and interest are not incorporated as terms of the equitable charge created by subrogation.

[221] I order an equitable charge over the Corsair in favour of TVAL as a result of subrogation up to the amount of $720,000, which was the TVAL money used to discharge the FPT loan.

Quantum – causes of action one, two and four

[222] The relief sought in the first and second causes of action is identical. Judgment is sought first for $937,500 (inclusive of GST) being the total of the list price and the secret commission received by the defendants for TVAL's BE2. The BE2 was never returned to TVAL. It was retained by Warbirds.

[223] The Official Assignee accepts that Mr DeMarco and/or OSRC is liable for a breach of fiduciary duty and a breach of trust. He accepts that TVAL is entitled to an account for the funds misappropriated from it.

[224] TVAL also seeks judgment for the use or benefit that Mr DeMarco and/or OSRC have received from the retention and use of the Warbirds payments. Essentially, that is interest on the funds paid by the Warbirds while they were in the defendants' hands.

[225] In this regard evidence was given by Mr Osborn, a forensic accountant. He had reviewed the accounts that were available from the records discovered by

Mr DeMarco and/or OSRC. These were not complete; therefore, he was required to make some assumptions.

[226] Mr Osborn was able to isolate the sum of $6,657 earned in interest by analysis of the accounts showing the deposit of funds received by Mr DeMarco from Warbirds for the TVAL aircraft. Mr Osborn noted that some of the Warbirds' funds had been paid into a solicitor's trust account and placed on deposit. He could not calculate the actual interest accrued on those funds as he had not been provided with any solicitor's trust ledger or other accounting documents. The capital invested in the solicitor's account was in the vicinity of $1 million.

[227] The interest of $6,657 which Mr Osborn was able to isolate was therefore only a part of the return by way of interest which Mr DeMarco would have received.

[228] An alternative calculation made by Mr Osborn provided the notional return on the full capital paid by Warbirds to the defendants. This was based on the return on monthly term deposits at rates which applied to the funds from the time they were received by Mr DeMarco from Warbirds. $968,379.50, being 85 per cent of the purchase price for the Albatros, was received on 1 July 2016. Other payments were received up to 21 July 2017.

[229] Mr Osborn produced spreadsheets showing his calculations based on monthly term deposit rates with interest payable at the end of the monthly deposit. The rates applied varied from 1.29 per cent in July 2016 for the rate to 0.22 per cent for the month of March 2020. Mr Osborn adjusted for the payment of resident withholding tax on the interest which affected the balance held. Interest accrued on the balances monthly on a compounding basis.

[230] TVAL relied on the authority of *Sempra Metals Ltd* to base its claim for compound interest.[112] That case involved tax paid under a mistake which was recoverable under a specific statutory provision.[113] The majority found that compound interest calculated on the overpaid tax money was recoverable by the plaintiff based

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112 *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34, at [22].
113 At [25].

on either a claim for actual loss to the claimant which was subject to the usual proof and rules such as remoteness or under a claim based on unjust enrichment.[114]

[231] As the defendants have not discovered the information which would have enabled Mr Osborn to calculate the actual benefit, I consider TVAL is entitled to the interest amounts calculated by Mr Osborn under his alternative calculations. Mr Osborn's alternative calculation is a reasonable estimate of what Mr DeMarco would have earned on his deposits. The bank rates used by Mr Osborn were actual rates which were current over the period of the calculation. The calculation makes appropriate adjustments for the capital payments Mr DeMarco made to TVAL.

[232] On Mr Osborn's evidence, the total interest earned, based on bank deposit rates in the period involved up to 31 March 2021, was $19,520.05. Mr Osborn says the interest attributable to the Albatros and Sopwith Pup funds was $13,751.62. The remainder of the $19,520.05 was attributable to the BE2 funds he said.

[233] I am satisfied that the defendants were unjustly enriched by that amount. The Official Assignee accepted that TVAL was entitled to an account for interest.

[234] In summary, to date TVAL is entitled to:

(a) Judgment against the plaintiffs jointly and severally in the sums of:

(i) $937,500 being the total price paid by Warbirds for the BE2 under relief (a) of the first and second causes of action;

(ii) $19,520.05 being the additional profit or benefits that Mr DeMarco received from the retention and use of the Warbirds payments for the Albatros, Sopwith Pup and BE2 up to 31 March 2021 as calculated by Mr Osborn under relief (b) of the first and second causes of action; and

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[114] *Sempra Metals Ltd v Inland Revenue Commissioners*, above n 112, per Lord Nichols at [119].

(iii) An amount to be calculated on the same basis and for the same period as in (a)(ii) on the balance of the funds paid by Warbirds for the BE2 for which interest has not been calculated in (a)(ii). This is sought under Relief (b) of the first and second causes of action.

(b) A declaration on the fourth cause of action that TVAL holds and is entitled to enforce an equitable charge over the Corsair for the sum of the diverted funds of $720,000.

Claim for interest from 31 March 2021

[235] Mr Osborn's interest estimates take the interest calculations on the funds paid to the defendants by Warbirds (excluding the $720,000 diverted funds amount) up to 31 March 2021.

[236] In relation to the $720,000 (diverted funds) TVAL is entitled to interest calculated on the same basis as Mr Osborn has calculated the interest on the balance of the Warbirds funds paid to the defendants up to 31 March 2021. This does not appear to be one of the calculations incorporated in the material handed up during the hearing. Therefore, that amount will require further calculation. The plaintiff is entitled to that as part of the amount of the relief granted under the first and second causes of action at (b) of the relief sought.

[237] From 31 March 2021 the defendants are unlikely to have benefited from interest on deposits at the same rates as used in Mr Osborn's calculations. From 31 March 2021 it can no longer be inferred that Mr DeMarco was earning interest on the outstanding monies. Judgment had been entered against Mr DeMarco for over $300,000 in other proceedings in December 2020.[115] A costs order was made in those proceedings in March 2021.[116] A stay of execution of that judgment pending an appeal by Mr DeMarco was declined on 17 March 2021.[117] On the basis of those judgments

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115 *Anderson v DeMarco* [2020] NZHC 3490.
116 *Re DeMarco, ex parte Anderson*, above n 6, at [4].
117 *Anderson v DeMarco* [2021] NZHC 544.

Mr DeMarco was adjudicated bankrupt on 14 July 2021.[118] Therefore, by March 2021 Mr DeMarco was unlikely to be receiving interest on the TVAL monies due to his financial circumstances.

[238] In each of the causes of action, TVAL seeks interest under s 87 of the Judicature Act 1908. Section 87 of the Judicature Act allows a discretion to order "interest at such rate, not exceeding the prescribed rate, as the court thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment".[119] Clause 4 of the Judicature (prescribed rate of interest) Order 2011 has prescribed that rate as five per cent per year since 1 July 2011. Pursuant to the first proviso to s 87(1) compound interest cannot be awarded.

[239] In oral argument at trial Mr Scott, for the plaintiffs, argued that interest should be granted on an annual compounding basis at five per cent, relying on the principle in *Sempra Metals Ltd*.[120]

[240] Fitzgerald J said:[121]

> What is required, … is close consideration of whether the defendant has been enriched at the plaintiff's expense, and if so, whether that is unjust. And that is not to be considered in a moral or overarching "fairness" sense. Rather, a principled approach must be taken.

[241] Lord Hope, in *Sempra Metals Ltd*, noted that simple interest was an artificial construct which had no relation to the way the money "is obtained or turned to account in the real world. It is an imperfect way of measuring the time value of what was received prematurely. Restitution requires that the entirety of the time value of money that was paid prematurely be transferred back to Sempra by the Revenue".[122] In that case in a minority judgment Lord Scott criticised the confusion between restitution and compensatory claims. He took the view that to measure the interest by the sum that would have been produced if left with the bank at the bank's usual rate of interest

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118 *Anderson v DeMarco* [2021] NZHC 1757.
119 Judicature Act 1908, s 87(1).
120 *Sempra Metals Ltd v Inland Revenue Commissioners*, above n 112.
121 *Intext Coatings Ltd (in liq)*, above n 49, at [143].
122 *Sempra Metals Ltd*, above n 112, at [33].

on deposits and the usual rests allowed by the bank terms, was an ordinary application of the legal principles applicable to the assessment of compensatory damages rather than restitution.[123] Lord Nicholls noted it was always open to a claimant to prove actual interest losses by evidence.[124] In the case of a restitution claim he noted the remedy was sufficiently flexible to allow a claim for compounding interest where appropriate but it was for the court to achieve a just result.[125] As Lord Nicholls said, when considering the "benefit" of the debt for the purposes of unjust enrichment, benefit "…is not always worth its market value to a particular defendant".[126]

[242] The plaintiff also sought simple interest on that sum of 16 per cent accruing from 16 July 2016 to the date the amount secured by the charge is repaid. That claim was made under the fourth cause of action on the basis that TVAL was entitled to enforce an equitable charge over the Corsair on the terms of the security deed signed on 5 December 2011. As I have found that the terms of the security deed are not incorporated as terms of the equitable charge, it follows that interest at 16 per cent is not available on that basis.

[243] I do not consider it is appropriate that either compound interest or interest at 16 per cent is awarded here. The latter is well above market rates for the period. I have found that there was likely to be little benefit from use of the money by the defendants after 31 March 2021. Therefore, compound interest or a commercial interest rate should not be recovered on an unjust enrichment basis. In general terms unjust enrichment provides a flexible remedy to achieve a just result.

[244] The prescribed rate under the Judicature Act of five per cent per annum is well above present term deposit rates and that has been the case for some years.[127] The Interest on Money Claims Act 2016 which applies to claims filed since 1 January 2018, prescribes the use of an internet site calculator which calculates interest rates for the purposes of the Act. The basis for the calculation is the retail six-

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123 At [135]–[140].
124 At [94].
125 At [119].
126 At [119].
127 Jagose J noted in *Apollo Bathroom and Kitchen Ltd (in liq) v Ling* [2019] NZHC 237 at [50], the Reserve Bank of New Zealand's retail six-month term deposit rate, has been below four per cent per annum since mid-2015.

month term deposit rates published by the Reserve Bank of New Zealand averaged to obtain a base rate. To that is added a premium and the resulting rate is a simple interest rate. The calculator then expresses a daily effective rate for a specific time period which is put into the calculator.

[245] In relation to the amounts awarded under the first, second, and fourth causes of action, together with the remaining causes of action, which all claim Judicature Act rate interest, interest will be awarded at rates calculated in accordance with the Interest on Money Claims Act 2016 (but not exceeding five per cent per annum).

Summary and relief: first, second and fourth causes of action

[246] In summary, my findings on the first, second and fourth cause of action are:

(a) Judgment is granted against the defendants jointly and severally in the sums of:

(i) $937,500 being the total price paid by Warbirds for the BE2 under relief (a) of the first and second causes of action;

(ii) $19,520.05 being the additional profit or benefits that Mr DeMarco received from the retention and use of the Warbirds payments for the Albatros, Sopwith Pup and BE2 up to 31 March 2021 as calculated by Mr Osborn under relief (b) of the first and second causes of action; and

(iii) An amount to be calculated on the same basis and for the same period as (a)(ii) on the balance of the funds paid by Warbirds for the BE2 for which interest has not been calculated in (a)(ii) (under relief (b) in the first and second causes of action).

(b) A declaration on the fourth cause of action that TVAL holds and is entitled to enforce an equitable charge over the Corsair for the sum of the diverted funds of $720,000.

(c) Interest on the sums in (a) from 30 March 2021 at rates calculated in accordance with the Interest on Money Claims Act 2016 (but not exceeding five per cent per annum).

Fifth cause of action: Claim by TVAL against Mr DeMarco – Hisso parts buy-back arrangement

The buy-back agreement

[247] TVAL pleads, and Mr DeMarco admits, that, on an unknown date, Sir Peter Jackson, on behalf of TVAL, and Mr DeMarco entered into an oral agreement concerning aircraft parts purchased by Mr DeMarco on behalf of TVAL. TVAL claims Mr DeMarco breached this agreement.

[248] The nature of the obligation under the buy-back arrangement was set out by Mr DeMarco in an email dated 23 November 2012:

> I have always had an understanding with Peter and Linda that ANY original part, aircraft or engine I authorised to be purchased or recommended Peter to buy, I would assume full responsibility for. That is; if Peter decided he didn't want it or it was too expensive I would purchase it back from the company.

[249] Sir Peter Jackson explained the nature of this agreement. He said the arrangement came about because Mr DeMarco sometimes had to act quickly to secure parts. While usually Mr DeMarco would provide Sir Peter Jackson with details and photographs of any intended purchase of significant value for him to approve, sometimes Sir Peter Jackson was not available to authorise the purchase, presumably, on behalf of TVAL.

[250] The buy-back agreement allowed Mr DeMarco to make significant purchases of parts in TVAL's name. However, TVAL could then reject the purchase and Mr DeMarco would buy the part himself and reimburse TVAL for the cost.

[251] In 2012, Mr DeMarco arranged for TVAL to purchase a 180 hp Hisso Engine and collection of Hall Scott parts from Donald Meyer in the United States for USD$25,000 (together, called the Hisso Engine). This was done without TVAL's approval.

[252] The purchase came to light following the receipt of documents discovered following the Warbirds fraud and Mr DeMarco's departure from TVAL. These were:

(a) an invoice rendered to Mr DeMarco on 27 January 2012;

(b) instructions from Mr DeMarco to the TVAL accounts department dated 30 January 2012, requesting that payment be made;

(c) the TVAL purchase order that was raised by it; and

(d) an email from Mr DeMarco to the TVAL accounts department dated 20 September 2012, explaining "this engine has been stored with Joe Gertler and can be shipped when we consolidate additional freight".

[253] The Hisso Engine and parts were not transported to Aotearoa New Zealand but were stored in the United States. Sir Peter Jackson says that he made "significant attempts" to try and understand the purchase, including by using a private investigator in the United States.

[254] Eventually, in April 2018, the parts were tracked down and a photograph was taken of the engine. That photograph revealed that the engine was not an aero engine but had been modified for use as a marine engine.

[255] As a result, the Hisso Engine was worth much less than the USD$25,000 that Mr DeMarco had caused TVAL to pay for it.

[256] On 24 August 2020, TVAL gave formal notice to Mr DeMarco requiring him to compensate it in accordance with the terms of the buy-back arrangement.

[257] Mr DeMarco has failed to do so, in breach of the oral agreement, and has made no attempt to refund TVAL for the rejected Hisso Engine. Accordingly, TVAL seeks damages for breach of the agreement, being the USD$25,000 incurred by Mr DeMarco on behalf of TVAL to acquire the Hisso Engine.

[258] Mr DeMarco, in his statement of defence, admits the existence of the agreement, and Sir Peter Jackson's rejection of the Hisso Engine, but raises two issues of law: the employment relationship and a limitation argument. I now deal with those points.

The Employment Relations Act

[259] Mr DeMarco says that this buy-back agreement "was in the context of his role as employee performing his production duties pursuant to his employment contract" and accordingly ss 161 and 187 of the Employment Relations Act 2000 (the ERA) apply.

[260] Section 161 of the ERA gives the Employment Relations Authority exclusive jurisdiction to make determinations about employment relationship problems, including disputes about the interpretation, application, or operation of an employment agreement. In *JP Morgan Chase Bank NA v Lewis*,[128] the Court held that the words "relate to or arise out of an employment relationship" mean that the problem must be one that "directly and essentially concerns the employment relationship".[129]

[261] Section 187 gives the Employment Court exclusive jurisdiction over the matters listed in that section, including challenges to the determination of the Authority.

[262] The evidence indicates that the buy-back agreement was a separate contractual arrangement entered into between TVAL and Mr DeMarco that recognised that Mr DeMarco was acting as TVAL's agent in relation to certain part purchases. It recognised that Mr DeMarco actively traded aircraft parts in his personal capacity outside his employment with TVAL and so had an interest in personally acquiring parts that Sir Peter Jackson, for TVAL, rejected. I am satisfied that the buy-back agreement was not an employment agreement as defined in s 5 of the ERA. It was not a "contract of service". It was a commercial arrangement.

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128 *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255, [2015] 3 NZLR 618.
129 At [95].

The Limitation Act 2010

[263] A further matter raised in Mr DeMarco's defence is that the claim is precluded by the provisions of the Limitation Act. This defence applies only if claim is filed more than six years after the date of the act or omission on which the claim is based.[130]

[264] In this case the claim is based on an obligation which was not enforceable until a demand was made. The relevant date of the act or omission is the date on which the defendant defaulted following demand being made.[131]

[265] Despite the fact that Mr DeMarco caused the purchase to be made by TVAL in 2012, he did not disclose it to TVAL and, in particular, Sir Peter Jackson, who was to exercise the buy-back rights. The relevant demand was made on 24 August 2020. The claim was filed on 28 August 2020. Therefore, it was well within the six-year period provided under the Limitation Act.

[266] Mr DeMarco's statement of defence pleads:

> 57. The first defendant admits Sir Peter appears to have purported to reject the Hisso Parts. He offers to sell the parts for them.

[267] The pleading is inconsistent with evidence as to the terms of the buy-back arrangement as articulated by Mr DeMarco in his email of 23 November 2012. The plaintiffs' reply to the statement of defence confirmed that the offer made in the statement of defence is rejected.

[268] TVAL claims the sum of USD$25,000 that Mr DeMarco has not repaid to TVAL under the buy-back agreement. The plaintiff calculated that the average NZD/USD exchange rate in September 2020 was 0.66717. That is NZD $37,471.71.

[269] I am satisfied that there was an agreement with TVAL that has been breached by Mr DeMarco. The plaintiff does not have the goods; it was entitled to require Mr DeMarco to purchase them. TVAL is entitled to judgment for $37,471.71, together with interest on that amount.

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130 Limitation Act 2010, s 11(1).
131 Section 5(1)(a).

[270] Interest is awarded under the Judicature Act on the judgment amount from 30 September 2020, being the date that the cause of action arose following a reasonable time for repayment following the formal demand sent on 24 August 2020.

[271] As I have noted earlier, since 1 July 2011 cl 4 of the Judicature (Prescribed Rate of Interest) Order 2011 prescribes the maximum rate as five per cent per annum.

[272] As I have earlier explained, the fair approach to calculate interest is by use of the calculator established under the 2016 Interest on Money Claims Act. Therefore, interest is awarded from 30 September 2020 on the judgment amount at rates calculated in accordance with the Interest on Money Claims Act 2006 (but not exceeding five per cent per annum).

Sixth, ninth, and tenth causes of action: personal Cessna

[273] These causes of action all relate to claims that Mr DeMarco misused TVAL's property and resources to deal with a Cessna owned by him personally and for his own personal benefit.

[274] In November 2013 Mr DeMarco acquired a Cessna 206 (registration ZK-PCS) from Westland Air Charter Ltd. It was a small plane that had been used as a sea plane in Picton. Sir Peter Jackson says Mr DeMarco renovated the plane before selling it overseas for a profit. Following Mr DeMarco's departure from TVAL, investigations revealed that Mr DeMarco had used TVAL resources to rebuild and repaint the plane and ship it to the United States. TVAL was unaware of this until it was uncovered in September 2017.

[275] In his statement of defence Mr DeMarco admits that, from late December 2013 over a period of some nine months, he stripped and repainted his personal Cessna at TVAL's Kemp Street premises. He says he has no knowledge of, and therefore denies, the balance of the allegations.

[276] The sixth cause of action is based on conversion by destruction.

[277] Conversion is the unauthorised taking, misuse or disposal of property. The Court of Appeal in *Singh v Patel* summarised the elements of the tort of conversion as the following:[132]

> [22] The tort of conversion requires an unauthorised and wrongful act by the defendant which involves deliberately dealing with goods in a manner inconsistent with the plaintiff's rights to possession.[133] Conversion may be committed in several different ways, such as unauthorised taking, misuse or disposal of property.[134] In *Glenmorgan Farm Ltd (in rec and in liq) v New Zealand Bloodstock Leasing Ltd* this Court quoted with approval passages from the judgment of Lord Nicholls for the majority in *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* and from the judgment of Lord Steyn in the same case.[135] For ease of reference we set them out below:[136]
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> > … Conversion of goods can occur in so many different circumstances that framing a precise definition of universal application is well nigh impossible. In general, the basic features of the tort are threefold. *First, the defendant's conduct was inconsistent with the rights of the owner* (or other person entitled to possession). Second, the conduct was deliberate, not accidental. Third, the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods. The contrast is with lesser acts of interference. If these cause damage they may give rise to claims for trespass or in negligence, but they do not constitute conversion.
> >
> > …
> >
> > [119] Despite elaborate citation of authority, I am satisfied that the essential feature of the tort of conversion, and of usurpation under Iraqi law, *is the denial by the defendant of the possessory interest or title of the plaintiff in the goods* … When a defendant manifests an
> >
> > assertion of rights or dominion over the goods which is inconsistent with the rights of the plaintiff he converts the goods to his own use. (Emphasis added.)

[278] The elements of conversion are:[137]

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132 *Singh v Patel* [2021] NZCA 242 at [22].

133 See *Coleman v Harvey* [1989] 1 NZLR 723 (CA) at 730; *Cuff v Broadlands Finance Ltd* [1987] 2 NZLR 343 (CA) ay 346; *McKaskell v Benseman* [1989] 3 NZLR 75 (HC) at 89; and *Harris v Lombard New Zealand Ltd* [1974] 2 NZLR 161 (HC) at 164–165.

134 Cynthia Hawes "Interference with Goods" in Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) 619 at 633.

135 *Glenmorgan Farm Ltd (in rec and in liq) v New Zealand Bloodstock Leasing Ltd* [2011] NZCA 672, [2012] 1 NZLR 555 citing *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*, [2002] UKHL 19, [2002] 2 AC 883.

136 At [26] and [27] quoting *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)*, above n 135, at [39] per Lord Nicholls and [119] per Lord Steyn.

137 *Kuwait Airways Corporation v Iraqi Airways Co* [2002] UKHL 19; affirmed in *Singh v Patel* [2021] NZCA 242 at [22].

(a) the defendant's conduct was inconsistent with the rights of the owner (or person entitled to possession);

(b) the conduct was deliberate, not accidental; and

(c) the conduct was so extensive an encroachment on rights of the owner as to exclude them from the use and possession of the goods.

[279] Wilful destruction of goods is conversion.[138] Acts which fall short of destruction, but which change the quality of the goods can still amount to conversion if they deny the plaintiff's rights in the property.[139]

[280] Mr DeMarco's statement of defence admits that over a nine-month period from about late December 2013, Mr DeMarco stripped and repainted his personal Cessna using materials at TVAL's Wellington workshop in Kemp Street.

[281] Roger Posthuma, engine shop manager at Kemp Street, gave evidence that the work on the Cessna took place over a period of several months from late 2013. Although he was not directly involved in the job, Mr Posthuma's evidence is that Mr DeMarco did not keep his own stock of materials at Kemp Street for his personal projects. The inference is that Mr DeMarco used TVAL materials.

[282] Based on the nature of the admitted work undertaken by Mr DeMarco, TVAL considers the following materials are likely to have been used, as set out in a costs table prepared by a former-TVAL employee, Daryl Lane, in 2017:[140]

Item	**Cost ($)**
Epoxy primer kit x 4	1,656
Two way thinner 20L	88
Prepsol 10L	35
Masking Tape	15
Masking Paper	54
Autonet Sanding Discs 6"	159

138 *Éditions JCL Inc v 91439 Canada Ltée* [1995] 1 FC 380 (FCA).
139 *Fouldes v Willoughby* (1841) 8 M&W 540 (Exch) at 547.
140 This was based on business records of TVAL, which I am satisfied are admissible.

Scotch Bright Roll	67
Scotch Bright Disc	80
Spray Booth Elec/Gas/Filters @ 384 hours	3,264
Total	**5,418**

[283] Mr DeMarco's use of these materials amounts to conversion. The materials were either destroyed or have been altered so that they no longer have any value or use to TVAL. Therefore, TVAL was deprived of those goods.

[284] The TVAL spray booth was also used to repaint the Cessna. Mr Posthuma gives evidence that he saw Mr Woolcott using the booth to paint the Cessna.

[285] The use of the spray booth also amounts to conversion. The electricity, gas and filters required to run the spray booth have been consumed or destroyed, in a manner inconsistent with TVAL's ownership.

[286] Mr Posthuma's evidence is that the cost of the different materials, as set out in the table prepared by Daryl Lane, represents a fair estimate of the materials used. The measure of damages for conversion is the value of the goods.

[287] The first plaintiff also addressed a possible Limitation Act defence, although that was not pleaded by Mr DeMarco.

[288] Although the prima facie rule is that a claim must be filed within six years of the act or omission on which it is based, that rule is displaced where the plaintiff did not gain knowledge of the relevant facts until a later date (the *late knowledge* date).[141]

[289] In those circumstances, the claim must be filed within three years of the date on which the plaintiff gained knowledge, or ought reasonably to have gained knowledge, of all of the following facts:[142]

(a) that the act or omission on which the claim is based has occurred;

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141 Limitation Act 2010, s 11(2) and (3).
142 Limitation Act 2010, s 14(1).

(b) that the act or omission on which the claim is based was attributable to the defendant;

(c) that the claimant has suffered loss or damage (where that is a necessary element of the claim);

(d) that the claimant did not consent to the act or omission (where that is a necessary element of the claim); and

(e) that the act or omission was induced by fraud or mistaken belief (where that is a necessary element of the claim).

[290] Sir Peter Jackson's evidence is that he and the other TVAL directors did not identify that TVAL property had been used on Mr DeMarco's Cessna until September 2017 following the investigations as a result of the Warbirds Fraud. There is no suggestion that TVAL ought reasonably to have gained knowledge of these facts prior to September 2017.

[291] I am satisfied the late knowledge date for this claim is September 2017. The claim was filed on 28 August 2020, within the three-year time limit provided under the Limitation Act.

[292] In his statement of defence Mr DeMarco admits that he, from late December 2013 over a period of some nine months, stripped and repainted his personal Cessna at TVAL's Kemp Street premises. However, he says he has no knowledge of, and therefore denies, the balance of the allegations.

[293] I am satisfied that the elements of the tort of conversion are made out and the value of the resources was $5,418 on the dates they were consumed by Mr DeMarco.

[294] Accordingly, TVAL is entitled to judgment on the sixth cause of action in the sum of $5,418. I also award interest on the same basis as for the previous claim.

[295] Accordingly, interest is awarded on the judgment sum from 1 September 2014, the date that Mr DeMarco admits he completed the stripping and repainting of the

Cessna at rates calculated in accordance with the Interest on Money Claims Act 2016 (but not exceeding five per cent per annum), pursuant to s 84 of the Judicature Act 1908. This is in accordance with my earlier reasons for awarding interest under the Judicature provisions.

[296] As the plaintiffs do not pursue the eighth cause of action, I now move onto the ninth cause of action.

Ninth cause of action – freight of personal Cessna

[297] The plaintiffs allege that at the same time that the Cessna was to be shipped to the United States for sale, Mr DeMarco was also arranging a shipment of TVAL parts for a trade in the United States.[143]

[298] Sir Peter Jackson says TVAL had authorised the following items to be included in the shipment (the TVAL shipment):

(a) two steel fuselages that were to be traded for the Buffalo Steam Roller; and

(b) vintage aircraft parts being sent to two other customers in the United States (which were legitimate purchases and do not form part of the current claim).

[299] TVAL alleges that in arranging the TVAL shipment, Mr DeMarco owed TVAL duties as a senior employee and agent.[144] Mr DeMarco was authorised to contract with a shipping company as agent for TVAL, and did so in this transaction.

[300] The two steel fuselages that formed part of the TVAL shipment were approximately 17 foot in length and could fit into a 20-foot container.

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143 That trade is the subject of the seventh cause of action, discussed in the plaintiffs' submissions relating to a trade of aircraft parts for a Buffalo Steam Roller.

144 See above at [95]–[104], discussing fiduciary obligations of employees.

[301] However, Mr DeMarco ordered a 40-foot container in order to accommodate his Cessna, which the statement of defence admits. He then directed TVAL employees to pack his personal Cessna into the container for shipping to the United States.

[302] Sir Peter Jackson also gives evidence that the larger container was only required because of the shipment of the Cessna. He says neither he nor the TVAL directors were aware that the larger container was being ordered or that Mr DeMarco used a TVAL container to ship his personal Cessna overseas. Mr DeMarco does not plead, and there is no evidence of, any informed consent being given to Mr DeMarco to contract on this basis.

[303] The allegation by TVAL is that by instructing TVAL employees to order a 40-foot container, Mr DeMarco obtained an unauthorised personal benefit, inconsistent with his duty of loyalty as an employee, in that he:

(a) avoided the cost of arranging for the shipment of his personal Cessna to the United States; and

(b) caused TVAL to incur higher costs for the TVAL shipment than would otherwise have been the case.

[304] The statement of defence suggested that a 20-foot and a 40-foot container would have been the same price.

[305] However, contrary to this assertion, Roger Posthuma gave evidence on the price difference between the two sizes of container:

(a) enquiries made with Mainfreight in the course of preparing his evidence indicate that the difference in cost of $3,790.21; and

(b) a costs table prepared in 2017 by a then TVAL employee, and part of TVAL's business records, estimates the cost difference in 2014 as $1,750.

[306] The Limitation Act provides a defence only where the claim is filed more than six years after the act or omission on which the claim is based.[145] The relevant act is the ordering of the 40-foot container. The waybill records that the container was shipped on board on 20 September 2014. This claim was filed on 28 August 2020. Accordingly, the claim was filed within six years of the relevant act.

[307] In any event, the modified rule under the Limitation Act would apply.[146] The evidence is that the TVAL directors had no knowledge that a TVAL container had been used to ship the Cessna until September 2017. The claim was filed on 28 August 2020, so was also brought within three years of the late knowledge date.

[308] The plaintiff seeks an account of the benefit secured by Mr DeMarco having his personal Cessna in the trade container at TVAL's expense. The difference sought is $1,750 in accordance with the estimated cost difference between the 20 foot and 40-foot container in 2014. I am satisfied that the resources to the sum claimed were converted by Mr DeMarco.

[309] Judgment is granted for the cost of the Cessna freight of $1,750 together with Judicature Act interest on that sum from 20 September 2014 at rates calculated in accordance with the Interest on Money Claims Act 2016 (but not exceeding five per cent) under s 87 of the Judicature Act for the reasons set out above.

[310] The tenth cause of action is related to the shipping of the Cessna.

Tenth cause of action – packing of personal Cessna

[311] The tenth cause of action concerns Mr DeMarco's use of TVAL resources to pack his personal Cessna aircraft for shipping. It alleges Mr DeMarco instructed TVAL employees to use TVAL resources, including TVAL employees' labour, for Mr DeMarco's personal gain.

[312] Mr Lane again prepared a table of the TVAL material that was used to pack the Cessna including estimates of labour as follows:

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145 Limitation Act 2010, s 11(1).
146 Section 11(3).

Item	Cost ($)
8 Sheets of MDF	288
60 Meters 95x45 h1	240
Large Ratchet Straps x 6	135
Small Ratchet Straps x 10	50
Max Labour	435
Daryl Labour	693
Total excluding GST	**3,591**

[313] This amounts to $731 having deducted the difference in the container price of $1,750 and labour, which is not claimed.

[314] Mr Posthuma, is generally familiar with the materials used and gave evidence that in his view, the costs of the items used appear to be a fair estimate.

[315] The relevant act occurred when Mr DeMarco used the packing materials to pack his Cessna into the container, and the container was shipped depriving TVAL of the materials. The container was shipped on 20 September 2014. The claim was filed on 28 August 2020, within six years of the relevant shipping.[147]

[316] The unauthorised use of TVAL resources was a breach of Mr DeMarco's obligation of loyalty in the employment relationship. TVAL is entitled to recover the amount sought.

[317] I allow judgment for $713 on the tenth cause of action, together with interest on that sum from 20 September 2014 at rates calculated in accordance with the Interest on Money Claims Act 2016 (but not exceeding five per cent) under s 87 of the Judicature Act, for the reasons set out above.

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147 Limitation Act 2010, s 11(1).

[318] The seventh and eleventh causes of action relate to a trade of parts that Mr DeMarco arranged as agent for TVAL on the instructions of Sir Peter Jackson for TVAL with Brian Coughlin in the United States to obtain in exchange for an original Buffalo Steam Roller.

Seventh cause of action: Buffalo Steam Roller trade

[319] Sir Peter Jackson's evidence was that in the vintage aircraft community it was frequent practice to trade items rather than purchase outright. Mr DeMarco often made TVAL aware of possible trades with museums or other collectors.

[320] On 3 April 2014 the evidence of Sir Peter Jackson was that Mr DeMarco made him aware of a potential trade for an original 1918 Buffalo Steam Roller in working condition. Mr DeMarco said that the seller was looking for USD$30,000 but would consider a trade for two steel fuselages that TVAL owned at the time. Sir Peter Jackson was familiar with the two steel fuselages as he had purchased them from Mr DeMarco sometime in the early 2000s.

[321] Sir Peter Jackson says he approved the trade of the steel fuselages, and authorised Mr DeMarco to act as TVAL's agent in respect of the trade. This approval is referred to in the pleading as the "Buffalo trade instructions". Sir Peter Jackson's expectation was that the trade was to go ahead as laid out in the 3 April 2014 email.

[322] The steel fuselages were shipped to the United States in 2014.

[323] TVAL alleges that Mr DeMarco owed TVAL fiduciary duties as agent. I accept that submission.[148] Mr DeMarco was authorised as an agent for TVAL to arrange the Buffalo trade in accordance with the instructions.

[324] An agent must comply strictly with the terms of what they have agreed to do and will be in breach of their agency agreement if they act beyond their instructions.[149] A contract of agency is generally subject to an implied term that the agent "will obey

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148 For the same reasons as stated above at [95]–[107] in relation to the sale of aircraft to the Warbirds.

149 See Peter Watts and FMB Reynolds *Bowstead and Reynolds on Agency*, (20th ed, Sweet & Maxwell, London, 2014) at [1-014]; and *Kelly v Cooper* [1993] AC 205 (PC) at [6-003].

all lawful and reasonable instructions of his principal in relation to the matter in which the agent is to carry out his duties".[150]

[325] In the course of investigations following the discovery of the Warbirds Fraud in 2017, the plaintiffs discovered that additional items had been shipped with the steel fuselages, including valuable historic aircraft parts from an original Sopwith Camel.

[326] Sir Peter Jackson says that one of the most valuable WWI planes in the TVAL collection was an original 1916 Sopwith Camel. This plane was acquired from a museum in Arkansas in 2010. In summary Sir Peter Jackson says:

> The original Sopwith Camel was a significant purchase. Mr DeMarco knew, as did all of the TVAL employees, that my approval was required to sell or trade any aircraft parts. This was especially so for an original aircraft such as this one. It was a rare find, and it cannot be replaced.

[327] Following the discovery of the Warbirds fraud in 2017, further investigations into Mr DeMarco's conduct were undertaken and a number of documents were found in September 2017.

[328] In 2014 Mr DeMarco had provided the TVAL accounts department with documents to confirm the trade. These documents were apparently not provided to Sir Peter Jackson at the time. They were:

(a) an invoice from Mr Coughlin's business that recorded it was also receiving additional parts listed as "wood wings, box of accessories and tires";

(b) a TVAL trade Information Form records "fuse, tail feather, old wings, some parts" were included in the trade in respect of the "Steel tube Camel project".

[329] In 2016 Mr DeMarco had provided Mr Coughlin with an invoice on TVAL letterhead dated 1 September 2014. That document included a list of the parts that had been included in the shipment as a "Sopwith Camel Project":

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150 *Apatu v Peach Prescott & Jamieson* [1985] 1 NZLR 50 (HC) at 64.

(a) a set of lower and upper wings;

(b) two green plywood side panels and one green plywood turtle deck;

(c) a crate of engine parts;

(d) a box of airframe parts; and

(e) tyres.

[330] Sir Peter Jackson says he obtained a list of parts and a series of photographs of the contents of the container from Daryl Lane, then the Airframe Production Manager at TVAL. These had been kept as part of TVAL's business records for the shipment.

[331] It appeared from those photos, which were produced by Sir Peter Jackson, that Mr DeMarco had, without authorisation from TVAL or Sir Peter Jackson, included additional TVAL owned parts in the container sent to Mr Coughlin. These parts appear in the list of parts prepared by Mr Lane. The photographs of the additional parts include items he recognised as:

(a) the original wings from the original Sopwith Camel;

(b) the turtledeck and plywood side panels from the original Sopwith Camel;

(c) the landing gear from the original Sopwith Camel;

(d) four TVAL manufactured Bristol F2b Fighter wing struts; and

(e) a box of TVAL owned Bristol F2b Fighter brackets.

[332] In his statement of defence, Mr DeMarco denies any knowledge of the Buffalo Trade instructions but admits that he shipped some of the TVAL parts listed at (a), (b), and (e) above. He says they were unairworthy and home built (items (a) and

(b)), or scrap (item (c)). He denies he was in breach of his duty to TVAL. He puts TVAL to proof on the amounts claimed for the parts.

The value of the parts

[333] In the statement of defence to the fourth amended statement of claim, Mr DeMarco alleged that the wings, plywood side panels, and turtle deck were "not original, but scrap, unairworthy, home built parts".

[334] I am satisfied, on the evidence, that the Sopwith Camel parts were valuable due to their historic significance. Sir Peter Jackson gives evidence that original WWI aircraft that survive today have inevitably gone through multiple restorations over the past 100 years. His evidence is that:

(a) use and repair work does not necessarily reduce the value of original WWI aircraft; and

(b) the value of original aircraft is not affected by airworthiness, as historic value is of far more importance.

[335] In addition, the evidence establishes that Mr DeMarco had endorsed TVAL's intentions of restoring the Sopwith Camel to an airworthy condition. Therefore, those Sopwith parts were to be used by TVAL. Sir Peter Jackson says he was not made aware the wings would not be used. And even if he had been, they would have been retained due to their significance.

[336] Mr DeMarco had kept Sir Peter Jackson updated as the restoration progressed. On 29 February 2012, shortly after the fabric had been removed from the Sopwith Camel, Mr DeMarco emailed Sir Peter and explained that:

(a) the Sopwith Camel had been stripped down and was ready for extensive restoration;

(b) the fuselage was "generally in great shape and nearly all original"; and

(c) the wings "had new spars put in".[151]

[337] In addition, the evidence suggested that Mr Coughlin was using the Sopwith Camel parts himself to build an airworthy Sopwith Camel. This can be inferred from:

(a) An article published in the Spring 2020 edition of a magazine called The Flying Machine (specialising in the restoration and building of WWI-era aircraft). It confirms that Mr Coughlin had a Sopwith Camel project underway. It says that "the wings were from Frank Tallman's original Camel that he bought from Col. Jarett in the 1950s". This was the same provenance as the Sopwith Camel that TVAL purchased in 2010.

(b) Sir Peter Jackson identified photographs in the article containing a number of other TVAL owned parts that were included in the container and are now being used by Mr Coughlin.

[338] Mr Anthony Ditheridge is an expert in World War I era aircraft. He is a toolmaker. His interest in aircraft began in 1978 and since then he has helped to restore a collection of World War II aircraft and owned a Tiger Moth which he flew. From 1987 he has owned between 30 and 40 different vintage aeroplanes. From 1987 he was involved in restoring World War I aeroplanes including a Sopwith Camel. Throughout the period of his involvement in vintage aircraft he has restored and manufactured replicas and been involved in sourcing and purchasing parts for the vintage aircraft.

[339] Mr Ditheridge was asked to value the above parts and received information on them as set out in Sir Peter Jackson's affidavit, photographs and a copy of the article concerning Mr Coughlin's Sopwith Camel project as well as information concerning the background of the Sopwith Camel. He was able to ascertain the condition of the Sopwith wings. He was able to compare these to two transactions he had been

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[151] Spars are the central longitudinal section of timber, which hold a series of timber ribs that run at right angles to the spars.

involved in personally, including the sale of his own Sopwith Camel. He carried out a similar exercise in relation to the other parts. He was therefore able to make his estimate of their value.

[340] Mr Ditheridge gave evidence to the effect that:

(a) the wings retained a great deal of their original structure, in particular the wing ribs;

(b) although the wing spars did not appear to be original, that is a replacement that must be made in order to make original wings airworthy;

(c) the rest of the wing construction was clearly made to drawing and is "more than likely" original, but with some repairs over the years; and

(d) WWI original aircraft are exceedingly rare and anything that can be saved from an original aircraft will add significant value to any finished aircraft.

[341] Mr Ditheridge provided estimated valuations for each of the parts, totalling NZD$411,191 as follows:

Sopwith Camel wings	(greater than 200,000 NZD)	394,554.00
Sopwith Camel parts		8,089.00
Bristol Fighter struts		7,759.00
Bristol Fighter brackets		789.00
Total		**$411,191.00**

[342] Mr DeMarco did not raise any defence under the Limitation Act to this claim.

[343] I accept that the relevant acts for the purposes of this claim were when Mr DeMarco concluded the Buffalo trade in breach of his instructions, and when he

shipped the unauthorised items to Mr Coughlin as part of that trade. Mr DeMarco has not discovered any documents showing exactly when the trade with Mr Coughlin was concluded. The items were shipped on 20 September 2014. Given that the claim was filed on 28 August 2020, it was within six years of the shipping taking place.

[344] I am satisfied on the evidence that Mr DeMarco traded the listed parts with Mr Coughlin without the authority of TVAL when he knew, or must have known, that such specific authority was needed in the circumstances. In my view he is in breach of his fiduciary duties as agent of TVAL. TVAL is entitled to damages to the amount of $411,191 together with interest on that amount from 20 September 2014.

[345] Interest is awarded pursuant to s 87 of the Judicature Act in accordance with the Interest on Money Claims Act (but not exceeding five per cent) for the reasons set out above.

Eleventh cause of action: Steam Roller trade commission (to Mr DeMarco's mother)

[346] Following Mr DeMarco's suspension from TVAL, Sir Peter Jackson and other members of TVAL investigated Mr DeMarco's email account and laptop. An email from Mr Coughlin to Mr DeMarco's [redacted] email address dated 17 April 2014 was found. This was sent shortly after Mr DeMarco's email to Sir Peter Jackson on 3 April 2014 proposing the trade for the Buffalo Steam Roller.

[347] In his email to Mr DeMarco, Mr Coughlin states: "Again if you can make that trade happen with the 1918 steam roller, I'll send 3k to your mom".

[348] Sir Peter Jackson's understanding is that Mr DeMarco's mother is very elderly and lives in New York.

[349] The allegation by TVAL is that this is an offer of commission by way of payment to Mr DeMarco's mother, as a reward for Mr DeMarco influencing TVAL, his principal. TVAL was not aware of this and did not consent to its agent receiving any gift.

[350] TVAL says that given there were additional parts provided by Mr DeMarco to Mr Coughlin, and Mr DeMarco's pattern of similar conduct, the Court is entitled to infer that the offer was accepted. Mr DeMarco has failed to provide discovery that would enable this to be tested. Mr DeMarco, however, pleads that the comment was merely a jovial remark and was not serious.

[351] In the circumstances I do not consider that I can infer Mr DeMarco's mother was paid a secret commission of $3,000. There is no evidence of whether Mr DeMarco agreed or that his mother received the money. There are no other transactions involving Mr DeMarco's mother. I am not satisfied that a secret commission was agreed, nor that it was paid.

[352] Therefore, the claim under the eleventh cause of action is dismissed.

Thirteenth cause of action: sale of TVAL items to Mr Saint-Andre

[353] This is a claim in conversion in relation to the unauthorised sale by Mr DeMarco of TVAL parts.

[354] In March 2016, Mr DeMarco sold seven TVAL-owned instruments to Fernand Saint Andre, a French-Canadian aircraft builder. TVAL says the sale was made without its knowledge or authorisation, and the proceeds of the sale were never paid to TVAL.

[355] The evidence relied upon is in a series of iMessages recovered from Mr DeMarco's laptop. These are:

(a) on 10 March 2016, Mr Saint Andre agreed to purchase 11 items from Mr DeMarco for $6,000 USD plus transport costs;

(b) Mr Saint Andre confirmed that he received the items and sent photographs of them to Mr DeMarco (the Saint Andre photographs); and

(c) on 29 March 2016, Mr Saint Andre asked Mr DeMarco to confirm he had received the payment.

[356] Sir Peter Jackson gives evidence that seven of the instruments shown in the Saint Andre photographs belonged to TVAL, being:

(a) a Wilhelm Morrell Airspeed Anemometer;

(b) a TVAL-produced Maximall gauge;

(c) a TVAL-produced Fob Watch holder;

(d) a tachometer;

(e) a Bamberg Compass Bowl;

(f) a gimbal from Bamburg Compass #F110; and

(g) a starting magneto – serial number 37734.

[357] In his evidence, Sir Peter Jackson says that each of the instruments shown in the Saint Andre Photographs share relevant identifying features with instruments owned or manufactured by TVAL.

[358] In his statement of defence, Mr DeMarco admits he made this sale but denies that the seven instruments were TVAL's property.

[359] I am satisfied, on the evidence, that the items belonged to TVAL and have been sold and are no longer in TVAL's possession. TVAL was not aware of the sale of those items until investigations began in late 2017.

[360] An unauthorised sale or wrongful disposal amounts to conversion where it deprives the owner of possession of their goods.[152]

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[152] *Helson v McKenzies (Cuba Street) Ltd* [1950] NZLR 878 (CA) at 903 and 907; and *Coleman v Harvey* [1989] 1 NZLR 723 (CA) at 729.

[361] I am satisfied that the unauthorised sale amounts to conversion here, as it has permanently deprived TVAL of possession of its property.

[362] The remedy for conversion is the value of the goods at the date they were converted.[153]

[363] Mr Ditheridge has provided expert evidence that the Saint Andre parts were worth between $13,810 and $17,755 NZD.

[364] TVAL claims compensation in the amount of $17,755 NZD for the value of the goods. I am satisfied that represents the value of the goods.

[365] TVAL also claims interest pursuant to the Judicature Act from 29 March 2016, being the date Saint Andre requested receipt of his payment and so an appropriate date for Mr DeMarco to account to TVAL for the funds received.

[366] I am satisfied that judgment should be entered for $17,755 NZD being the value of the parts. Interest on that amount from 29 March 2016 is awarded under s 87 of the Judicature Act in accordance with the Interest on Money Claims Act 2016 (but not exceeding five per cent) for the reasons set out above.

Fourteenth cause of action: unauthorised conduct in relation to WWI Aviation Heritage Trust

[367] This claim alleges unauthorised conduct by Mr DeMarco as TVAL's agent in relation to his dealings with the WWI Aviation Heritage Trust (WAHT).[154]

[368] Mr DeMarco was appointed by Sir Peter Jackson to act as TVAL's agent in all TVAL's relevant dealings with WAHT. TVAL says:

(a) Mr DeMarco was obliged, as agent to act in accordance with the instructions given to him by Sir Peter Jackson; and

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153 *Gardiner v Metcalfe* [1994] 2 NZLR 8 (CA).

154 WAHT was established in the UK in 2013 in the lead up to the WWI centenary celebrations. It is a registered charity with the principal object to promote knowledge and understanding of aviation during WWI.

(b) Mr DeMarco is liable for damages as a result of a failure to fulfil that obligation.

[369] Sir Peter Jackson instructed Mr DeMarco that TVAL's involvement with WAHT was to be on defined conditions. One condition was that TVAL aircraft were to be used only on the basis that there was no cost or risk to TVAL.

[370] TVAL alleges Mr DeMarco acted in breach of those instructions and incurred significant cost on behalf of TVAL as well as exposing it to liability, including by entering into agreements that granted indemnities from TVAL to other parties.

[371] Sir Peter Jackson says Mr DeMarco had brought WAHT to his attention in 2013. Mr DeMarco initially suggested that the centenary of WWI might trigger sales opportunities in the UK. No approval was given. Nevertheless, a story ran in the UK Sunday Times in January 2014 incorrectly stating that Sir Peter Jackson was providing funding for a trust and was sending TVAL aircraft to the UK.

[372] Sir Peter Jackson met with Mr DeMarco, together with the directors of TVAL and Matthew Dravitzki, Sir Peter Jackson's personal assistant at the time, to discuss the involvement with WAHT on 4 February 2014.

[373] Mr DeMarco's proposal was that TVAL would supply WAHT with two aircraft corresponding to each year of the WWI centenary. This was a total of ten aircraft over five years. He informed Sir Peter Jackson that other collectors were also keen to loan their aircraft over the same period.

[374] Sir Peter Jackson said he was concerned at early signs that WAHT was likely to be dependent on future fundraising efforts. In particular, he said it was reliant on a TVAL donation of £5,000 just to enable it to legally register as a trust.

[375] Sir Peter Jackson eventually agreed to Mr DeMarco pursuing TVAL involvement on behalf of TVAL, on a set of strict conditions. The objective was to ensure that there was to be no cost or liability to TVAL. The evidence of Sir Peter

Jackson, Mr Dravitzki and Mr Corke, all of whom attended the meeting, is consistent on this point. Sir Peter Jackson said the WAHT instructions were as follows:

(a) TVAL aircraft were not to be loaned for free; WAHT would pay an annual lease cost of £9,000 per aircraft per annum. This was partly to ensure that WAHT had financial backing to be a sustainable organisation and afford the costs involved in displaying aircraft.

(b) WAHT were to pay all shipping costs, all running costs, all insurance, maintenance, and storage costs.

(c) To ensure that funds were available for any return shipping costs, WAHT would need to hold funds in an escrow account. This was to avoid the risk that WAHT would run out of funding and TVAL would need to pay to ship its aircraft home if they were not sold.

(d) No aircraft were to be sent until WAHT had reached their fundraising goals and were able to cover at least the first year's worth of costs.

(e) TVAL would provide a short-term loan of the £5,000 required for legal costs, to be repaid as soon as WAHT's fundraising was complete.

[376] Mr DeMarco provided Sir Peter Jackson and TVAL with only selective reporting on his dealings with WAHT on behalf of TVAL. This led TVAL to believe that its instructions were being followed.

[377] On 12 May 2015 Mr DeMarco emailed with an update and stated that the TVAL aircraft sent to the UK "have been fully funded by the trust, all maintenance and operating costs have been covered".

[378] In an email exchange of 28 June 2016, Sir Peter Jackson sought confirmation that the use of TVAL constructed aircraft in the British Somme commemorations was "nothing to do with TVAL? … No expense or liability to TVAL?" Mr DeMarco confirmed "no expense to us".

[379] Contrary to the WAHT instructions, the evidence indicates that Mr DeMarco had entered into unauthorised arrangements with WAHT and other parties on behalf of TVAL. In fact he had signed some of the agreements as a director of TVAL when he was not. The documents show that TVAL was to incur expenditure and exposed TVAL to risk.

[380] Separately, Mr Wulff (referred to earlier in this judgment)[155] had decided to allow his Albatros aircraft to be involved in the activities organised by WAHT in the United Kingdom in which TVAL was also involved. Again, Mr DeMarco acted as agent for TVAL in entering arrangements with Mr Wulff in relation to use of his Albatros.

[381] Mr Wulff and Sir Peter Jackson were associates. In 2014 they had agreed on terms by which Mr Wulff would buy the Albatros and a BE2 aircraft from TVAL.

Shipping costs

[382] Contrary to Sir Peter Jackson's instructions, Mr DeMarco caused TVAL to pay the costs of shipping its own aircraft to the UK.

[383] The first aircraft were sent to the UK in mid-2014:

(a) the BE2, registration ZK-KOZ, that was being acquired by Mr Wulff; and

(b) the BE2, registration ZK-TFZ, that TVAL would retain ownership of and which would be leased by WAHT.

[384] Contrary to the agreed arrangement, TVAL paid $9,410.09 to ship the TVAL-owned BE2 (ZK-TFZ) to the UK.

[385] In 2015, TVAL shipped two further TVAL manufactured aircraft to the UK:

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[155] See above at [6], [31], [41], and [141]–[144].

(a) a Sopwith Snipe, registration ZK-SNI. TVAL would retain ownership of this and it would be leased by WAHT; and

(b) an Albatros DVa, registration ZK-TGY, that was being acquired by Mr Wulff.

[386] The evidence shows that TVAL incurred shipping costs of $4,295.03 for the Snipe (ZK-SNI).

[387] The evidence also establishes that each of these costs was incurred at Mr DeMarco's instruction. On 19 November 2015 he emailed TVAL's accounts department requesting that the invoice for the shipping be paid. He noted that the cost of shipping the Albatros would be recovered from Mr Wulff or from WAHT but failed to reflect the instruction that the cost of shipping the Snipe should also be borne by WAHT. Mr DeMarco failed to put in place arrangements for those shipping costs to be recovered from WAHT. They have never been recovered.

TVAL agreements

[388] The evidence also establishes that Mr DeMarco committed TVAL to contractual obligations.

[389] On 15 March 2015, Mr DeMarco signed a Heads of Agreement between the trustees of the Stowe Maries Great War Aerodrome and WAHT. He signed above a notation reading "Gene DeMarco – MD TVAL". This was incorrect – Mr DeMarco was not managing director, he was TVAL's production manager. Sir Peter Jackson says Mr DeMarco did not disclose this agreement to TVAL at the time.

[390] In March 2016 Mr DeMarco signed two agreements with WAHT relating to the use of TVAL aircraft in the UK. One was a document titled "The Vintage Aviator Ltd Operations Manual for WWI Aviation Managed Aircraft in Europe" (the Operations Manual). The documents were signed on behalf of TVAL. The document records TVAL as the "operating authority of the aircraft managed by the WW1 Aviation Heritage Trust Ltd in Europe".

[391] Mr DeMarco also entered into, on behalf of TVAL, an operating agreement dated 31 March 2016 between TVAL and WAHT (the TVAL-WAHT Agreement). The agreement was not disclosed to TVAL's directors until 2017. Mr Corke gives evidence that he was "shocked" to see it.

[392] Mr DeMarco signed the TVAL-WAHT Agreement for and on behalf of TVAL above a signature block reading "TVAL Director, duly authorised". Mr DeMarco was not a director of TVAL.

[393] In addition, TVAL say the terms of the agreement were inconsistent with the WAHT instructions and specifically:

(a) the agreement recorded that "the aircraft" (defined as the two BE2s, the Snipe, and the Albatros) had all been imported into the United Kingdom at "TVAL's cost and expense"; and

(b) Mr DeMarco committed TVAL to an indemnity. The agreement recorded that TVAL was to supervise the maintenance of the aircraft and was to "hold WAHT harmless and indemnify WAHT against any cost, loss or liability that WAHT may suffer" as a result of TVAL's supervision of maintenance, or operation of the aircraft.

[394] There was no provision for a lease fee to be paid nor for shipping costs to be held in escrow, as TVAL had instructed.

[395] As noted by Mr Corke, to reflect the WAHT instructions, WAHT should have been required to provide an indemnity to TVAL to ensure that TVAL was not exposed to any cost or liability, not the other way around.

Wulff Oral Operating Agreement

[396] Mr Wulff explains in his affidavit evidence that Mr DeMarco also committed TVAL to obligations in an oral agreement, which Mr Wulff said covered the following points:

(a) Mr Wulff directed that the Albatros be delivered to the UK so it could be used by WAHT;

(b) it was of "utmost importance" to Mr Wulff that Mr DeMarco/TVAL take care of the operation (as opposed to management) of the Albatros, rather than WAHT;

(c) Mr DeMarco made Mr Wulff aware of the TVAL-WAHT Agreement, which was stated to cover the Albatros; and

(d) Mr DeMarco told Mr Wulff that the terms of the TVAL-WAHT Agreement, and all of WAHT's rights, would extend to Mr Wulff as owner of the Albatros.

[397] The effect of the alleged Wulff Oral Operating Agreement was to extend the indemnity granted to WAHT to Mr Wulff, such that TVAL committed to "hold [Mr Wulff] harmless and indemnify [Mr Wulff] against any cost, loss or liability that [Mr Wulff] may suffer" as a result of TVAL's supervision of maintenance, or operation of the aircraft.

Liability to Mr Wulff for crashed Albatros

[398] Sir Peter Jackson had given express instructions that any involvement with WAHT was to involve no cost or liability to TVAL. Instead, as described above, Mr DeMarco had caused TVAL to incur shipping costs, and exposed it to risk by providing an indemnity from TVAL to WAHT and to Mr Wulff in respect of the operation of the aircraft while in the UK.

[399] There were two relevant Somme commemorations in 2016. The British centenary marking the start of the Battle of the Somme was on 1 July, and the centenary of Aotearoa New Zealand soldiers joining the battle was on 15 September 2016.

[400] Mr Wulff said he agreed that his Albatros could be flown at the commemoration in France in September 2016. Mr DeMarco arranged for the aircraft

to be flown to and from France, rather than be transported. On the return flight to the UK from France after the commemoration, the Albatros suffered engine failure and crashed.

[401] Mr DeMarco reported on the crash to TVAL. On 15 September 2016 Mr DeMarco emailed Sir Peter Jackson with a link to a news article about the Albatros crash landing. He then exchanged emails with Sir Peter Jackson discussing the implications of the crash for Mr Wulff. He stated, "Oliver only carried third party insurance as we do".

[402] On 16 September 2016 Mr DeMarco emailed Mr Corke and advised him of the crash. Mr DeMarco then confirmed, in response to a query from TVAL director Michael Stephens, that "the aircraft was effectively under control of UK WAHT" at the time of the crash. This did not reflect the arrangements entered with WAHT by Mr DeMarco on behalf of TVAL. According to those, the aircraft was in the possession and control of TVAL at the time of the crash.

[403] The crashed Albatros was returned to TVAL in New Zealand. The wings, struts, landing gear, fuselage and engine were damaged beyond worthwhile repair.

The cause of the crash

[404] The Albatros had suffered a propeller strike when landing two days before its crash on 15 September 2016. This occurs if the aircraft lands in such a way as to cause the nose to tilt down and the spinning propeller hits the ground. The repairs had been quickly carried out before the Somme commemoration flight. Propeller strike can cause significant damage to the engine due to the forces passing down the crankshaft. In the case of the Albatros, it had also damaged the spinner, which controls the airflow into the engine, which had to be removed.

[405] Mr DeMarco had not informed TVAL or Mr Wulff at the time of the propeller strike.

[406] A number of reports were prepared into the cause of the crash. Sir Peter Jackson says these reports were inconclusive but did raise issues as to the operation of the aircraft:

(a) an engineering statement prepared by Rex Kenny and John Bushell in November 2017 advised that the Albatros' engine should have been fully stripped down following the propeller strike; and

(b) a TVAL-prepared accident report dated 8 November 2018 raised issues around the competency of the pilot.

[407] Mr DeMarco's statement of defence admits that the crash was caused, in part, by:

(a) the failure to perform a full engine strip-down following the propeller strike;

(b) the decision to fly the Albatros without a back spinner; and

(c) the decision to fly, rather than ship, the Albatros back from the Somme commemorations to the United Kingdom.

[408] Mr DeMarco, in his pleadings says the responsibility for the airworthiness of the Albatros was that of TVAL's airworthiness manager. However, the evidence indicates that Mr DeMarco had assured Mr Wulff that the Albatros would be covered by the Operations Agreement he had entered on behalf of TVAL with WAHT.[156] Mr Wulff said he "trusted Mr DeMarco and the people he chose to fly it but no-one else". In view of TVAL's evidence that it was unaware it had been bound by Mr DeMarco to the TVAL/WAHT agreement, I am satisfied that it was because of Mr DeMarco's unauthorised actions in agreeing to TVAL being responsible that TVAL became liable to Mr Wulff.

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[156] As stated in Mr Wulff's affidavit (in *Wulff v DeMarco* CIV-2018-485-427) referred to by leave in these proceedings.

The settlement with Mr Wulff

[409] The belated discovery of the propeller strike prompted several complaints from Mr Wulff to TVAL:

(a) Mr Wulff emailed Sir Peter Jackson on 31 October 2017 complaining that he had not been made aware of the propeller strike until he visited Aotearoa New Zealand in January 2017; and

(b) he emailed Mr Shaheen at TVAL on 13 November 2017, complaining about the "lapse of diligence" in numerous aspects.

[410] A formal demand for compensation from TVAL for the crashed Albatros was made by Mr Wulff's lawyers on 28 March 2018. That letter, and the correspondence that followed:

(a) asserted the existence of the Wulff Oral Operating Agreement; and

(b) said that Mr Wulff would potentially claim that TVAL breached a duty of care to take reasonable care of the aircraft.

[411] By then Mr DeMarco had already been suspended from TVAL for some months following the discovery of the Warbirds fraud. He was under investigation by the SFO and was not available to provide further information to TVAL on the circumstances of the crash. It appeared there was a serious possibility that TVAL was responsible for the crash.

[412] TVAL took the view it was liable to compensate Mr Wulff for the crashed Albatros on the following basis:

(a) Wulff Oral Operating Agreement: Mr Wulff claimed that Mr DeMarco had agreed that Mr Wulff would have the same benefits as WAHT under the WAHT-TVAL Agreement. In other words:

(i) TVAL agreed to supervise the maintenance and to operate the aircraft (including the Albatros); and

(ii) TVAL was to "hold Mr Wulff harmless and indemnify Mr Wulff against any cost, loss or liability that Mr Wulff may suffer" as a result of TVAL's supervision of maintenance, or operation of the aircraft.

(b) Bailment: that Mr DeMarco was in breach of bailment for the following reasons:

(i) After Mr Wulff had purchased the plane, TVAL retained possession of the Albatros. A bailment relationship accordingly arose, because TVAL knowingly retained possession of property belonging to another, and subsequently allowed WAHT to take possession of the aircraft.[157] As bailee, TVAL owed a duty to Mr Wulff to take reasonable care of his property.[158]

(ii) When the Albatros was damaged, a rebuttable presumption arose that the damage was caused through breach of TVAL's duties.[159] The onus at that point was on TVAL to prove that either:[160]

a. TVAL was not at fault, and that the damage to the plane occurred notwithstanding their reasonable precautions; or

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157 *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725 at 734; and *Southland Hospital Board v Perkins Estate* [1986] 1 NZLR 373 (HC) at 375.

158 *Conway v Cockram Motors (Christchurch) Ltd* [1986] 1 NZLR 381 (HC) at 382.

159 *Southland Hospital Board v Perkins Estate*, above n 157, at 378–379; and *Wilson & Horton Ltd v Attorney-General* [1997] 2 NZLR 513 (CA) at 526.

160 *Conway v Cockram Motors (Christchurch) Ltd*, above n 158, at 382; and *Petersen v Papakura Motor Sales Ltd* [1957] NZLR 495 at 496.

b. even if TVAL had taken reasonable precautions, the loss would have occurred.

(iii) Sir Peter Jackson said that while the various reports prepared in relation to the crash were inconclusive, at least one of those reports indicated that following the propeller strike, the Albatros' engine should have been fully stripped down before it was flown again. This reflected in the admissions now made by Mr DeMarco in his statement of defence.

[413] Based on these claims TVAL decided to compensate Mr Wulff by delivering a replacement Albatros to him in the United Kingdom.

[414] In reaching that decision TVAL took into account the following:

(a) the Wulff Oral Operating Agreement was consistent with Mr Wulff's previous statements about TVAL operating the aircraft, and appeared likely to be true;

(b) Mr DeMarco had been trusted to interact with both WAHT and Mr Wulff, and both parties could rely on the agreement to which Mr DeMarco had committed TVAL;

(c) Sir Peter Jackson and the TVAL directors had no knowledge of the TVAL-WAHT Agreement or the Wulff Operating Agreement – both of which had been signed by Mr DeMarco as managing director, which he was not; and

(d) Mr DeMarco's dishonesty in his dealings with TVAL made it practically impossible to dispute Mr Wulff's claims. Mr DeMarco now had a lack of credibility and, in any event, was unavailable to give evidence due to his suspension.

[415] An Albatros had already been manufactured for the proposed sale to Warbirds, which had fallen through following the discovery of Mr DeMarco's Warbirds Fraud. That aircraft was delivered to Mr Wulff.

[416] On 7 September 2018 TVAL and Mr Wulff entered into a settlement agreement to that effect. That settled the liability of TVAL to Mr Wulff as a result of the commitments entered into by Mr DeMarco on behalf of TVAL.

Loss caused by Mr DeMarco's breach of instructions

[417] TVAL claims that because of Mr DeMarco's breach of his obligation to act in accordance with the WAHT instructions given by TVAL, it incurred costs and liabilities as follows.

Costs of freight

[418] TVAL incurred freight and associated travel costs in the amount of $59,618.55, being:

(a) The cost of freighting two TVAL manufactured and owned aircraft to the UK was $13,705.12, comprising:

(i) $9,410.09 to ship the BE2 (ZK-TFZ) in 2014;

(ii) $4,295.03, for shipping the Snipe (ZK-SNI) in 2015 (this figure represents TVAL's 50 per cent share of the container that contained both the Snipe and the Albatros being delivered to Mr Wulff).

(b) The cost incurred in sending two TVAL employees to disassemble and pack the TVAL owned Snipe and BE2 for the purpose of freighting them back to New Zealand was $33,367.88, being $16,956.88 in travel costs and $16,411 spent in the UK while retrieving the aircraft.

(c) The cost of freighting two TVAL owned aircraft back to New Zealand of $12,545.55. Both the BE2 and the Snipe were sent in the same shipment.

[419] TVAL also claims it has incurred loss in providing a replacement Albatros to Mr Wulff and is entitled to recover that loss from Mr DeMarco.

[420] TVAL says as Mr DeMarco has exposed TVAL to potential liability through breach of contract, TVAL is entitled to recover the costs of reasonably settling those potential liabilities from Mr DeMarco. I am satisfied that the liability existed to the extent that it was reasonable to reach a settlement. I note that this agreement was reached with the assistance of TVAL's lawyer, Chapman Tripp and is in full and final settlement of all claims arising from the agreement entered into on TVAL's behalf/by Mr DeMarco with Mr Wulff.

[421] TVAL points to the case of *Biggin & Co Ltd v Permanite Ltd*, where the English Court of Appeal held that the cost of a reasonable settlement should be taken as the measure of damages for breach of contract in circumstances where the defendant's breach exposed the plaintiff to a potential liability.[161] The terms of a settlement, while not conclusive should be taken as the measure. The rationale behind the rule is that "the law … encourages reasonable settlements, particularly where … strict proof would be a very expensive matter".[162]

[422] The rule applies where the plaintiff can prove that:[163]

(a) the defendant's breach caused the claimant's liability to the third party and is not too remote to be recoverable; and

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161 *Biggin & Co Ltd v Permanite Ltd* [1951] 2 KB 314 (CA) ["*Biggin*"] at 321 and 324–325. See also James Edelman, Simon Colton and Jason Varuhas *McGregor on Damages* (20th ed, Sweet & Maxwell, London, 2018) at [21-045]; and Andrews et al *Contractual Duties: Performance, Breach, Termination and Remedies* (2nd ed, Sweet & Maxwell, London, 2017) at [21-118], which both cite *Biggin* as the leading authority for the principle that the costs of reasonable settlement are recoverable as damages. See also *Dubai Aluminium Co v Salaam* [2001] QB 113 (CA) which also cites *Biggin* with approval at 132.

162 *Biggin,* above n 161, at 321.

163 At 321. See also *Stargas SpA v Petredec Ltd* [1994] 1 Lloyd's Rep 412 (QB) at 423.

(b) the settlement and the settlement amount were reasonable in the circumstances. It is not necessary to prove that the claim would have succeeded or probably would have succeeded, it is enough to show that the claim had "sufficient substance for the settlement of it to be regarded as reasonable".[164]

[423] Sir Peter Jackson says that, but for Mr DeMarco's breach of TVAL's instructions, TVAL would not have agreed to WAHT retaining Mr Wulff's plane in circumstances where the risk of damage was on TVAL. This was explicit in the TVAL/WAHT instructions. If Mr DeMarco had followed the instructions, TVAL either would not have been exposed to the liability, or it could have recovered any loss suffered from WAHT.

[424] In terms of remoteness, TVAL says Mr DeMarco was fully aware of the potential liability he created for TVAL in entering into the TVAL/WAHT Agreement and the Wulff Oral Operating Agreement. TVAL's exposure to this type of liability (and the costs of the subsequent settlement) was reasonably foreseeable and is therefore recoverable.[165]

[425] TVAL submits that the settlement of Mr Wulff's claims against TVAL (both in bailment and as a result of the Wulff Oral Operating Agreement) were reasonable and, realistically, necessary given the arrangements put in place by Mr DeMarco.

Cost of replacement Albatros

[426] Mr DeMarco disputed the value of the replacement cost of the Albatros and the value of the wrecked aircraft.

[427] The market value put on the replacement Albatros by TVAL was $990,670 plus GST. Warbirds had previously agreed to purchase the same plane at that price. TVAL's valuation expert Mr Ditheridge's evidence is that, in his expert opinion, the

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164 *General Feeds Inc Panama v Slobodna Plovidba Yugoslavia* [1999] 1 Lloyd's Rep 688 (QB) at 696.

165 *Hadley v Baxendale* [1854] EWHC J70, (1854) 9 Exch 341; and *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528 at 539.

figure of $990,670 is "incredibly good value", and he would ascribe a value of at least $2 million to the replacement Albatros if it were sold in the United Kingdom.

[428] From that must be deducted the value of the damaged Albatros that was returned to New Zealand and of which TVAL retains possession.

[429] Mr Ditheridge says that the damaged Albatros could be suitable for purchase for static display in a museum. Applying the assumptions that would apply to the purchase of that damaged aircraft, including the uncertainty and risk as to the degree of repair required, he says he would recommend a purchaser pay no more than $98,834–$148,251 for the aircraft.

[430] Given Mr Ditheridge's opinion on the value of the replacement Albatros, TVAL submits that it was appropriate to discount $990,670 plus GST by the lower end of the range of the crashed Albatros, or $98,834. This gives a loss of $891,836.

[431] I accept that evidence. Mr DeMarco, in his statement of defence, disputed the value placed on the damaged aircraft of $15,000 in the fourth amended statement of claim. I am however satisfied that the value of the wreck is in the range ascertained by Mr Ditheridge. The wreck is apparently still owned by TVAL. In those circumstances I am satisfied it is appropriate to take the lower end of the range and fix $99,000 (a rounded figure) as the figure for the wrecked plane returned to TVAL. This also, to some extent, recognises that the valuation evidence puts the value of the replacement Albatros in the vicinity of $2 million whereas I have allowed $990,670 which was the previous list price by TVAL of the aircraft.

Additional cost of delivery to the UK

[432] Under the settlement agreement with Mr Wulff, TVAL was required to deliver a replacement aircraft to the United Kingdom and was responsible for all costs of delivery.

[433] The evidence indicates that the following additional costs were incurred for delivery:

(a) the cost of customs charges and, in particular, the Value Added Tax (VAT) charged by the UK tax authority, Her Majesty's Revenue and Customs (HMRC).

(b) WAHT's VAT registration number was quoted to Customs when the Albatros arrived in the UK on 17 September 2018, because they were the operator of the aircraft. HMRC charged WAHT an import VAT in the amount of £94,998.18, which TVAL then paid on behalf of WAHT.

(c) a duty of £33,959.42 from United Kingdom Customs, and cartage and destination charges of NZD $532.65. TVAL paid these charges, together with the VAT, according to an invoice from Mainfreight dated 21 September 2018 in the amount of NZD $261,297.18.

[434] TVAL says it has attempted to reach an agreement with WAHT whereby the latter would claim back the VAT and refund TVAL. Agreement has not been reached.

[435] In total, TVAL claims adjusted for the wreck as follows:

Shipping costs to UK	13,705.12
Costs to return aircraft to NZ	33,367.88
Shipping costs to NZ	12,545.55
Value of replacement Albatros less returned wreck	990,670.00
	(99,000.00)
Import costs (VAT)	216,297.18
Total	**$1,167,585.73**

[436] I am satisfied on the evidence that Mr DeMarco breached the express term of his agency agreement with TVAL as to the term of the agreement to be negotiated with WAHT. Secondly, Mr DeMarco committed TVAL to liabilities and costs to Mr Wulff as set out above without authority and in breach of his duty of loyalty to TVAL. I am satisfied that the liability to Mr Wulff was reasonably settled in the circumstances. Accordingly, judgment will be entered for $1,167,585.73 in terms of the amount in the table at [435] above.

[437] As to interest, I consider it should be awarded from 31 August 2018,[166] on the same basis as I have indicated in relation to the earlier causes of action. Interest on the amount of judgment at the rate calculated in accordance with the Interest on Money Claims Act 2016 (but not exceeding five per cent) under s 87 of the Judicature Act for the reasons set out above.

Fifteenth and sixteenth causes of action: tours

[438] These claims by TVAL against Mr DeMarco also arise from Mr DeMarco's employment with TVAL and/or as agent of TVAL.

Fifteenth cause of action – Hood Aerodrome Tours

[439] TVAL's evidence was that:

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[166] The date of delivery of the Albatros replacement to Mr Wulff under [1](a) of the Settlement Agreement dated 7 September 2018.

(a) TVAL's collection of vintage aircraft was primarily housed at Hood Aerodrome, in Masterton. TVAL held flying weekends and offered tours of the collection housed at Hood Aerodrome.

(b) TVAL offered tours of its collections. These were previously run by a company called Lollapaloosa Ltd, run by Sara Randle, who was Mr DeMarco's partner at the relevant time.

(c) The engagement with Lollapaloosa Ltd ended in 2015. Scott Thomson, a volunteer, subsequently offered to run the tours at no cost to TVAL.

(d) Mr DeMarco received the proceeds of the tours arranged by Mr Thomson.

[440] TVAL alleges that Mr DeMarco:

(a) failed to account to TVAL for all tours that occurred in the 2015/2016 flying season; and

(b) failed to account to TVAL for any tour proceeds from the 2016/2017 flying season.

[441] Mr DeMarco had previously accounted for 50 per cent of the tour income in the 2015/2016 flying season. This was accepted by Mr Corke on behalf of TVAL.

[442] TVAL seeks only an account of 50 per cent of tour revenue received by Mr DeMarco.

Tour administration

[443] Mr Thomson's evidence was that he volunteered to run the tours after 2015. In doing so he said he hoped, in part, to raise a sum towards the upkeep of the collection. He assumed that he was running the tours for, and on behalf of, TVAL, and that any proceeds obtained from the tour admissions would go to TVAL.

[444] Mr Thomson's evidence was:

(a) the TVAL hangar was open at weekends during the summer season, and tours could happen outside of weekends by arrangement;

(b) tour admission prices varied but were typically $15 per adult and $5 for children. There was also a merchandise shop;

(c) people would pay by cash, EFTPOS, or occasionally cheque. Mr Thomson collected the cash until a reasonable amount (around $500) had accumulated, and then would hand the cash to Mr DeMarco;

(d) Mr Thomson would record any receipt of money on a form that was completed daily and provided to Mr DeMarco. He also kept his own records; and

(e) the EFTPOS machine processed payment to Dairy Air Ltd. Mr Thomson assumed that they were receiving payment by arrangement with TVAL and always thought the proceeds were going back to TVAL.

TVAL's understanding with Mr DeMarco

[445] TVAL says there was no prior arrangement with Mr DeMarco that he could retain 50 per cent of the proceeds of Hood Aerodrome tours.

[446] Mr Corke says that he approved an arrangement whereby Mr DeMarco's partner, Ms Randle, would receive a 50 per cent commission for running a small number of tours in 2015 while Mr Thomson was away on holiday, but he believed this was only for a small number of tours.

[447] In December 2016 Mr DeMarco provided a credit memo in relation to 50 per cent of the proceeds for the 2015/2015 flying season. Mr Corke did not challenge this but says he did not focus on the details of the tours as he did not view the proceeds as being significant.

[448] TVAL accepts that as a result of this acquiescence there was an understanding in place from December 2016 onwards that TVAL property at Hood Aerodrome could continue to be used for tours on the condition that Mr DeMarco account to TVAL for 50 per cent of the proceeds.

[449] It pleads in [138] of the fourth amended statement of claim that:

> From on or about December 2016, there was an express and/or implied agreement that **Mr DeMarco** could continue to operate tours of the Hood Aerodrome for subsequent flying seasons on the condition that he accounted to TVAL for 50 percent of the tour operation proceeds.
>
> (Emphasis added)

[450] This was admitted by Mr DeMarco in his statement of defence. He goes on to say this was pursuant to a contract between TVAL and Dairy Air Ltd. TVAL denies this was the case. It says the agreement was with Mr DeMarco.

[451] The TVAL employees who were aware of the arrangement say:

(a) Mr Corke: that he assumed that Mr DeMarco was using Dairy Air Ltd to issue the credit memo out of expediency; and

(b) Ms Kate Leppard, an accountant employed by TVAL: as far as she was aware, if TVAL were to enter any arrangement with Mr DeMarco relating to the tour proceeds it would be with Mr DeMarco personally.

[452] There is no evidence of any prior agreement or contract with Mr DeMarco or any other party relating to the operation of the tours. Mr Thomson says the tours were operated by him with limited to no involvement from Mr DeMarco.

Failure to account to TVAL

[453] TVAL alleges that contrary to Mr Thomson's expectation or the implicit understanding with TVAL, Mr DeMarco failed to pass on either the records kept or to disclose the true nature of the tours that occurred. It points to the evidence of Ms Leppard, that:

(a) Mr DeMarco did not provide TVAL with any of the daily forms that had been completed by Mr Thomson, or other TVAL volunteers, nor has he provided those on discovery;

(b) Ms Leppard had to make several requests for information on the tours, in April, May, and December 2016; and

(c) On 8 December 2016, Mr DeMarco eventually provided a credit memo from Dairy Air Ltd to TVAL in the amount of $10,084 and provided monthly visitor sheets indicating that funds were due to TVAL on a 50/50 share.

[454] Ms Leppard says following Mr DeMarco's suspension, TVAL investigated the tours that took place and discovered that TVAL had not received complete payments for the funds received for tours in 2015/2016 flying season.

[455] Mr Thomson says based on his records that 13 tours occurred that have not been accounted for to TVAL. He calculates that a total of $1,439 was obtained from these 13 tours.

[456] Ms Leppard says Mr DeMarco provided no further information about tours carried out after April 2016 apart from one invoice raised for $240 to the Wairarapa Friendship Force. He provided TVAL with no funds in respect of tours from the 2016/2017 flying season.

[457] Mr Thomson, however, emailed Mr DeMarco with an overview of the 2016/2017 flying season on 26 May 2017 in which he said:

> We took over $24,700 in admission which strikes me as a healthy lump.
>
> We took about $10,000 for merchandise…

[458] This information was not passed on by Mr DeMarco to TVAL. Instead, he emailed Mr Thomson on the same day and asked that Mr Thomson keep the information in his reporting email confidential.

[459] Mr Thomson gave evidence that he had cross-referenced booking dates and his list of occasional call-out fees to confirm that the tours did occur. His records show that expected proceeds totalled $24,763.90.

[460] TVAL claims Mr DeMarco has breached his duties as employee by failing to account properly to TVAL. As a result, he is liable to account to TVAL for 50 per cent of:

(a) the tours that he did not disclose during the 2015/2016 flying season; and

(b) the proceeds from the 2016/2017 flying season.

[461] On the basis of that calculation, TVAL claims a total of $13,101.45 for the two flying seasons based on the numbers provided by Mr Thomson as follows:

Flying season	**Total**	**50% share**
2015/2016 (year end 31/3/2016)	$1,439	$719.50
2016/2017 (year end 31/3/2017)[167]	$24,763.90	$12,381.95
Total		**$13,101.45**

[462] TVAL also claims interest under the Judicature Act on that sum.

[463] I am satisfied that the claim has been made out and Mr DeMarco has breached his agreement with TVAL by failing to account properly for 50 per cent of the proceeds of the tours.

[464] Interest on each of the figures listed above from the year end date listed at the rate calculated in accordance with the Interest on Money Claims Act 2016 (but not exceeding five per cent) under s 87 of the Judicature Act for the reasons set out above.

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[167] Ms Leppard's evidence was that the financial year ended 31 March each year.

Sixteenth cause of action: secret tour of Kemp Street premises

[465] This claim is based on secret tours conducted by Mr DeMarco of the TVAL Kemp Street workshop. TVAL was not aware of these tours and the fact Mr DeMarco had been conducting them and charging for them.

[466] The evidence is that guests are rarely allowed access to Kemp Street. On 16 December 2016 Mr DeMarco hosted a "secret tour" of the Kemp Street premises. This was unauthorised and Mr DeMarco charged for entry. The evidence is that:

(a) Mr DeMarco's then partner, Sara Randle, placed an advertisement on a website called "eventsoja.com" for a tour of the "very private Wellington facility"; and

(b) a Facebook posting for the tour described it as a 'Top Secret' tour, reassuring readers that the exclusive location was "not a misprint! And yes! We do mean the TVAL Wellington workshop!"

[467] The statement of defence admits that the tour took place and that Mr DeMarco retained the $1,375 paid by the attendees at $275 per ticket. It denies that the tour took place without the authorisation or knowledge of the TVAL directors or owners and denies any breach of fiduciary duty.

[468] The evidence suggests otherwise:

(a) The private nature of the Kemp Street workshop was promoted as a selling point in the advertisements.

(b) Mr Corke gave evidence that Mr DeMarco organised the tour without his knowledge or approval; and

(c) Sir Peter Jackson confirms that Mr DeMarco never had any authority to undertake such tours. He also confirms that the tour took place while he was overseas. Had he been aware, he would have refused permission.

[469] The allegation is that Mr DeMarco breached that duty both by:

(a) organising the tour without the knowledge or authorisation of TVAL directors or owners – which Sir Peter Jackson describes as an "egregious betrayal of the trust I had placed in him and the trusted access he had to TVAL assets and facilities"; and

(b) failing to account to TVAL for the money received from the Secret Tour attendees.

[470] Mr DeMarco used TVAL property without its consent and further he failed to account for the monies earned as a result of that unauthorised use. This is a breach of the duty of loyalty owed by Mr DeMarco to TVAL that I have referred to earlier.

[471] TVAL claims the total $1,375 paid by attendees, and interest under the Judicature Act, with the cause of action accrued on 16 December 2016, being the date of the unauthorised tour.

[472] I am satisfied that Mr DeMarco was in breach of his duty to TVAL and he received money during that breach for which he has failed to account. TVAL is entitled to judgment for the sum of $1,375, together with Judicature Act interest calculated from 16 December 2016. That interest is to be calculated according to the Interest on Money Claims Act 2016 under s 87 of the Judicature Act (but not exceeding five per cent) for the same reasons as above.

Eighteenth cause of action: TVAL petrol

[473] This claim in conversion is that Mr DeMarco used TVAL-owned aviation fuel kept at Hood Aerodrome for his own personal aircraft without authorisation from TVAL and without compensating TVAL for the value of the fuel used.

[474] There are no precise records of the taking of this petrol or the amount of petrol that was actually taken. However, TVAL points to the following evidence:

Fuel at Hood Aerodrome

[475] Dave Cretchley, TVAL's Airworthiness Manager gave evidence about the fuel facilities at Hood Aerodrome. These comprised:

(a) A fuel pump operated by the oil company, BP, where fuel is paid for using fuel cards supplied by BP that are linked to an individual or company account. TVAL has a fuel card that employees can use for TVAL projects. Employees are required to write down the amount of fuel purchased and the relevant project in the TVAL logbook.

(b) A mobile tanker operated by TVAL. The tanker is fuelled using the BP fuel pump and then used to fuel the aircraft.

Discrepancy in fuel usage

[476] Mr Cretchley has undertaken an analysis of TVAL fuel usage from 2012 to 30 April 2021 to identify whether there were any discrepancies in the expected usage of TVAL fuel and the actual consumption of TVAL fuel (to isolate the additional consumption of fuel by Mr DeMarco for personal use).

[477] In summary, that analysis shows:

(a) for the period between 2012 and 2016, when Mr DeMarco was employed by TVAL (the DeMarco period), the actual fuel usage exceeded the expected fuel usage by over 8,000 litres, at a value of approximately $18,700; and

(b) in the period after Mr DeMarco left TVAL (2018 to 2021) there was essentially no difference between the expected fuel usage and the actual fuel usage (the control period).

[478] Mr Cretchley explains the records upon which he based his analysis as follows:

(a) accurate records as to authorised flights taken by TVAL aircraft, in TVAL's Flight Records;

(b) Operator Statements created for New Zealand Civil Aviation Authority compliance purposes, which capture the expected fuel consumption for each aircraft. Fuel consumption is calculated on a conservative basis for safety reasons, meaning that expected fuel usage will often exceed actual fuel usage; and

(c) TVAL's Fuel Record Books, which record the consumption of fuel.

[479] Mr Cretchley says he used this information to:

(a) determine the total fuel expected to be used for flights in TVAL aircraft for each year; and

(b) the actual fuel used by TVAL from the start from 2012 to 30 April 2021.

[480] Mr Cretchley says that because the Operator Statement contains a conservative figure for expected fuel usage to ensure planes do not run out of fuel, he went through a process to correct the expected fuel figure:

(a) That exercise showed that during the control period, expected fuel usage exceeded actual fuel usage (24,778.24 litres to 19,798.05 litres). Dividing this number gives a number of 1.2515, which provides a correction for the overestimation of the expected fuel use provided for by the Operator Statements.

(b) Mr Cretchley says that correction provides a more accurate expected fuel usage figure for each year.

[481] Mr Cretchley then compared the expected fuel usage figures with the actual fuel usage figures each year. He excluded the year 2017 as Mr DeMarco only worked for TVAL for part of that year and spent a portion of that time overseas. Mr Cretchley used his personal knowledge of the approximate average value of fuel in each year to determine the expected monetary value for the difference in amount.

[482] The differences between the control period and the DeMarco period are as follows:

Control period

Year	Corrected expected use (L)	Actual Use (L)	Difference (L)
2018	5,049.62	5,765.81	716.19
2019	6,825.28	6,905.54	80.26
2020	4,075.22	3,982.12	-93.10
2021 (until 30 April)	3,848.70	3,144.58	-704.12
Total	19,798.82	19,798.05	**-0.77**

DeMarco period

Year End (31 March in relevant year)	Corrected expected use (L)	Actual Use (L)	Difference (L)	Value
2012	6,999.52	10,203.04	3,203.52	@ $2.10 +GST = 7,736.50
2013	6,730.64	8,446.72	1,716.08	@ $2.10 +GST = 4,144.33
2014	8,338.55	9,749.96	1,411.41	@ $2.10 +GST = 3,408.55
2015	4,057.58	5,229.22	1,171.64	@ $1.70 +GST = 2,290.55
2016	2,751.57	3,293.23	541.66	@ $1.80 +GST = 1,121.23
Total	28,877.86	36,922.17	**8,044.31**	**$18,701.16 (including GST)**

Mr DeMarco's responsibility for the fuel use

[483] There is no direct evidence of Mr DeMarco using fuel for his own purposes at Hood Aerodrome. However, TVAL points to the fact that Mr DeMarco has not given discovery of any document evidencing his own fuel usage or the purchase of fuel for his own usage, save for certain historical purchases made from TVAL outside of the period claimed for. TVAL relies on the following evidence to establish an inference that the fuel was used by Mr DeMarco personally:

(a) Mr Cretchley says there were a number of incidents that caused him to suspect that Mr DeMarco was fuelling his planes at Hood Aerodrome using TVAL fuel:

(i) on one occasion TVAL's fuel tanker was unexpectedly emptied over a weekend when:

1. Mr DeMarco had his personal Corsair in the maintenance hangar; and

2. nobody else from TVAL had reason to empty the fuel tanker at the time; and

(ii) there were a number of occasions when TVAL air show volunteers, who were under the direction of Mr DeMarco, used the TVAL tanker to fill aircraft including Mr DeMarco's personal aircraft.

(b) Ms Leppard, the accountant, says that there were occasions on which Mr DeMarco did actually legitimately purchase fuel from TVAL. She says her search of TVAL's records located eight invoices to companies controlled by Mr DeMarco for the use of fuel supplied by TVAL. She has searched for invoices in the period 2010 to 2017. However, the latest invoice was dated 13 February 2014. No payment was made to TVAL for any use of fuel between February 2014 and 2017.

(c) There was no indication in the discovery provided that Mr DeMarco made alternative arrangements for the supply of fuel from 2014 onwards.

[484] Sir Peter Jackson's evidence is that neither he nor the TVAL directors had knowledge that Mr DeMarco had been using TVAL fuel until after September 2017.

[485] I consider that based on the above evidence an inference can be drawn that Mr DeMarco took the TVAL fuel for his own personal use without paying for it.

[486] I am satisfied that the directors could not have reasonably known about this at an earlier date. Given the claim was filed on 28 August 2017, the claim is within the three-year period provided in the Limitation Act.

Quantum claimed

[487] Mr Cretchley's analysis values the additional fuel used at $18,701.16 (including GST).

[488] In the absence of precise records provided by Mr DeMarco at the time or discovered in this proceeding, I am satisfied the Court can rely on this evidence to establish the value of TVAL's claim.

[489] Judgment is therefore granted for the sum of $18,701.16 (excluding GST). The yearend date in each of the years is the date from which interest accrues.

[490] Interest is awarded on each of the amounts owing in each year from the 31st March of the relevant year, as stated above at [482]. Interest is to be calculated in accordance with the Interest on Money Claims Act 2016 (but not exceeding fiver per cent) under s 87 of the Judicature Act for the reasons set out above.

Conclusion

[491] I conclude that on the first to fourth causes of action, TVAL is entitled to judgment as follows:

(a) $937,500 is awarded against the defendants, jointly and severally.

(b) $19,520.05 is awarded to TVAL against the defendants, jointly and severally.

(c) Third cause of action dismissed.

(d) Fourth cause of action: an equitable charge by way of subrogation is ordered for the sum of $720,000 over the Corsair vintage aircraft.

[492] In relation to the other causes of action, judgment is entered in the amounts concluded under each cause of action.

[493] Interest is awarded as on the various judgment amounts at the rates and from the dates set out in the judgment relevant to each head of claim.

Costs

[494] Counsel indicated they wished to be heard on the issue of costs. Memoranda should be filed and served by the plaintiffs within 10 days of the date of this judgment.

[495] Memoranda in reply by the defendants should be filed and served within a further five days.

[496] Any reply by the defendants should be filed within a further three days.

Leave

[497] In view of the number of calculations that were handed up during the hearing as the arguments developed, I reserve leave to the parties to file any submissions relating to the calculations in this judgment that may need adjustment within 10 days of the date of this judgment. To that extent this judgment is interim.

_____

Grice J

Solicitors:
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Civil Aviation Authority, Te Whanganui-a-Tara | Wellington.
Meredith Connell, Tāmaki Makaurau Rohe | Auckland for the defendants.

Attachment 1 – summary of claims: 5th to 7th, 9th to 18th causes of action

Cause of Action	Description	Claim ($NZD)
5th	**Hisso buy-back:** claim under contractual arrangement for repayment for unsatisfactory purchases: repayment of TVAL money spent on poor quality Hisso engine.	37,471.71
6th	**Cessna stripping and repainting:** claim for use of TVAL resources used for work in DeMarco's personal Cessna.	5,418.00
7th	**Buffalo trade:** claim for valuable aircraft parts included in a parts trade contrary to TVAL instructions. [same container as Cessna.]	411,191.00
9th	**Cessna freight:** claim for increased shipping costs solely incurred to ship Cessna for DeMarco's personal benefit.	1,750.00
10th	**Cessna packing:** claim for TVAL resources used to pack DeMarco's personal Cessna for shipping.	713.00
11th	**Buffalo commission:** secret commission earned by DeMarco in return for organising a trade on TVAL's behalf.	dismissed
13th	**Saint Andre:** claim for TVAL owned parts that DeMarco sold to Mr Saint Andre and retained the proceeds of sale for himself.	17,755.00
14th	**WAHT:** claim arising from interactions with WWI Aviation Heritage Trust in the UK: DeMarco breached his instructions as agent and put TVAL to significant cost, including a claim for a replacement aircraft from Oliver Wulff which TVAL settled.	1,212,585.73
15th	**Hood tours:** Mr DeMarco received income collected from tours of TVAL's aircraft collection at Hood Aerodrome and failed to account to TVAL for the funds received.	13,101.45
16th	**Kemp St tour:** DeMarco arranged a "secret tour" of TVAL's Wellington facility without consent from the owners or directors and retained tour income for himself.	1,375.00
18th	**TVAL petrol:** claim for TVAL owned petrol used by DeMarco for the purpose of fuelling his personal aircraft.	18,701.16
	Total	**$1,720,062.05**