

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

CIV-2009-404-0852

UNDER the Land Transfer Act 1952

IN THE MATTER OF an application that a caveat not lapse under
Section 145 and Section 145A of the Land
Transfer Act 1952

BETWEEN THE OFFICIAL ASSIGNEE AS
ASSIGNEE OF THE BANKRUPT
ESTATE OF ALAN CLIFF ARMITAGE
Applicant

AND SANCTUARY PROPVEST LIMITED
Respondent

Hearing: 11 May 2009

Appearances: M Robinson for Applicant
K Gould for Respondent

Judgment: 11 June 2009

JUDGMENT OF ASHER J

*This judgment was delivered by me on 11 June 2009 at 5:00 pm
pursuant to Rule 11.5 of the High Court Rules*

.....
Registrar/Deputy Registrar

.....
Date

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[1] The Official Assignee of Auckland, as assignee of the bankrupt estate of Alan Cliff Armitage (“Mr Armitage”), applies for an order that a caveat 7888616.1 lodged against certificates title NZ52B/827 and NZ52B/828 (North Auckland Registry), being 127-129 Great South Road, Manurewa (“the property”), does not lapse. The Official Assignee submits that it can show a reasonably arguable case that it has an interest in the land.

Background

[2] Mr Armitage has been bankrupt three times. On 20 June 2001, while he was bankrupt for the second time, a trust called the Sanctuary Trust was created. The settlor was a Peter Walter Crump (“Mr Crump”), and the trustee a Sydney Kevin George Dunn (“Mr Dunn”). In the trust deed it was stated that the “parent” means Alan Cliff Armitage. Under clause 14 of the trust deed the power of appointment of new trustees and removal of existing trustees is vested in the parent. The final beneficiaries are the children of the parent, and the discretionary beneficiaries include the final beneficiaries and the parent. Mr Armitage, therefore, is a discretionary beneficiary and has the power to remove and appoint trustees. His children are the primary beneficiaries. He is not the settlor and he is not a trustee.

[3] On 2 July 2001 Sanctuary Propvest Limited, (“Sanctuary Propvest”), the respondent, was incorporated. The director was Mr Dunn, and he held all the shares. On 6 July 2001 Mr Dunn signed a memorandum of acknowledgement to the beneficiaries of the Sanctuary Trust agreeing that he held the shares in Sanctuary Propvest for the beneficiaries of the Sanctuary Trust.

[4] The property was acquired on 7 January 2002. Mr Armitage ceased to be a bankrupt late in 2002, after the purchase of the property. The exact date of his discharge from bankruptcy is not disclosed in the affidavits.

[5] On 5 August 2005, Mr Dunn resigned as director of Sanctuary Propvest, resigned as trustee of Sanctuary Trust, and transferred his shares in Sanctuary

Propvest to Mr Crump. Mr Crump, who had become the trustee of the Sanctuary Trust, became the sole director and shareholder of Sanctuary Propvest.

[6] Between 16 August 2005 and 16 July 2008 the Companies Office records show that the registered office of Sanctuary Propvest was Mr Armitage's residential address at 108D Colwill Road, Massey.

[7] Mr Armitage was discharged from bankruptcy in 2002 and he subsequently carried out certain business activities which resulted in a judgment of \$818,000 being entered against him in 2007. He was declared bankrupt for the third time on 17 October 2007.

[8] Following a Serious Fraud Office investigation, Mr Armitage was charged and convicted of fraudulently obtaining bank funds for the purchase of the property, by falsely inflating the purchase price.

[9] The Official Assignee has examined on oath Messrs Armitage, Crump and Dunn. The Official Assignee has reached the view that, as the assignee of Mr Armitage's estate in bankruptcy, he has an interest in Sanctuary Propvest's land. On 24 July 2007 the Official Assignee lodged a caveat to protect that interest.

[10] On 3 February 2009 the Official Assignee received notice that application had been made by Sanctuary Propvest for the caveat to lapse. The Official Assignee then made this application that the caveat not lapse.

[11] The Official Assignee issued proceedings on 17 March 2009 seeking, amongst other claims, a declaration that the interest of Sanctuary Propvest in the property is held by it as trustee for Mr Armitage. The crucial pleading is at paragraph 33, where it is asserted that at all material times it was the intention of Mr Dunn and Mr Crump that Sanctuary Propvest operated as a legal entity solely and exclusively for the benefit of Mr Armitage, rather than for the benefit of its shareholders.

[12] Mr Armitage is not shown on the title as having any interest in the property, and is not a shareholder of Sanctuary Propvest. He is the discretionary beneficiary of the Sanctuary Trust and has the power to appoint trustees of that trust.

The issue

[13] The caveat sets out the interest claimed and grounds on which it is founded, as follows:

The caveator claims the beneficial interest in the land contained in the above certificates of title as a result of a constructive trust of which the registered proprietor Sanctuary Propvest Limited is trustee and the caveator is beneficiary.

The caveator is described as the Official Assignee at Auckland, as trustee in the bankruptcy of Alan Cliff Armitage. The issue, therefore, is whether it is reasonably arguable that Mr Armitage is the beneficiary of a constructive trust in relation to the property, where Sanctuary Propvest is the trustee.

Approach to the application

[14] The principles which apply in considering applications under s 145A of the Land Transfer Act 1952 include the following:

- a) The person seeking to sustain the caveat has the onus of establishing a reasonably arguable case: *Castle Hill Run Ltd v NZI Finance Ltd* [1985] 2 NZLR 104 at 106.
- b) The caveator must establish an arguable case that it has an interest in the land of the kind referred to in s 137 of the Land Transfer Act 1952.
- c) The interest in the land must be that of the caveator: *Guardian Trust and Executors Co of New Zealand Ltd v Hall* [1938] NZLR 1020 at 1025.

- d) The summary procedure under s 145A is unsuitable for the determination of disputed questions of fact: *Sims v Lowe* [1988] 1 NZLR 656 at 659-660.
- e) The caveator, in order to sustain a caveat, does not have to definitively establish a right to the estate or interest claimed in the caveat. What is necessary is for the caveator to show a reasonably arguable case: *Sims v Lowe* at 660.

Submissions

[15] The Official Assignee by three affidavits of Ms Seaman, a Deputy Official Assignee, has set out the basis upon which the interest is claimed. Unfortunately Ms Seaman's affidavits contain quite a number of assertions which are no more than submissions, and of no assistance to the Court. She makes statements such as: Sanctuary Trust was settled to enable Mr Armitage "to avoid the restrictions of bankruptcy" and that "it appears that from the outset Mr Armitage had a vested interest in the Trust's assets", which are no more than opinion. I put such expressions of opinion to one side.

[16] The general background for the claim, emphasised by Mr Robinson for the Official Assignee in submissions, is Mr Armitage's undoubtedly poor record of financial dealings. He has been bankrupt three times. The present judgment being pursued of \$818,000 arose from a transaction between the second and third bankruptcies. Judgment was entered following an order that Mr Armitage's defence be struck out because he failed to comply with orders for discovery and other Court orders, and because he failed to explain what had happened to the sum of \$818,000 he had received. The claim was based on the allegation that he had an obligation to account for that money to a company he was associated with, Established Investments Limited (In Liquidation): *Established Investments Limited (In Liquidation) v Armitage* HC AK CIV-2004-404-4084 2 April 2007, Andrews J. A caveat has been sustained against a property owned by a company, Guardette Investments Limited, in favour of Established Investments Limited, on the basis that Mr Armitage is involved in a transaction which links and traces the \$818,000 to the

property: *Established Investments Limited (In Liquidation) v Guardette Investments Limited* HC AK CIV-2008-404-004624 19 November 2008, Abbott AJ.

[17] Mr Robinson argues that Sanctuary Propvest is a sham and alter ego for Mr Armitage, and that it is appropriate to pierce the corporate veil. He relies on the decision of *Official Assignee v 15 Insoll Avenue Limited* [2001] 2 NZLR 492, where the corporate veil was lifted when it was established that the company did not have persons as directors who knew or had consented to be directors. He also argues that the Sanctuary Trust was a sham and that there was a common intention, ascertained objectively, to conceal the true nature of the transaction, relying on *Official Assignee v Wilson* [2008] 3 NZLR 45.

[18] He relies on the transcript of interviews carried out by the Official Assignee of Mr Armitage, Mr Crump and Mr Dunn, and in particular some answers illicit from Mr Dunn, which he submits show that it is at least arguable that the transactions were not intended to reflect their legal form, and may have been fraudulent.

[19] Mr Gould in response submits that the Official Assignee can be in no better position than Mr Armitage. He submits that it could not be the case that Mr Armitage could take advantage of his own wrong and come to Court and prove a constructive trust against Mr Crump, and that if he could not do it, nor can the Official Assignee. He referred extensively to *Official Assignee v Wilson* and submitted that even if the trust was a sham, that could not impeach the status of Sanctuary Propvest. *Official Assignee v 15 Insoll Avenue Limited*, he submitted, involved forgery and fraud and a very different fact situation.

[20] In relation to the transcripts, Mr Gould submits that there is nothing sinister disclosed in the answers, and Mr Dunn's lack of memory of his role as a trustee must be seen in the context of the time that has elapsed since he became a trustee. He points to the fact that there is now a new bankruptcy, and asks who benefits if the company structure is put to one side. If it is the Sanctuary Trust, then the trust is under the control of Mr Crump as trustee, to whom the assets will revert.

[21] Mr Armitage has sworn a short affidavit. He denies that the assets of Sanctuary Propvest are held for his benefit or controlled by him. Mr Gould says that the structure must be accepted at face value.

[22] In relation to the company, the Official Assignee has not relied on an express or implied trust, which would arise from the actual or inferred intention of the parties. It has not, at least in the words of the caveat, relied on a resulting trust, which is based on the presumed intention of a transferor of property, when the transfer cannot be carried out in accordance with the transferor's intention. This is understandable given Mr Armitage's position that he is not connected with the setting up of the trust. Rather Mr Robinson relies on a constructive trust.

[23] It is Sanctuary Propvest's position rather than the Sanctuary Trust's position that must be considered first. It is the company that owns the property, and it is its title against which the caveat is registered. The Official Assignee claims that the property is held by Sanctuary Propvest on trust for Mr Armitage.

The evidence relevant to lifting the company and trust veils

[24] Mr Robinson points to the setting up of the company and the trust, and relies on the contents of the interview transcripts, with particular focus on the transcript of Mr Dunn. Mr Dunn is no longer a shareholder, director or trustee, having been replaced on 5 August 2005. However, at the time the company was set up he was its director and shareholder, as trustee of the Sanctuary Trust. Mr Dunn is a truck driver and belonged to a bowling club with Mr Armitage, and met him regularly for drinks.

[25] The effect of his statement was that he was asked to become involved in the trust and the company by Mr Armitage. His role was to be that of a "letterhead" while Mr Armitage would run the company. Mr Dunn's evidence indicates that Mr Armitage was the person who set up the company and the trust. He said that he was told that if he helped Mr Armitage in this way he would get a good credit rating and that it would enable him to obtain a house or something of his own. He said that Mr Armitage decided to buy the property. He thought that helping Mr Armitage seemed to give him a good opening to get his own house. He said that whenever any

issues arose in relation to the trust or the company he would refer them to Mr Armitage who would look after them. The transcript of the interview contained the following exchange:

Ok, so who decided to buy that property?

Mr Dunn: Alan did all of that. He just, he said, he'd be the broker, he'd go round and look for places to buy, and he'd just buy it through Sanctuary Property.

Mr Armitage would come around with papers for him to sign, which he would sign. He indicated in a slightly unclear exchange that he would sign blank cheques. He stated that he did not know Peter Crump, who is allegedly the settlor of the trust. The only person he knew was Mr Armitage. In one answer he said:

... Yeah, all I knew that I was the letterhead managing director of Sanctuary Properties, and that's all that I knew. Everything else I didn't really, he didn't tell me cause he said, "You don't need to know whatever happens now". He said, "You've got the property, it's under your name, under, as being the managing director, or the director of Sanctuary Properties." And then after that everything was just done through Alan, who'd just come round in the middle of the night and say, "Here, I need a autograph here.". Or, he'd just turn up out of the blue, just say, "Oh look, here, I need another signature here." And a couple of the signatures didn't, weren't the same as what I done. And the forge guy said, you know, "Is that yours?" I said, "Yes, that's mine." Is that yours?" And I'd go, "Yeah, that looks like mine." And "Is this yours?" "No, that doesn't look nothing like mine."

[26] Mr Robinson submits that this exchange can be construed as confirmation by Mr Dunn that some of his signatures that he saw were forgeries. In fact the exchanges are far from clear, although that is certainly a possible interpretation of the words used. Mr Dunn later said that Mr Armitage said to him (in a quote from the transcript):

Look, you don't need to know anything at all, Syd. I'll, the show will be run by me and everything, all you are is just on the letterhead you're the managing director of Sanctuary Properties.

Mr Robinson relies on these statements and others to similar effect as indicating that the company was a sham, and that effectively it was holding the property on trust for Mr Armitage.

[27] Mr Gould referred to the evidence of Mr Armitage and Mr Crump. Mr Armitage said that the trust was set up under the guidance of advisers and lawyers, and that Mr Crump made the decisions about setting up the trusts. He admitted that when the property was purchased a higher sale price was falsely shown on the agreement, and as a consequence a first mortgage in excess of the actual purchase price was obtained from the bank. Later in the interview he admitted that he appointed Peter Crump to replace Sydney Dunn (as he was entitled to do in accordance with his powers under the Trust Deed as “parent”). He asserted that the only benefit Mr Crump got from his involvement was as a friend.

[28] Mr Crump in his interview said that he was a friend of Mr Armitage, and that the setting up of the trust was not for his benefit. Initially in the interview he did not appear to know that Mr Armitage was a beneficiary. In explaining why he set up the Sanctuary Trust he said:

Yeah, and a lot of that happened [im]pinged on his inability to do business.

However, he then proceeded to deny that that was why he set up the trusts. He said that he did it “through the friendship that we have”. He said that he knew Mr Dunn. This was in contrast to what Mr Dunn said in his interview, which was that he did not know Mr Crump.

[29] In addition to pointing to the background factors relating to Mr Armitage’s general affairs already referred to, Mr Robinson relies on two letters. The first, a letter from Barfoot & Thompson dated 24 February 2009, addressed to Mr A Armitage, discusses the property and makes a recommendation about its sale. The second is a letter dated 20 January 2009 from the Manukau City Council to Sanctuary Propvest for the attention of Mr Crump, which records that members of the Council had a meeting on 11 December 2008 with Mr Armitage in relation to the property. These letters indicate that Mr Armitage had a close connection with the property, and are consistent with him having de-facto control.

[30] I consider that the following factors indicate a lack of intention on the part of Mr Armitage, Mr Crump and Mr Dunn to set up a genuine trust/company structure:

- a) The circumstances of the creation of the trust and purchase of the property arguably at the direction of Mr Armitage, at a time when he was prohibited by the provisions of the Insolvency Act 1967 from owning property. Indeed to own property would have been an offence (ss 60 and 128). It is reasonably arguable that he created the company to facilitate this unlawful act.
- b) Mr Dunn's lack of business knowledge and knowledge of the specific property purchase, his apparent lack of knowledge of Mr Crump, and his entire lack of substantive involvement in any of the property issues. The effect of his evidence was that he played no role in relation to either the trust or the company, other than to sign documents on request. He was the puppet of Mr Armitage, doing as he was bid. It is reasonably arguable that Mr Armitage was not only controlling the company. He was carrying out all actions for the company and essentially was the company in absolute disregard of the company structure.
- c) The signing of blank cheques by Mr Dunn, and the possible forging of the signatures, suggested by Mr Dunn. The company may have been created or its business conducted, in part, on the basis of at least some forgeries.
- d) Mr Armitage's control of the actions and affairs of the company, as described by Mr Dunn, and as indicated in the letters. This in itself does not necessarily indicate a sham, but must be considered with the other factors.

[31] In essence Mr Dunn's whole involvement appears to have been façade to hide Mr Armitage's control. It was never intended that Mr Dunn would function as a trustee or director, and he did not in any substantive way do so. He did what he was told by Mr Armitage.

Sanctuary Propvest: Can the corporate veil be pierced?

[32] Against this background it is necessary to consider what principled avenues are available to go behind the company structure. It must first be recognised that in New Zealand, company and trust structures are not lightly put to one side. New Zealand courts will not interfere with lawfully created entities, when they result from the parties arranging their affairs in accordance with their wishes and commercial convenience, providing the structures so created are genuine, and are intended to operate in accordance with their tenor. If parties wish to set up legal structures and transactions for a particular goal and they are legally created and the transactions take place, they will be enforced, even if they are for an ulterior commercial purpose. It was stated in *NZI Bank Limited v Euro-National Corporation Limited* [1992] 3 NZLR 528 (CA) at 539, following an established line of authority including *Re Securitibank Ltd (No. 2)* [1978] 2 NZLR 136 (CA), that the true nature of a transaction is to be ascertained by the careful consideration of the legal arrangements actually entered into and carried out. The parties are free to choose whatever lawful arrangements suit their purposes, providing they are not shams.

[33] While it is easy to assert that a structure is a sham, to give any such allegation teeth it is necessary to find a principled legal basis for putting the structure to one side and putting something else in its place. Otherwise to set aside a sham is to create a legal vacuum. The approach of the Official Assignee has been to argue that the transaction is a sham to such a degree that the real transaction was not reflected in the setting up of the trust and the company, and was to perpetrate an offence so as to allow a bankrupt to buy property effectively for his own use.

[34] It is necessary to consider whether the corporate veil could be lifted in such case. It was stated by Tipping J in *Chen v Butterfield* (1996) 7 NZCLC 261,086, at 261,092:

In essence the corporate veil should be lifted only if in the particular context and circumstances its presence would create a substantial injustice which the Court simply cannot countenance. Whether that is so must be judged against the fact that corporate structures and the concept of separate corporate identity are legitimate facets of commerce. They are firmly and deeply engrained in our commercial life. If they are genuinely and honestly used

they should not be set aside. In any event something really compelling must be shown to go behind them.

[35] As Paterson J stated at [44] of *Official Assignee v 15 Insoll Avenue Limited*:

It was accepted by Mr Morgan that there are structures, including standard family trusts, under which the Official Assignee would not be able to obtain declarations in respect of the trust property. I accept that submission and the finding in this case is not of general application. It is confined to the particular circumstances where a non-genuine structure, not operated genuinely either in accordance with its structure or according to company law principles, has been used as a front for Mr Russell. The special circumstances of the case entitle this Court to pierce the corporate veil.

[36] Paterson J did pierce the corporate veil in *Official Assignee v 15 Insoll Avenue Limited*. There, a Mr Russell incorporated a company with directors who were fictitious persons. Shares were issued to Mr Russell's minor children who did not receive any dividends and were not aware that they owned shares. Subsequent share issues and transfers were effected without the children's knowledge, and shares issued to Mr Russell's girlfriend were later transferred to his wife without her knowledge or approval. Mr Russell had the director, secretary and shareholders sign documents, the contents and effects of which they were not aware. Paterson J held that it was appropriate to pierce the corporate veil because of special circumstances indicating that it was a façade concealing the true facts, and because the company formed had not been genuinely and honestly used. He considered he was able to put the company structure to one side on the basis, first, that the company was a facade and a sham, and that the corporate veil could be lifted; and, secondly, because it was possible to find a category of constructive trust: at [39]-[40].

[37] In R Grantham and C Rickett *Company and Securities Law: Commentary and Materials* (2002) at 222, it is stated:

Though sparingly used, there is nevertheless a well-recognised jurisdiction whereby, even without a statutory mandate, the court can ignore the existence of the corporate entity and treat the acts of the company as those of the shareholder. This is termed "lifting the corporate veil". The grounds on which this jurisdiction may be exercised form something of a miscellany, but in broad terms there are three principal grounds. *The first is that the company is merely an agent of the shareholder.* While this is not truly a disregarding of the corporate entity, it is typically included within the list of factors that justify lifting the veil. *The second is that the corporate entity is a sham or facade designed to conceal the shareholder's involvement in the matter in question.* In *Adams v Cape Industries plc*, for example, the English

Court of Appeal found that a subsidiary created for the purpose of allowing Cape to operate in the United States of America, but without appearing to do so, was a sham. The third is that *the corporate entity is being used to perpetrate a fraud*. Thus, in *Gilford Motor Co Ltd v Horne*, Horne created the corporate entity to evade an agreement with his former employers not to solicit customers. The Court of Appeal found that this was a fraudulent use of the corporate entity. Consequently, Horne was found to be in breach of his agreement.

[emphasis added]

A Court should not intervene unless there is an element of impropriety in the setting up of the corporate structure: *Adams v Cape Industries plc* [1990] Ch 433 at 544, *Ard v Belhaven Pubs Ltd* [1998] 2 BCLC 447, 457.

[38] It would be artificial to regard Sanctuary Propvest as the agent of Mr Armitage. There is no evidence of an orthodox principal/agent relationship; rather, just Mr Dunn doing Mr Armitage's bidding, utilising the Sanctuary Propvest structure.

[39] I am satisfied that if a company structure has been set up as a façade, lacking in reality a structure involving shareholders and directors, but rather involving control by a single person in order to avoid or disguise legal duties or obligation on that person, that the Court can look behind that structure. This was the sort of sham that was put to one side in *Jones v Lipman* [1962] 1 WLR 832. Lipman had agreed to sell land to Jones, but subsequently transferred the land to a company, which he controlled, to avoid the sale. The Court was satisfied that the corporate veil should be pierced. Here, I have already found that it is seriously arguable that this company was set up to enable the bankrupt, Mr Armitage, to disguise what was in effect, acquisition of property by him.

[40] I am also satisfied that if a company is created as a sham or façade so that a person can perpetrate a fraud or carry out an unlawful activity, the Court may look behind the company structure. This sort of fraud was the basis of the piercing of the corporate veil in *Gilford Motor Co Ltd v Horne* [1993] 1 Ch 935, where the corporate entity was set up to enable a former employee to solicit customers of his former employer, despite an agreement not to do so. I have found that it is seriously

arguable that the company was created to by-pass the legal duty upon Mr Armitage as a bankrupt not to own property.

[41] I accept Mr Gould's submission that the facts in *Official Assignee v 15 Insoll Avenue Limited* involved forgery, and the use of the identities of children and persons without their permission, and that the sham was more blatant than the façade relied on here by the Official Assignee. However, the issue may only be one of degree. There is some evidence to suggest forgery, and of Mr Dunn's persona being used without his knowledge at the time. There is enough to show a seriously arguable question that the company was a sham to a degree that it is necessary to lift the corporate veil to expose the real situation. It may well be that a sufficient degree of impropriety is shown to warrant such a step.

[42] If the Court looks under a corporate veil, what can it expect of find? It cannot be a void. There must be some other person, different from the company, that holds the property in question on a recognisable legal or equitable basis. Who is that person here? Mr Gould submits that the person cannot be the Official Assignee in this, Mr Armitage's third bankruptcy, as it was the second bankruptcy that applied in 2002 when the property was purchased. He submits that under the veil there is no more than the existing shareholder, Mr Crump, who holds the shares on trust for the Sanctuary Trust. The Official Assignee cannot use the position of Mr Armitage's frustrated creditors whose interests it must pursue, to take on for itself some ownership mantle. Mr Gould argues that it is not possible to discern a basis upon which Mr Armitage could claim to be the beneficiary of a constructive trust, and that the Official Assignee cannot transform Mr Armitage's position into that of a claimant simply because it has the mantle of the interests of Mr Armitage's creditors.

[43] This issue was addressed in *Official Assignee v 15 Insoll Avenue Limited*, where Paterson J concluded that the lifting of the corporate veil meant that the person who created the company structure, Mr Russell, had to be treated as the owner of the property, or as the beneficiary pursuant to a constructive trust: [42]. Paterson J stated at [39]:

While I propose to resolve this matter by piercing the corporate veil, it may have also been possible to resolve it under another category of constructive

trust referred to by Grantham and Rickett. Under this category equity recognises a present equitable property right.

[44] It is necessary to consider the nature of constructive trusts. The distinction between institutional constructive trusts and remedial constructive trusts was discussed by Tipping J in *Fortex Group Ltd (In Receivership and Liquidation) v MacIntosh* [1998] 3 NZLR 171 (CA) at 172-173:

An institutional constructive trust is one which arises by operation of the principles of equity and whose existence the Court simply recognises in a declaratory way. A remedial constructive trust is one which is imposed by the Court as a remedy in circumstances where, before the order of the Court, no trust of any kind existed.

The difference between the two types of constructive trust, institutional and remedial, is that an institutional constructive trust arises upon the happening of the events which bring it into being. Its existence is not dependent on any Order of the Court. Such order simply recognises that it came into being at the earlier time and provides for its implementation in whatever way is appropriate. A remedial constructive trust depends for its very existence on the Order of the Court; such order being creative rather than simply confirmatory.

[45] I respectfully adopt the observations of Glazebrook J in *Commonwealth Reserves I v Chodar* [2001] 2 NZLR 374 at [36]-[37]:

[36] Should a constructive trust be imposed in these circumstances? To answer this it is probably useful to start with some general comments about constructive trusts. Constructive trusts are distinct from any other form of trust in that they are not directly dependent on the intention of the parties. Express and implied trusts arise from the actual or inferred intention of the parties, while resulting trusts are based on the presumed intention of a transferor of property. In contrast to this, a constructive trust is imposed by the operation of a rule of law, and possibly through the exercise of the Court's remedial discretion.

[37] It is also important to realise that a constructive trust is a means to an end. While it bears the name "trust," it is in some cases simply a mechanism to enforce personal accountability with proprietary consequences. The object of a constructive trust is generally not to create an ongoing trust relationship, but to force the disgorging of money or property by the constructive trustee. Viewing the constructive trust in this light highlights its remedial aspect

[46] A constructive trust arises therefore by operation of law in circumstances where it would be unconscionable for the holder of property to assert a beneficial interest in that property because the holder's conscience required the recognition of the beneficial claim of another. It is on its face odd to apply such a doctrine to a

situation such as this, where the essential allegation is that the person beneficially entitled is the person guilty of creating the unconscionable situation. If the Official Assignee is right, the beneficiary of the trust gets equity to intervene notionally to protect his interest, but here against his express wishes. It is necessary to consider whether it is misusing the constructive trust concept to apply it against the interests and wishes of the beneficiary, at the behest of the Official Assignee.

[47] The constructive trust is a flexible remedy, not limited in its application to the status of the plaintiff. It has evolved to meet situations where the intervention of equity is required to prevent the holder of property from acting inequitably. It would certainly be arguable if Mr Dunn himself had sought to not follow Mr Armitage's wishes and used the company for purposes contrary to those wishes, that Mr Armitage could claim that Mr Dunn was acting in breach of the trust. It is open to be concluded that there was a mutual understanding between Mr Armitage and Mr Dunn that Mr Dunn was, through the façade of the company, holding the property for his friend, and that he was obliged to do whatever he asked.

[48] That argument could be met with the response that Mr Armitage as the beneficiary did not come to seek equity with clean hands. However, such an argument cannot apply to the Official Assignee. It did not deter Paterson J in his consideration of the issue in *Insoll 15*. The Official Assignee is not in the same position as Mr Armitage. The Official Assignee has a role separate from that of the bankrupt: *Heath and Whale on Insolvency* at 4.65. It would be contrary to ordinary notions of fairness and equity to decline the Official Assignee's claim, just because Mr Armitage had contrived the situation. In *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316, Tipping J addressed this issue in relation to a claim by a company in liquidation, where it was submitted that the company was complicit in the alleged breaches of trust. He held at pp 330-331:

Although in strictly analytical terms it is the same legal entity as it was when the allegedly fraudulent breaches of trust occurred, the hands controlling it are now those of the liquidator and not those of the directors. There cannot be any suggestion that the liquidator's hands are unclean. In substance the liquidator, through the vehicle of the company, is suing on the first cause of action for the benefit of the clients of Marshall Futures Ltd whose funds have been lost. I agree that at first blush it may appear a little bizarre that the

nominal plaintiff is asserting its own fraudulent breach of trust as part of its cause of action against its officers.

It seems to me however that in these particular and unusual circumstances the corporate veil can reasonably be lifted to reflect the reality of what is going on. There can be no disadvantage or injustice to the defendants in so doing.

[49] There is a distinction between a company in liquidation, which is the same legal entity as the company, and the Official Assignee, who is a different legal entity to the bankrupt. The point made by Tipping J applies, therefore, all the more strongly to the Official Assignee. It cannot be suggested that the Official Assignee's hands are unclean.

[50] I prefer to regard Mr Armitage as the beneficiary of a constructive trust, rather than simply asserting that the corporate veil is lifted and that Mr Armitage is the owner, (the first approach of Paterson J in *Insoll 15*). That approach requires the Court in a de facto way to set aside legal structures that are in place, and to ignore all that has happened since 2002. It is difficult to see a principled way to take such a radical step. This problem does not arise, however, if the company structure is treated as existing, but as evidencing a constructive trust where the company is the trustee, and the controlling person the beneficiary. The company does exist as an incorporated entity. Its veil may be lifted to show its true guise, which is to be an entity to hold property for Mr Armitage.

[51] Mr Gould argues that if the corporate veil is lifted, that beneath it there is the Trust, and the Official Assignee is no better off. However, the approach of lifting the corporate veil and finding a constructive trust does not mean that the shareholder is assumed to be the beneficial owner. It is the person in control, and who has the real beneficial entitlement, who should be regarded as the beneficiary, whether that person is a shareholder or not. The Official Assignee also argues that in any event, the trust is a sham and the alter ego of Mr Armitage, and should be put to one side, and Mr Armitage recognised as the real owner. I find in [53] –[59] that this is reasonably arguable.

[52] I conclude that it is reasonably arguable that the corporate veil of Sanctuary Propvest should be pierced, and that the consequence could be that Mr Armitage has a beneficial interest in the property by virtue of a constructive trust.

The Sanctuary Trust – can it be disregarded as a sham?

[53] Before a trust is to be regarded as a sham, it must be shown that it is intended by the parties to have an effect different from its objectively determined legal effect: *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449 (FCA) at 456, *Official Assignee v Wilson* [108]. The fact that there is factual control by someone other than the trustee does not mean that the trust is a sham. It was stated in *Official Assignee v Wilson* at [69]:

The assumption of factual control by someone other than a trustee (or a sole trustee if there is more than one trustee) or by someone without legal right to exercise such power cannot of itself invalidate a trust. As noted by Jessica Palmer [“Dealing with the Emerging Popularity of Sham Trusts” [2007] NZ Law Rev 81] at 89:

The alter ego, as factual control, should be an impotent, meaningless concept. In the eyes of the law, factual control has no effect on legal ownership. Indeed, a stranger who takes control of trust assets will be considered a trustee de son tort and be liable to account for the property of beneficiaries. Factual control of trust property cannot justify recognition that the controller thereby owns the trust assets.

...

The alter ego concept, as it relates to factual control, serves to attribute an individual’s actions to those of the organisation that he is controlling. It is not a mechanism whereby an individual can appropriate property to him or herself by virtue of the control that he or she exercises.

[54] In *Kain v Hutton* [2008] 3 NZLR 589, there was a vesting of shares in a trust for the benefit of a number of parties, where the trustees distributed assets to one of the beneficiary parties (Mrs Couper) who immediately resettled them on discretionary trusts for the benefit of her and her relatives and husband. It was held by Blanchard J at [23]:

We therefore have no doubt at all that Mrs Couper and her co-trustees saw considerable benefit to her in the vesting of the Ponui shares in the trust which she established. It put her in effective control of those shares with the ability to take the benefit herself or, if she saw fit, to pass all or some of it to

her daughters or other family members. The factor which makes it impossible to accept that the resettlement was somehow forced on her for the benefit of non-objects is her complete ongoing control of the trust through the ability to appoint and remove trustees and discretionary beneficiaries. This factor makes it, in our view, hopeless to contend that there was some ulterior or collateral purpose at work. The trustees were perfectly entitled to benefit Mrs Couper in this way and to select her as the object to be benefited to the exclusion of the other discretionary objects ...

[55] It is implicit in the statement that it is permissible for a person who has the power of appointment of trustees and discretionary beneficiaries to exercise control of the trust. Mr Armitage, it is submitted by Mr Gould, was doing no more than this. He may have been in control, but that in itself does not mean that the trust is a sham or invalid. As was stated in *Official Assignee v Wilson* at [93]:

To draw the inference of a sham in the absence of direct evidence needs compelling material. Such a finding cannot be made if another inference is at least open on the evidence: *Sharrment v Official Trustee*.

[56] Here there is evidence, already referred to, from which it could be concluded that Mr Armitage and Mr Crump when they set up the trust, intended that it not operate as a trust at all, but rather as a vehicle which Mr Armitage would not only control, but treat as his own without reference to the others. The company in which the Trust owned the shares would buy the property using a friend (initially Mr Dunn), who pretended that he was a trustee for the trust, while in reality he was a trustee only for Mr Armitage, who was effectively the sole beneficiary.

[57] It was observed in *Official Assignee v Wilson* in relation to a sham trust at [19]:

There is an understandable perception that the OA was maintaining a position on behalf of those creditors of Mr Reynolds who were left lamenting because of his insolvency. That cannot overcome the fact that the OA cannot, as a matter of law or logic, be in a greater or different position than Mr Reynolds himself.

[58] In this case Mr Armitage, unlike Mr Reynolds in *Official Assignee v Wilson*, was a discretionary beneficiary of the trust. The Official Assignee has a reasonable argument that he is in the position of Mr Armitage, and that the position is that of beneficial owner of the property. It may be when this case goes to trial, that it is found to be the position that there was no trust structure in place as set out in the

Sanctuary Trust deed, but rather a different trust altogether, where Mr Dunn and then Mr Crump owned the shares on behalf of Mr Armitage, and would do his bidding in any matter. There is no difficulty in a constructive trust being imposed in relation to property owned by a trust: *Prime v Hardie* [2003] NZFLR 481, [30].

[59] Thus, even if the effect of setting aside the corporate veil was that the Trust as shareholder was the beneficial owner of the property, that trust may be set aside, and Mr Armitage treated as the beneficial owner of the property.

Conclusion

[60] The Courts must be vigilant not to let a sense of suspicion or unfairness lead to the setting aside of properly created commercial structures. In the absence of legislative intervention, companies and trusts if lawfully created and if intended to operate in accordance with the law and the dictates of a corporate structure, cannot be ignored. To do so would be to create commercial instability. Any reform in the area cannot be effected by ad hoc decisions of the Courts, based on perceptions of fairness to creditors.

[61] However, here the evidence goes further than to show only the creation of a discretionary family trust. It is seriously arguable that the company and the trust set up by Mr Armitage were vehicles of deception or even fraud, designed by Mr Armitage to enable him to do something unlawful and against the interests of his creditors, namely to enable him to own property while bankrupt. It is arguable that to achieve this result he set up structures which were never intended to operate according to their legal tenor. The company was not intended to operate as a company at all, but rather as an entity where an ignorant Mr Dunn would do or sign whatever he was asked to enable his friend Mr Armitage to have the benefits of property ownership. The trust, it will be argued, was set up for the same purpose.

[62] These issues arising, it is therefore seriously arguable that the Official Assignee has an interest in the property through Mr Armitage's beneficial interest. The application that the caveat not lapse must therefore succeed.

Result

[63] The application is granted, and an order is made that caveat number 7888616.1 not lapse. It is made on condition that the Official Assignee make all reasonable efforts to bring the substantive proceedings to an early hearing, with leave reserved to the respondent to seek to renew the application if such reasonable efforts are not made.

Costs

[64] The applicant has been successful and is entitled to costs on a 2B basis, together with disbursements.

.....
Asher J