Gardner & Anor v Mattila [2015] NTCA 1

PARTIES:	GARDNER, Kelvin and GARDNER, Hydee Elanore v MATTILA, Allan Michael Jorma By his litigation guardian TERESA LATZER
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 10 of 2012 (21032189)
DELIVERED:	20 FEBRUARY 2015
HEARING DATES:	8 APRIL 2014
JUDGMENT OF:	KELLY, BARR & HILEY JJ
APPEAL FROM:	SOUTHWOOD J

CATCHWORDS:

EVIDENCE – Witnesses – Conclusions capable of being drawn from evidence – Conclusions reached by the trial judge available on the evidence – Appeal dismissed

EQUITY – Fiduciary obligations – Duties of non-professional trustees exercising powers of investment – Trustee Act s 6 and s 7 – Duty to exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of other people – Imprudent expenditure of money –

Overcapitalisation of property – Breach of fiduciary obligations – Cross-appeal allowed

Trustee Act ss 6(1)(b), 7(1)(a), 7(1)(b), 7(1)(d)

Cohen v Cohen (1929) 42 CLR 91; *DeVries v Australian National Railways Commission* (1993) 177 CLR 472; *Fox v Percy* (2003) 214 CLR 118; *Mattila v Gardner & Anor* [2012] NTSC 76; *Mattila v Gardner & Anor* [2013] NTSC 32; *Re Dawson (decd)* [1966] 2 NSWLR 211, referred to.

Rae v Meek (1889) 14 App Cas 558; *Re De Clifford's (Lord) Estate* [1900] 2 Ch 707, followed.

REPRESENTATION:

Counsel:

Appellant:	A Wrenn
Respondent:	A Young

Solicitors:

Appellant:	
Respondent:	Bradley Solicitors

Judgment category classification:	B
Number of pages:	23

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Gardner & Anor v Mattila [2015] NTCA 1
No. AP 10 of 2012 (21032189)

BETWEEN:

KELVIN GARDNER and
HYDEE ELANORE GARDNER
Appellants

AND:

ALLAN MICHAEL JORMA MATTILA
By his litigation guardian
TERESA LATZER
Respondent

CORAM: KELLY, BARR & HILEY JJ

REASONS FOR JUDGMENT

(Delivered 20 February 2015)

THE COURT:

Background

[1] The respondent, Mr Mattila was the plaintiff at first instance. He is the only child of Allan Jorma Mattila ("the deceased"), who died intestate on 17 September 2005. The deceased's estate consisted of seven parcels of land respectively located at 60 Oxford Road, 100 Oxford Road, 110 Oxford Road, 115 Oxford Road, 120 Oxford Road, 111 Finn Road and 125 Finn Road, Berry Springs in the Northern Territory, some cash in the ANZ Bank,

life insurance policies and sundry other items. Mr Mattila inherited the whole of his father's estate in early 2006.

[2] After Mr Mattila inherited his father's estate he and the appellant Mr Gardner (who was the first defendant at first instance) made an agreement, recorded in a document headed "Lease Agreement", to develop a takeaway store and caravan park on the land at 115 Oxford Road.

[3] The Lease Agreement stated:

> I Michael Mattila of 115 Oxford Road Berry Springs agree to lease to Kelvin Gardner the whole of the property known as Berry Springs Store and Berry Springs caravan Park, including all contents fixtures and machinery on the said property. The property comprises all of the land known as 115 Oxford Road, Berry Springs, section 1809 Hundred of Ayers.
>
> The lease to be for 10 years from the date of signing with a 10 year option.
>
> The rent is to be negotiated upon completion of shop, ablution block and surrounding land.
>
> I Michael Mattila agree that I will pay for all repairs, improvements and building on section 1809 Hundred of Ayers.

[4] The development of the caravan park at 115 Oxford Road, Berry Springs was financed by the sale of five of the parcels of land that Mr Mattila had inherited from his father's estate and was supervised and largely undertaken by Mr Gardner with the assistance of Mr Mattila. Four of the parcels of land were sold by Mr Gardner using a power of attorney granted to him by Mr Mattila. The money from the sale of that land was deposited in a building account operated by Mr Gardner under that power of attorney and a

large portion of the money was spent on the development of the takeaway store and caravan park. It was alleged, and subsequently established after an account, that some of the money was misappropriated by Mr Gardner.

[5] The fifth parcel of land (Lot 120 Oxford Road) was sold to the second appellant, Mr Gardner's daughter, Ms Hydee Gardner (who was the second defendant at first instance) for $160,000. According to a valuation report tendered at the trial, it was worth $260,000 at the time of the transfer. Ms Gardner later sold it for $273,000. The difference between the purchase price and the resale price ($113,301.98) was paid into court to await the outcome of the proceeding.

[6] After the development of the takeaway store and caravan park had reached a certain stage, Mr Gardner went into occupation of the takeaway store and caravan park. However, no lease was entered into, and Mr Gardner paid no rent to Mr Mattila.

[7] Mr Mattila and Mr Gardner had a falling out. Mr Mattila revoked the power of attorney and sued Mr Gardner claiming:

(a) undue influence in relation to the sale of 120 Oxford Road to his daughter at an undervalue;

(b) conflict of interest, breach of trust, breach of fiduciary duty and breach of statutory duty in relation to the creation of an account known as the AMJ Mattila - Building Account to which Mr Gardner was the sole

signatory, the payment of Mr Mattila's money into that account, and the payment of moneys out of that account;

(c) damages for negligence for the economic loss suffered as a result of Mr Gardner's failure to take reasonable care to ensure that the blocks of land at 125 Finn Road and 60 Oxford Road were sold for their true value;

(d) breach of his fiduciary duties by pursuing the development of the caravan park and takeaway store at 115 Oxford Road; and

(e) a declaration that the Lease Agreement is void for uncertainty.

[8] Mr Gardner counterclaimed for:

(a) damages for breach of the Lease Agreement (for failing to complete the renovations and infrastructure to the property, and failing to provide a lease to Mr Gardner);

(b) *quantum meruit* for the work that Mr Gardner performed for the betterment of the respondent's land at 115 Oxford Road in developing the store and caravan park on that land from March 2006 to 30 June 2010; and

(c) a constructive trust arising out of money that Mr Gardner claimed he had spent on the works that were undertaken on the land at 115 Oxford Road.

[9] The learned trial judge gave judgment for Mr Mattila on:

(a) the claim for undue influence in relation to the sale of 120 Oxford Road to Mr Gardner's daughter at an undervalue (ordering the payment out to Mr Mattila of the $113,301.98 in court plus accumulated interest);

(b) the claims relating to misappropriation of money from the AMJ Mattila - Building Account (ordering Mr Gardner to account for the disbursement of funds from that account and to pay to Mr Mattila any amount which was found to have been misappropriated or wrongly disbursed);

(c) the negligent sale of the land at 60 Oxford Road, Berry Springs only (awarding damages of $90,000); and

(d) the claim for a declaration that the Lease Agreement was void for uncertainty.

[10] The further sum found to be owing by Mr Gardner to Mr Mattila following the account was $160,465.54.

[11] His Honour dismissed Mr Mattila's claim that Mr Gardner had breached his fiduciary duties by pursuing the development of the caravan park and takeaway store, and the claim that 125 Finn Road was sold at an undervalue.

[12] On the counterclaim his Honour gave judgment for Mr Gardner for $124,000 on his *quantum meruit* claim and dismissed Mr Gardner's other claims.

The Appeal

[13] Mr Gardner has appealed from the whole of the judgment[1] on the following grounds:

1. The decision was unjust and unfair.

2. The decision was based on factual findings by the trial judge that were incorrect.

3. The decision was based upon a ruling during the trial disallowing admission of relevant evidence that caused a miscarriage of justice.

[14] The orders sought are:

1. Judgment for the First Appellant.

2. Judgment for the Second Appellant.

3. Judgment for the First Appellants [sic] Counterclaim.

[15] Ground 3 was abandoned on the hearing of the appeal. Grounds 1 and 2 were argued together.

On the hearing of the appeal, counsel for Mr Gardner indicated that the appellants' essential complaint was that the learned trial judge had accepted a submission by counsel for the respondent that Mrs Donna Gardner had lied in giving evidence. The part of the judgment about which the appellants complain is [104] in which his Honour stated:

[1] Presumably this was intended to refer only to those parts of the judgment on the claim and counterclaim which were unfavourable to Mr Gardner.

> Mr Young submits that in this case Mrs Donna Gardner told a clear lie about the gambling at the Litchfield Tavern. She said that Mr Gardner had his own money and did not drink and gamble with the plaintiff's money. This was contradicted by Mr Gardner. Mr Young said that she also told a lie about giving "change" to Mr Mattila. That assertion was made for the first time while she was under cross examination and was not supported by Mr Gardner. He also said that they both told a lie in saying that they did not know what happened to a significant amount of the $21,000.00 that was not transferred to the Berry Springs Caravan Park and Takeaway Account during the period in which the balance of the AMJ Mattila – Building Account was transferred to that account. Their evidence about this simply beggars belief. I accept Mr Young's submission in this regard.

[16] The underlined portion of that paragraph relates to the affidavit of Donna Gardner sworn 20 February 2012 paragraph 84 in which she says, "I recall Kelvin paid for drinks and bet with his own money." The appellants complain that counsel has added his own sentence to the sworn affidavit; that, in effect, Mr Young added a gloss to Mrs Donna Gardner's evidence which was not warranted by the words of the affidavit, and that this was wrongly accepted by the trial judge.

[17] In our view this complaint is baseless. There is a clear implication in Mrs Gardner's affidavit that Mr Gardner did not drink and gamble with the plaintiff's money. There would be no other point to her making this assertion in the affidavit. The fact that Mr Gardner sometimes paid for his own drinks and bet with his own money would have no relevance whatsoever to the proceeding. The sole relevance of her evidence to the effect that Kelvin paid for drinks and bet with his own money would be to counter the allegation that he sometimes drank and gambled with

Mr Mattila's money. Counsel for the respondent was perfectly justified in drawing that inference from Ms Gardner's evidence and the trial judge was not in error in accepting counsel's submission to that effect.

[18] The appellants also complain that the learned trial judge was wrong to accept the submission from counsel for the respondent that Mrs Gardner told a lie about giving Mr Mattila the "change" from cheques cashed by the Gardners (after purchasing items for the development of the caravan park or other items for Mr Mattila), and in finding that her assertion to this effect was not supported by Mr Gardner. Counsel for the appellants pointed to a portion of the cross-examination of Mr Gardner in which he was asked about how much he would have given back Mr Mattila in change after cheques were cashed and he had bought what was required. Mr Gardner said, "Whatever was left unless he wanted me to hold onto it for the next day".[2]

[19] However, as counsel for the respondent has pointed out, counsel for Mr Gardner at the trial conceded that 50% of the sum claimed as "Litchfield Tavern cheques disbursement" ($110,886) had been misappropriated by Mr Gardner and used by him for drinking and gambling at the Litchfield Tavern. He also conceded that the difference between the amounts of the cash cheques cashed by Mr Gardner and the authorised expenditure evidenced by receipts or other documents had been misappropriated. This came to $75,320.93. This concession directly contradicted Mrs Gardner's

[2] Transcript of proceedings (29 February 2012), p 360

claim that unspent amounts were returned to Mr Mattila as change after the cheques were cashed. His Honour was justified in making a finding, in light of these matters, that Mrs Gardner had lied. This is so regardless of whether Mr Gardner had, in one part of his cross-examination, made some reference to having given change to Mr Mattila.

[20] The appellants further complained that his Honour had erred in accepting the submission by Mr Young that both Mr and Mrs Gardner had lied in saying that they did not know what happened to a significant amount of the $21,000 that was not transferred to the Berry Springs Caravan Park and take away account. The appellants complain that Mrs Gardner was not cross-examined about the $21,000. In response to this submission, counsel for the respondent pointed out that Mrs Gardner was in fact cross-examined about the $21,000 and provided transcript references. Mrs Gardner's evidence about the ten cheques in question was contained in a spreadsheet attached to her affidavit sworn on 20 February 2012. This evidence from her trial affidavit was different from the explanation given in the account document prepared by Mrs Gardner after the order for an account.

[21] Counsel for the respondent concedes that his submission that Mrs Gardner had said that she did not know what had happened to the $21,000 was incorrect. The true position is that Mrs Gardner gave false explanations for what had happened to the $21,000 in her trial affidavit. It was Mr Gardner who said he did not know what had happened to the $21,000.

[22] Nothing flows from this. The finding that Mr and Mrs Gardner had lied about the $21,000 did not lead to a judgment in relation to any part of that sum at the first hearing. His Honour simply made an order to account in relation to that and other sums. After the accounting process it was found that the sum of $1,000 of this $21,000 had been misappropriated by Mr Gardner and the balance was properly accounted for.[3]

[23] The appellants complain that his Honour failed to take into account inconsistencies in the respondent's affidavit evidence and say that if he had done so "the fabrications and premeditated allegations would have been clear to his Honour". Purported examples were given by counsel at the hearing of the appeal. They included a statement in Mr Mattila's affidavit (sworn in 2010) to the effect that he is an alcoholic, which was said to contradict this evidence given in cross-examination at the trial (in 2012):

> MR WRENN: I put it to you that during this period from 6 February to 29 March 2006 *[a time when Mr Mattila was in Broome with his girlfriend]* that you took the money out of the bank and had a heavy drinking and partying spree during that period of time?
>
> MR MATTILA: I was drinking, yeah, but don't say I was heavily a drinker, yeah.

[24] These two pieces of evidence are not contradictory.

[25] It was also said that he contradicted himself at times over whether or not he had made certain loans to Mr Gardner by authorising him to draw cheques for himself. In each case the extracts from the evidence referred to did not

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[3] This was as a result of counsel for Mr Mattila only pressing for $1,000 of this claim.

unequivocally demonstrate any contradictions in Mr Mattila's evidence. Rather the impression gained was of a confused and cognitively impaired man with no clear conception of the term "loan" as distinct from the concept of "he got that money", struggling with counsel's questions. At the time of the trial, Mr Mattila was a chronic alcoholic who had started drinking alcohol when he was 13 or 14 years of age. A psychological assessment tendered at the trial found him to have a low IQ suggestive of mental retardation. He had very limited literacy and numeracy skills.

[26] Counsel for the appellants submitted that Mr Mattila had made a false claim in relation to misappropriation of the contents of a safe deposit box. (An early letter from his solicitors made such a claim and in cross-examination Mr Mattila was said to have admitted opening the box himself.) However, the evidence does not support the allegation that Mr Mattila deliberately made a false claim. It is not even clear that the two pieces of evidence referred to in the appellants' submission (the letter and the answers in cross-examination) referred to the same safe deposit box; indeed they appear on the face of them to refer to different boxes.

[27] In any case none of the asserted contradictions nor the purported false claim related to the substance of either Mr Mattila's claims or Mr Gardner's counterclaims. Neither were they said to have been relevant to any particular findings of fact by the trial judge; the appellants simply asserted that, because of these matters, his Honour should have formed a negative impression of Mr Mattila's credit.

[28] Counsel for the appellants submitted that Mr Mattila's evidence was "glaringly improbable", "contrary to compelling inferences" or "inconsistent with facts incontrovertibly established on the evidence",[4] and that, therefore, this Court should overturn the trial judge's findings of fact, notwithstanding that they may have been based on findings of credit.

[29] We do not agree. Mr Mattila's evidence was relatively straightforward and none of the examples relied on by counsel for the appellants (and referred to above) were improbable or inconsistent with facts established on the evidence. The appellants have not shown any reason why his Honour ought not to have accepted the evidence of Mr Mattila which forms the basis of any of his Honour's findings.

[30] The appeal is dismissed.

The Cross Appeal

[31] The cross appeal concerns alleged breaches of duty by the first appellant, a non-professional trustee, in relation to trust monies which were spent by him on building works which were uncommercial (in the sense that the value which such works added to the respondent's land was only a fraction of the cost of the works) and the consequences of such breaches.

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[4] *DeVries v Australian National Railways Commission* (1993) 177 CLR 472 per Brennan CJ, Gaudron and McHugh JJ at 479; *Fox v Percy* (2003) 214 CLR 118; HCA 22 per Gleeson CJ, Gummow and Kirby JJ at [29]

[32] In dismissing Mr Mattila's claim that Mr Gardner had breached his fiduciary duties by pursuing the development of the caravan park and takeaway store his Honour said:

> Contrary to what is pleaded in paragraph 15 of the Further Amended Statement of Claim, Mr Gardner did not breach his fiduciary duties by pursuing the development of the caravan park and takeaway store. Nor did that pursuit give rise to a conflict of interest between his interest and the interests of Mr Mattila. Further, contrary to what is pleaded in paragraph 16 of the Further Amended Statement of Claim, Mr Gardner did not breach any trust or fiduciary duty by entering into the Lease Agreement. The Lease Agreement was entered into before any trust or fiduciary duties arose. Nor does the fact that the Lease Agreement may have been risky, or uncommercial or unprofitable give rise to a breach of trust or breach of fiduciary duty. Many commercial ventures fail. That is not to say they were not undertaken bona fide. Mr Gardner also stood to lose if the venture ultimately failed. It was not pleaded that Mr Gardner was negligent in the manner that he conducted the development works.[5]

[33] In written submissions, counsel for the respondent noted that the trial judge had held that Mr Gardner became a trustee for Mr Mattila after the Lease Agreement was signed because he was the sole signatory of the AMJ Mattila - Building Account, operated the account, supervised the development works on Lot 115 Oxford Road, and conducted Mr Mattila's business affairs pursuant to a power of attorney.[6] Mr Young contended that, that being so, the breach of fiduciary duty consisted not of entering into the Lease Agreement in the first place, but of imprudent expenditure of money in carrying out the development.

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5 *Mattila v Gardner & Anor* [2012] NTSC 76 at [84]

6 *Mattila v Gardner & Anor* [2012] NTSC 76 at [82] See also *Cohen v Cohen* (1929) 42 CLR 91: a person having a power of attorney to sell property and deal with the proceeds in a separate account was held to be a trustee.

[34] The duties of a non-professional trustee exercising a power of investment are set out in s 6 and s 7 of the *Trustee Act*. These duties apply to Mr Gardner in the circumstances: he was exercising a power of investment by supervising and making decisions about the expenditure of trust money in developing the caravan park and shop, intended to be an income producing asset. They include the duty to exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of other people,[7] a duty not to invest in speculative or hazardous investments,[8] a duty to take advice,[9] and a duty (as trustee exercising a power of investment) to exercise that power in the best interests of the beneficiary.[10]

[35] Unfortunately for those with little education and skill who take on the duties of a trustee, the standard is an objective one, independent of the skill and prudence the trustee in question personally possesses.[11]

[36] Counsel for the respondent contends that Mr Gardner discharged none of these duties. He contended that no consideration was given by Mr Gardner to the best use of Mr Mattila's money, no alternative use or investment was considered, no business plan was prepared, no legal or financial advice was

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7 *Trustee Act* s 6(1)(b)
8 *Trustee Act* s 7(1)(b)
9 *Trustee Act* s 7(1)(d)
10 *Trustee Act* s 7(1)(a)
11 Heydon JD and Leeming MJ, *Jacobs' Law of Trusts in Australia* [1718] at p 386 and the cases cited therein: *Rae v Meek* (1889) 14 App Cas 558 at 569; *Re De Clifford's (Lord) Estate* [1900] 2 Ch 707 at 716.

sought on Mr Mattila's behalf, and the risk of overcapitalization (which eventuated) was not considered.[12]

[37] We think it is clear that for the bulk of the time when the development was being carried out, Mr Gardner was a trustee for Mr Mattila of the money in the AMJ Mattila - Building Account and owed fiduciary duties to Mr Mattila in relation to that money.

(a) The Lease Agreement was signed on 13 March 2006.[13]

(b) The next day, Mr Mattila gave the first power of attorney to Mr Gardner and it was registered two days after that on 16 March 2006.[14]

(c) Mr Gardner opened the AMJ Mattila - Building Account on 4 May 2006 with himself as sole signatory. (Mr Mattila had apparently asked Mr Gardner to open the account to keep the money away from Mr Mattila's then girlfriend, not as a step in implementing the Lease Agreement.)[15]

(d) It was admitted in the defence that Mr Mattila reposed trust and confidence in Mr Gardner in relation to his financial affairs[16] and also that he was acting as trustee during the material times.[17]

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12 Cross-examination of Donna Gardner, transcript of proceedings (28 February 2012) pp 207-215

13 *Mattila v Gardner & Anor* [2012] NTSC 76 at [9]

14 *Mattila v Gardner & Anor* [2012] NTSC 76 at [12]

15 *Mattila v Gardner & Anor* [2012] NTSC 76 at [14]

16 *Mattila v Gardner & Anor* [2012] NTSC 76 at [49]

(e) The trial judge found that Mr Gardner "largely took over the management of Mr Mattila's affairs",[18] supervised the development works,[19] that after the Lease Agreement was made Mr Gardner became a trustee and incurred fiduciary obligations towards Mr Mattila,[20] and that Mr Gardner was in the position of trustee and attorney in relation to the money in the AMJ Mattila - Building Account.[21]

[38] It seems to us that it is no answer to Mr Mattila's claim for breach of fiduciary duty in connection with the development works, to say that Mr Mattila entered into the Lease Agreement (pursuant to which Lot 115 Oxford Road was to be developed into a caravan park) before the fiduciary relationship arose. Mr Gardner owed Mr Mattila fiduciary duties in expending Mr Mattila's funds in carrying out that development, and those duties included the duties set out at [34] above. The question is whether he breached those duties.

[39] In assessing whether Mr Gardner breached the fiduciary duty he owed to Mr Mattila, the Court must consider three main issues:

(a) How much money was spent on the development of the caravan park and shop?

(b) What was the improvement in its value as a result of that spending?

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17 Further Amended Defence paragraph 13(d), *Mattila v Gardner & Anor* [2012] NTSC 76 at [50]
18 *Mattila v Gardner & Anor* [2012] NTSC 76 at [57]
19 *Mattila v Gardner & Anor* [2012] NTSC 76 at [82]
20 *Mattila v Gardner & Anor* [2012] NTSC 76 at [82]
21 *Mattila v Gardner* [2013] NTSC 32 at [5]

(c) Was the difference in these amounts such as to lead to the conclusion that Mr Gardner had breached his fiduciary duty?

[40] Ascertaining how much was spent on the improvements is not straight forward. In his supplementary submissions, counsel for Mr Mattila calculates the amount so spent as $451,003.77. He derives this by deducting the amount Mr Gardner withdrew from the AMJ Mattila - Building Account ($828,814.89) the following sums:

(a) the amount found to have been misappropriated ($160,465.54);[22]

(b) the amount ultimately agreed by the parties (following the accounting) to have been drawn by Mr Mattila for his own purposes ($143,672.20);[23] and

(c) the amount spent on machinery or repairs of machinery and equipment ($73,673.38);[24]

[41] This figure may not be accurate because it assumes that all moneys not misappropriated, drawn by Mr Mattila, or spent on machinery and repairs to machinery and equipment, were spent on the development of the caravan park. That assumption may not be entirely correct. For example, it appears that Mr Mattila agreed to accept some amounts less than he had originally claimed by way of compromise. It follows that the amount misappropriated

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22 *Mattila v Gardner* [2013] NTSC 32 at [32]

23 This figure is taken from the account attached to the affidavit of Donna Gardner sworn on 20 February 2012 annexure DG1

24 This figure is likewise taken from the account attached to the affidavit of Donna Gardner sworn on 20 February 2012 annexure DG1

may have been higher, making the amount assumed to have been spent on the development correspondingly lower.[25] However, the appellants have not identified any other category of expenditure from the account so the assumption, though it may be only a rough and ready guide given the inadequacies in the accounts prepared by Mrs Gardner, seems to be a reasonable one.

[42] To test the reasonableness of the figure, one can go to the appellants' pleadings and to evidence adduced by the appellants as to the "reasonable cost" of the improvements.

(a) Schedule 1 to Mr Gardner's further amended defence alleged that $453,256.06 was paid out of the AMJ Mattila - Building Account for "repairs, improvement and building", and there is no evidence of any "repairs, improvement and building" having been done on any property other than Lot 115 Oxford Road. (The other blocks were sold to fund the developments on Lot 115.)

(b) At the trial the appellants relied on a report by a quantity surveyor/ building consultant, Mr Geoff Bamber, who was asked by Mr Gardner to "provide a costing for building works and improvements including cleaning and clearing of the property at 115 Oxford Road".

Mr Bamber's report gave a total figure of $858,518 for the cost of

[25] For example, the trial judge in *Mattila v Gardner & Anor* [2012] NTSC 76 dated 29 September 2012 made a finding of fact that Mr Gardner had misappropriated "at least $11,000 of the $21,000 that was not banked into the Berry Springs Caravan Park and Takeaway Account". Yet following the account, Mr Mattila pressed only $1,000 of this amount. (See *Mattila v Gardner* [2013] NTSC 32 at [5] and [9].)

clearing the land and constructing the improvements.[26] That figure was not simply the amount spent from the AMJ Mattila - Building Account but also included labour costs.[27]

(c) In Mr Bamber's report, he said that he had consulted "the widely recognised Rawlinsons Australian Construction Handbook for the year 2007 (when most of the construction work took place)". Based on that he stated:

> The anticipated cost for a 20 bay Park would, … be in the order of $352,000.
>
> Add to this the clean-up of the Camp, the reconstruction of the 2-Bed Accommodation Unit and adjacent workshop, the Take-away shop, the repairs to the bore, supply of the water tank, concrete base and pressure pump and the anticipated total cost would be in the order of $550,000 - $560,000.

The much higher figure of $858,518 was explained as being due to a number of idiosyncratic features of this development including the fact that "no time for completion was set or even target dates for completion of elements of the works, and the project … was simply allowed to roll on of its own accord".

[43] It seems reasonable, therefore, (indeed conservative) to adopt a figure of around $450,000 for the amount spent by Mr Gardner from the AMJ Mattila

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[26] It is noteworthy that among the material supplied to Mr Bamber for use in preparation of his report was an email from Mrs Gardner in which she claimed the cost of cleaning up the block alone (over a three month period) to be $380,000 in use of equipment (with operators) plus "4 labourers at any given time at $20 an hour". Based on an eight hour day and a five day week over three months, that would come to $38,400 bringing her estimate of the cost of the clean up alone to around $418,000. (This figure was not accepted by Mr Bamber.)

[27] The trial judge used some of the information in Mr Bamber's report to calculate the amount of $124,000 which he awarded Mr Gardner for his *quantum meruit* claim for work done on those improvements.

- Building Account on the development of the caravan park and shop, a figure slightly less than the figure which the appellants' own pleadings allege to have been expended from the account for that purpose.

[44] For the purposes of deciding whether there was such an overcapitalisation of Lot 115 Oxford Road as to amount to a breach of fiduciary duty, it is necessary to add to that figure the sum of $124,000 which Mr Mattila was ordered to pay to Mr Gardner by way of *quantum meruit* for work done by Mr Gardner on the development. That brings the total cost to Mr Mattila of the developments on Lot 115 Oxford Road to around $574,000. For this, Mr Mattila received improvements to the land worth approximately $126,950,[28] less than a quarter of the price he paid for them. These improvements had no building permits or certificates of occupancy.

[45] Counsel for the appellants submitted that Mr Linkson's valuation failed to take into account the income earning potential of the caravan park. However, no evidence of this was adduced. The appellants did not put any alternative valuation into evidence. The only evidence of the value of the improvements to the property before the Court is the report of Mr Linkson and accordingly we adopt the value stated in that report.

[46] Mr Young for the respondent contended that it can be confidently inferred from the discrepancy between the cost to Mr Mattila of the improvements

[28] In his affidavit (annexure BL3, p 10) the valuer, Mr Bill Linkson, valued the improvements at $150,000. Mr Linkson subsequently revalued the improvements to $126,950 on the basis of the information that the main improvements, the kiosk and ablution block, did not have Building Permits or Certificates of Occupancy: transcript of proceedings (27 February 2012) p 181

and the value of those improvements that Mr Gardner did not exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of other people. We agree.

[47] From the moment Mr Gardner took on the responsibility of making decisions about the scope of the development work and operating Mr Mattila's bank account for that purpose, he was in a position where his duty to manage Mr Mattila's finances in Mr Mattila's interest, and to avoid (among other things) imprudent over-capitalisation of the property at 115 Oxford Road, was in conflict with his own interest in having facilities built on that land for his own use under the Lease Agreement.

[48] There is no suggestion that Mr Gardner sought professional advice in relation to the development (indeed the absence of building permits and certificates of occupancy point fairly strongly to his not having done so). Mr Young also contends that the investment in a caravan park in the relevant area was speculative and imprudent. Whether that is so (as distinct from simply being poorly executed) is less clear, but we are satisfied that in expending Mr Mattila's money on this development, the trustee, Mr Gardner, did not exercise the care, diligence and skill that a prudent person of business would exercise in managing the affairs of other people and, accordingly, that he breached the fiduciary duty he owed to Mr Mattila. It might be said that, to some extent, Mr Mattila went along with what Mr Gardner was doing, but given the evidence and the findings of the trial

judge in relation to his cognitive impairment (referred to in [26] above) he was not capable of giving fully informed consent to the breach of trust.

[49] In our view the cross appeal should be allowed.

[50] On one view of the matter Mr Mattila would be entitled to equitable damages assessed as the difference between the cost to him of the assets in question ($574,000) and the value of those assets ($126,950). However, the practical effect of that would be to nullify the decision of the trial judge to award $124,000 on a *quantum meruit* to Mr Gardner and, there having been no appeal against that aspect of his Honour's judgment, we consider that assessing damages on that basis would not be appropriate.

[51] Moreover, the case on the cross appeal was conducted before this Court on the basis of money having been paid out of the AMJ Mattila - Building Account in breach of Mr Gardner's fiduciary duty to Mr Mattila and the cross appellant did not seek equitable damages which included a return of the $124,000 awarded by way of a *quantum meruit* to Mr Gardner. The nature of the liability of a defaulting trustee who wrongly pays out trust money is essentially one of effecting restitution to the estate of the trust property which has been lost.[29] In this case the trust property which has been lost is the money from the AMJ Mattila - Building Account lost as a result of the imprudent over-capitalisation of Lot 115 Oxford Road, namely

[29] R. Meagher, D. Heydon and M. Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (2002, LexisNexis Butterworths, 4th ed), p 834; *Re Dawson (decd)* [1966] 2 NSWLR 211 at 404.

the amount paid out of the account for those improvements (approximately $450,000) less the value of the improvements of which Mr Mattila received the benefit. As we are necessarily dealing in round figures, we assign a value of $150,000 to the value of the improvements (based on Mr Linkson's first report). We therefore assess the value of the respondent's claim on the cross appeal at $300,000.

ORDERS:

(a) The appeal is dismissed.

(b) The cross appeal is allowed.

(c) The first appellant is to pay the respondent $300,000 by way of restitution of moneys expended from the AMJ Mattila - Building Account in breach of the first appellant's fiduciary duty to the respondent.

(d) The appellants are to pay the respondent's costs of and incidental to the appeal and the cross appeal.