

**IN THE SUPREME COURT
OF NEW ZEALAND**

SC 32 / 2023

**I TE KŌTI MANA NUI
O AOTEAROA**

BETWEEN

RAEWYN PHYLLIS COOPER

Appellant

AND

MARCUS ROBERT WILLIAM PINNEY

Respondent

AND

JENNIFER JANE PINNEY AND PHILIP JOHN SMITH
as trustees of the MRW Pinney Family Trust

Interested parties

SUBMISSIONS FOR THE RESPONDENT

Dated this 9th day of October 2023

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SUBMISSIONS FOR THE RESPONDENT

May it please the Court,

Introduction

1. Factually, this case is about an unremarkable discretionary trust, the MRW Pinney Family Trust (**Trust**) formed by deed dated 27 January 2006 (**Trust Deed**). The whole of the Trust's property was sourced from a partial distribution of the Pinney Trust, itself settled by the respondent's father.
2. Legally, this case is about division of relationship property within the meaning of s 2 the Property (Relationships) Act 1976 (**PRA**),¹ i.e., property beneficially owned by the parties.² Property owned by either of them in the capacity of a trustee is not within the ambit of the PRA.³
3. The appellant, Raewyn Phyllis Cooper (**Raewyn**) relies on *Clayton v Clayton*⁴ to contend that the respondent, Marcus Robert William Pinney (**Marcus**) holds powers in relation to the Trust that amount to a general power of appointment of the Trust's property and are therefore "property" under the PRA.
4. Marcus says:
 - a. He does not hold powers that are akin to a general power of appointment of the Trust's property; His powers are not property under the PRA.
 - b. Raewyn's argument that he does could not be further from the truth; the facts in *Clayton* are distinguishable, and the principle in *Clayton* does not apply.
 - c. What Raewyn seeks is to share in trust property; any award would undermine the principles and purposes of the PRA; and
 - d. Even if Raewyn's claims were sound, her claim is worthless because the net value of the Trust (i.e., the value of any relevant powers) did not increase during the relationship.

¹ Submissions for the Appellant at [4].

² Property (Relationships) Act 1976 (**PRA**), s 2.

³ PRA, s 4B.

⁴ *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551 (**Clayton**).

5. The key reason why *Clayton* is distinguishable is that under the Trust Deed, all the Trustees' powers of appointment of property are special powers and not general powers. Further, the Trust Deed does not exclude the fiduciary duty to consider the interests of the other beneficiaries, and the Trustees must comply with the mandatory duties in the Trusts Act 2019 (**Trusts Act**). The only power held individually by Marcus is the power to appoint and remove trustees. That power is restricted in scope by the requirement for a minimum of 2 trustees, constrained by its purpose, and subject to fiduciary duties.
6. Importantly, the beneficiaries could bring Marcus and the trustees to account in the Courts if they act in excess of or abuse of their powers.
7. These submissions are structured as follows:
 - a. Part 1: The relevant facts are addressed and the facts in this case are contrasted with those in *Clayton*.
 - b. Part 2: The legal principles that underlie *Clayton* are explained.
 - c. Part 3: The rationale in *Clayton* is clarified and applied to the facts of this case.
 - d. Part 4: An analysis and quantification of Raewyn's claims/ potential claims under ss 8, 9A and 17 of the PRA.
 - e. Part 5: The response to the appellant's comments about the relevance of Tikanga Māori to this appeal.

Part 1: Relevant Facts

The Property Pool

8. The facts are accurately set out by Clark J in the High Court.⁵
9. Financially, Marcus and Raewyn's relationship was a failure, not just for themselves, but also for the trading company, Te Taho Deer Park Limited (**Company**), and the Trust. Raewyn and Marcus did not build up any property during their relationship. Marcus does not seek to keep the fruits of the

⁵ *Pinney v Cooper* [2020] NZHC 1178 (**HC Judgment**) at [11]-[17] and [166]-[173].

relationship for himself. There are no relationship fruits to keep, only debt.

10. The parties' sole source of income was the Company. Both the Family Court and High Court noted that the Company was not a financial success.⁶ The Company, although still trading at the end of the relationship, was barely solvent. By June 2014, the Company had sold its breeding stock to raise funds, and its debts to the bank and the Trust had increased from \$109,116 in 2006 to \$320,979. Its net equity position had gone from (\$150) as at 30 June 2006⁷ to (\$90,991) as at 30 June 2014.⁸
11. In the High Court, Clark J, after finding that the Family Court Judge had erred in identifying relationship property chattels to the value of \$45,000,⁹ set out the following table as to the value of the parties' relationship property pool.¹⁰

Assets	
Cash at separation	\$3,000
Ms Cooper's bank account at separation	\$297
Mr Pinney's Westpac bank account	\$703.19
Subaru Legacy	\$20,000
Mr Pinney's current account with the MRWT	\$32,390
Total assets	\$56,390.19
Liabilities	
UDC debt for car	\$5,496
Te Taho Deer Park Ltd shareholder's current account debt	\$128,962
Total liabilities	\$134,458
TOTAL	-\$78,067.81

12. Clark J also determined that Marcus was not entitled to a contribution from Raewyn to offset his overdrawn current account with the Company (\$128,962), even though this was used to fund relationship living expenses. For pragmatic reasons (Raewyn has no assets) Marcus has not appealed that judgment.
13. This appeal, like the appeal to the Court of Appeal before it, is another attempt by Raewyn to increase the value of the relationship property pool by adding to it property which belongs to the Trust.
14. The Trust was formed in January 2006 and on that date, the appointment of

⁶ *Cooper v Pinney* [2018] NZFC 9120 (**FC Judgment**) at [94]; HC Judgment at [16].

⁷ 305.1372 at 1385 and 1389.

⁸ 305.1372 at 1524.

⁹ HC Judgment at [129].

¹⁰ HC Judgment at [167].

assets from the Pinney Trust took effect.¹¹

15. The Pinney Trust was settled by Marcus's father, Bernard Pinney in 1977 when Marcus was approximately 8 months old. Its beneficiaries were Bernard's children and remoter issue.¹² As at December 2005, when the trustees exercised their powers to resettle some of its assets on the trustees of the Trust, its trustees were Lindsay McIntyre (a Chartered Accountant), Jennifer Pinney (Marcus's widowed mother), and John Acland (a farmer).
16. The High Court found that the net value of property resettled on the Trust in 2006 was \$1,652,992 comprising:
 - a. Farmland and buildings valued at \$1.1 million;¹³
 - b. Debt owed by Marcus to the Pinney Trust for advances to purchase livestock and vehicles to a value of \$311,122;
 - c. Marcus's current account with the Pinney Trust, overdrawn by \$23,307;
 - d. A partnership investment of \$2,091; and
 - e. A cash sum of \$216,472.
17. During the course of the parties' relationship, although the value of the farmland increased (primarily through market forces), the net value of the Trust's assets fell to \$1,572,758 – see Schedule A. This was because the Trust forgave the debts of \$334,429, which Marcus had owed to the Pinney Trust,¹⁴ and the Trust granted a mortgage to the ANZ bank to guarantee the Company's increasing debts. The Trust's assets also included a debt of \$188,071 owed to the Trust by the Company, whose prospects of recovery must be dubious.

Factual distinctions between the facts in this case and those in *Clayton*

18. There are three critical factual distinctions between this case and *Clayton*:
 - a. First, Marcus is not the source of the Trust's property. In this case,

¹¹ Deed declaring date of partial distribution and appointing part of the trust capital: 301.0437.

¹² HC Judgment at [3], *Cooper v Pinney* [2023] NZCA 62 (CA Judgment) at [5].

¹³ HC Judgment at [110]. The HC overturned the FC's finding that the farm was transferred for a value of \$445,000. This was not challenged on appeal.

¹⁴ HC Judgment at [112]; CA Judgment at [17].

unlike *Clayton*, all property of the Trust (farmland, advances to Marcus, investment, and cash) was resettled on the Trust by the trustees of the Pinney Trust (**Pinney Trustees**).¹⁵

- b. Second, unlike *Clayton* this is not a “settlor-controlled trust”. The “settlers” nominated on the Trust Deed were Marcus and the Pinney Trustees, but by application of usual principles of trust law, Marcus was a nominal settlor only,¹⁶ and the true settlers are the Pinney Trustees, as only they appointed capital to the Trust.¹⁷
 - c. Third, as set out above, the period of the relationship was one of financial failure for the parties and loss for the Company and the Trust.
19. One of the reasons that courts have embraced “worldly realism” when considering trust issues in relationship property disputes is the reality that, but for the settlement of certain property on trust, the property (or the bulk of it) could otherwise be described as “fruits of the relationship” and subject to division under the PRA. In cases like *Clayton*, courts have intervened when trusts have been used to subvert the purposes and principles of the PRA by enabling one party to retain the benefits of the fruits of the relationship after it ends. This appears to be part of Miller J’s rationale in his dissenting Court of Appeal judgment.¹⁸
 20. That is not part of the matrix of this case. The farm owned by the Trust is not “fruits of the relationship”. The parties benefited from the Trust and its assets, but they did not generate or contribute to them. Marcus lost the stock and plant he brought to the relationship (\$168,000) and has been held solely responsible for the parties’ relationship debt to the Company (\$128,962).
 21. The appellant comments on “the very little she has received” from Marcus,¹⁹ and that Marcus seeks to accrue for himself “the entirety of the fruits of the [parties’] shared efforts”.²⁰ Those comments are misleading. The reality is that

¹⁵ 301.0437.

¹⁶ The reasons for Marcus’s nomination as a settlor are explained in 301.0435.

¹⁷ *Commissioner of Inland Revenue v Dick* [2003]1 NZLR 741 (CA) at [64]-[71]; *Singh (as Trustees of Shean Singh Family Trust) v Ash* [2018] NZCA 310 at [6]; *Webb v Webb* [2020] UKPC 4, [2021] 2 NZLR 376 (**Webb**) at [88], HC Judgment at [111].

¹⁸ CA Judgment at [97] per Miller J.

¹⁹ Submissions for the Appellant at [11].

²⁰ Submissions for the Appellant at [107].

although Raewyn has received little, Marcus has received less.

22. Justice will be undermined by any award in Raewyn's favour.

Part 2: The Foundations of Clayton

23. The substantive ground of appeal is that this Court's analysis in *Clayton* applies, and that Marcus holds "rights" or "interests" in relation to the Trust that are "property" within the meaning of the PRA.
24. This part sets out the principles of law that underpin this Court's decision in *Clayton*. Part 3 sets out the reasoning in *Clayton* and addresses why this same reasoning does not apply in this case, and therefore the appeal must fail.
25. Because the appellant accepts the validity of the Trust and does not argue that it is either a sham or an "illusory" trust those topics are not addressed.

Powers and Fiduciary Duties

Powers

26. The appellant invites this Court to extend radically its analysis in *Clayton* in a manner which is inconsistent with the jurisprudential basis in that case. For this reason, it is helpful to start by clarifying the underlying concepts:²¹
- a. the nature of powers in general;
 - b. the nature of general powers of appointment of property;
 - c. the constraints that apply to the exercise of powers; and
 - d. the role of fiduciary duties in a discretionary trust.
27. A power is the legal authority to deal with or dispose of property.²² Powers are discretionary, and the donee of a power cannot be compelled to exercise it.

²¹ For a more detailed analysis of the propositions in this section, see G Thomas, *Thomas on Powers* (2nd ed, OUP, 2012) (**Thomas on Powers**) at 1-12-1-22; L Tucker et al (eds), *Lewin on Trusts* (20th ed, Sweet & Maxwell, 2023) (**Lewin on Trusts**) chapter 28; and J Glister and J Lee, *Hanbury and Martin Modern Equity* (22nd ed, Sweet & Maxwell, 2021), chapter 7.

²² Powers can also have their source in statute, equity, or in the common law. Certain rules on powers are set out in the Property Law Act 2007, ss 16, 73-74.

Powers of appointment of property

28. A power of appointment of property permits the donee to dispose of interests in property that the donee does not beneficially own. There are three types:²³
- a. a general power of appointment: the power to appoint the subject matter of the power (i.e., the property) to or for the benefit of anybody in the world, including the donee;
 - b. a special (or limited) power of appointment: the power to appoint the subject matter to a limited class of objects, such as a selection from a class of discretionary beneficiaries; and
 - c. a hybrid or intermediate power of appointment: the power to appoint the subject matter to anyone, except a particular person or class.
29. General powers of appointment over property are unlimited as to objects, and, as *Clayton* held, create property interests akin to absolute ownership.²⁴ In contrast, limited and hybrid powers do not create rights or interests in property, that can be subject to the PRA.

Fiduciary powers

30. When powers are vested in trustees, they must be exercised in the interests of the beneficiaries, due to the fiduciary nature of the trustee's office.²⁵ While the boundaries of fiduciary law are not settled, "[t]he paradigm fiduciary relationship in the law applying here is that of trustee and beneficiary."²⁶ The United Kingdom Supreme Court recently re-affirmed this position.²⁷
31. In this context, it is radical for the appellant to submit that fiduciary obligations

²³ *Thomas on Powers* at 1-15. To complicate matters further, some powers of appointment are 'mere powers' which are permissive and others are 'trust powers' which are obligatory. This distinction is not relevant for present purposes: *Lewin on Trusts* at 28-023.

²⁴ *Lewin on Trusts* defines this type of power as a 'beneficial power' because it may be exercised for the benefit of the donee: 28-016.

²⁵ *Thomas on Powers* at 1-46. See *Re Gulbenkian's Settlements* [1970] AC 508 (**Gulbenkian**) at 518 and *Re Hay's Settlement Trusts* [1982] 1 WLR 202 (Ch) at 208.

²⁶ *McLaughlin v McLaughlin* [2021] NZHC 3015 (**McLaughlin**) at [326] per Gendall J; *Chirside v Fay* [2006] NZSC 68, [2007] 1 NZLR 433 at [74] per Tipping J. See also J McGhee (ed) *Snell's Equity* (24th ed, Sweet & Maxwell, 2020) at 7-004.

²⁷ *Children's Investment Fund (UK) v Attorney General* [2022] UKSC 33, [2022] AC 155 (**Children's Investment Fund**) at [43].

are not an essential part of a trust at equity.²⁸

32. Once it is established that a person is a fiduciary, it follows that they owe fiduciary duties, the core of which is loyalty. The fiduciary must act for and only for the benefit of the beneficiary in matters covered by the fiduciary duty.²⁹
33. Other duties flow from the duty of loyalty, including the duty not to self-benefit, the duty to avoid a conflict between the fiduciary's duties and interests, and the duty not to profit.³⁰ Fiduciaries also have duties to act in good faith, and in the interests of the person to whom the duties are owed.³¹
34. Generally, a fiduciary power cannot be exercised by the donee for their own benefit. However, it is possible for the terms of a trust to permit an exception to this general rule. For example, it is common for trustees to be placed in an inherent position of conflict by the settlors through the terms of the trust, such that the no-conflict rule and the no-self-benefit rule do not apply fully.³² The extent of any limitation of fiduciary duties is a question of interpretation of the trust deed.
35. There is nothing objectionable about the settlor of a trust expressly or implicitly limiting fiduciary duties, provided that any limitations do not reduce the trustee's obligations beyond their "irreducible core".³³
36. General powers of appointment are not subject to fiduciary duties because they can be exercised selfishly, and loyalty has no relevance. One of the facts which led to this Court finding that Mr Clayton held a general power of appointment over the VRPT's property was the extent to which the standard fiduciary duties had been expressly limited by the terms of the trust deed.³⁴

The exercise and review of powers

37. The law regulates the exercise of both fiduciary and non-fiduciary powers, and

²⁸ Submissions for the Appellant at [41]-[56].

²⁹ *Children's Investment Fund* at [45].

³⁰ *Children's Investment Fund* at [46].

³¹ *Bristol v West Building Society v Mothew* [1998] Ch 1 at p19, *Gulbenkian* at p 518.

³² *McLaughlin* at [335].

³³ *Children's Investment Fund* at [82]. The source of the term "irreducible core" is *Armitage v Nurse* [1998] Ch 241 (CA) at 253-254.

³⁴ *Clayton* at [58] and [64].

Courts will enquire into:³⁵

- a. Whether a power has been exercised within its scope (i.e., within the express or implied terms of the power); and
 - b. Whether a power has been exercised for a proper purpose.
38. The exercise of a power that offends any of these principles is void.³⁶
39. The Court will also consider whether adequate deliberation has taken place as to whether and how a fiduciary power should be exercised.
40. The scope of a power is determined by the instrument that creates it. Most relevantly to this appeal, a power can be held jointly or severally but if it is held jointly, then it must be exercised jointly. Any exercise of a joint power by one of the joint power holders would be void.
41. While a general power of appointment may be reviewable as to its scope, the choice of objects is uncontrolled and not reviewable by the Court.³⁷

New Zealand Discretionary Trusts

42. These concepts play out in a particular way in the context of discretionary trusts, of the kind that are common in New Zealand, including the Trust.
43. The core concept of an express trust is that property is held by a person or persons (the trustee) for the benefit of somebody else (the beneficiary), and subject to the terms set out in a trust deed, and in the general law.
44. Discretionary trust deeds usually give the trustees a range of powers. Some relate to the management and administration of the trust property, allowing the trustee to safeguard and enhance it, such as the power of investment and

³⁵ *Thomas on Powers* at [11.01]. For fiduciary powers, see *Grand View Private Trust v Wang* [2022] UKPC 47 (**Grand View**) at [51]. A “fraud on power” is clandestine excessive execution by which a limited power is indirectly exercised in favour of a non-object: *Kain v Hutton* [2008] NZSC 61, [2008] 3 NZLR 589 (**Kain v Hutton**) at [47] per Tipping J.

³⁶ There is some debate as to whether it is void or voidable: *Grand View* at [122].

³⁷ In *Gisborne v Gisborne* (1877) 2 App Cas 300 at p 305 the trustees had “uncontrollable” authority. The Court held it could still intervene if the exercise of the power was not *bona fide*. In *Re Dilke* [1905] 1 Ch 529 at p 41 a general power of appointment over property could only be exercised with consent of the trustees. The Court held that the condition attached to the exercise of the power; there was no restriction on choice of objects.

the power of sale.³⁸ Other powers enable the trustee to create or change beneficial interests in the property, such as powers of appointment of property, and powers of maintenance and advancement.³⁹ Other powers do not readily fit these categories, such as the power to appoint trustees.

45. The trustees' powers of appointment of property are nearly always special powers – powers to appoint the property among a defined class of discretionary beneficiaries – with nominated persons who would take on default of appointment (the “final beneficiaries”).
46. It is rare in New Zealand for settlors to entrust a general power of appointment to their trustees, particularly given this would create property rights that would undermine the ability for the trustees to protect property against potential claimants, for instance beneficiaries' creditors or spouses.⁴⁰
47. The exercise of powers by the trustees is discretionary, but trustees are required to act honestly and in good faith,⁴¹ and to consider whether to exercise a power and in whose favour,⁴² as part of which, they must consider the interests of the beneficiaries.⁴³
48. Clauses that expressly limit fiduciary duties, particularly those related to conflict and self-benefit, are common features of the New Zealand family trust, where the settlors are often also trustees (sometimes together with an independent) and beneficiaries. The duty to act for no reward is commonly negated in the case of a professional trustee.
49. Where there is more than one trustee, in the absence of wording to the contrary, s 38 of the Trusts Act requires that they act unanimously.
50. The requirement for 2 trustees is one way to protect the discretionary beneficiaries against the risk of a consolidation of power in any one person,

³⁸ For examples, see cl 22 of the Trust Deed.

³⁹ The authors of *Lewin on Trusts* include powers to add and remove beneficiaries, powers of amendment, and powers of revocation in this category: *Lewin on Trusts* at 28-012.

⁴⁰ For challenges to the validity in a creditor-protection context, see *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch), *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2011] UKPC 17, [2012] 1 WLR 1721 (TMSF), and *Brkic v White* [2021] NZCA 670, [2021] NZFLR 840 (**Brkic v White**).

⁴¹ Trusts Act 2019 (**Trusts Act**), s 25.

⁴² Trusts Act, s 32.

⁴³ Trusts Act, s 26. See also *Gartside v Inland Revenue Commissioners* [1968] AC 553 at 617; *Gulbenkian* at 518.

particularly when the no-conflict rule is negated or modified. An alternative is to require that there must be at least one trustee who is not a beneficiary. Yet another approach is to require any conflicted trustee to abstain from decision-making when relevant (which is a modification of the unanimity rule).

51. The mandatory duties set out in ss 22-27 of the Trusts Act reflect the irreducible core concept as it now applies in New Zealand. These duties apply to all express trusts governed by New Zealand law,⁴⁴ and cannot be modified or excluded by the terms of the trust.⁴⁵ The mandatory duties include, relevantly, the duties to act honestly and in good faith,⁴⁶ in the interests of the beneficiaries,⁴⁷ and for a proper purpose.⁴⁸
52. Although discretionary beneficiaries have no beneficial interest in a trust's property, they have a right to due administration, and can turn to the courts if the trustees do not act in accordance with their duties.⁴⁹ For example, a beneficiary may apply to review a trustee's act, omission, or decision,⁵⁰ or to compel the replacement of a trustee.⁵¹
53. This is not purely theoretical. As part of its jurisdiction over the supervision of trusts, the court regularly reviews the exercise of trustee powers,⁵² as well as the exercise of powers of appointment and removal of trustees.⁵³
54. This is the case throughout the Commonwealth. In *Grand View Private Trust v Wang*, the Privy Council confirmed that even discretions that are "absolute and unconstrained" can be reviewed for scope, purpose and due process.⁵⁴ Similarly, in *Baba v Sheehan*, the New South Wales courts considered whether the exercise of a power of appointment and removal of trustees had been exercised for a proper purpose.⁵⁵ This Court recently considered a similar

⁴⁴ Trusts Act, s 5.

⁴⁵ Trusts Act, s 22.

⁴⁶ Trusts Act, s 25.

⁴⁷ Trusts Act, s 26.

⁴⁸ Trusts Act, s 27.

⁴⁹ *Kennon v Spry* [2008] FCA 56, (2008) 238 CLR 366 at [74]; *Johns v Johns* [2004] 3 NZLR 202 (CA) at [34].

⁵⁰ Trusts Act, s 126.

⁵¹ Trusts Act, s 114.

⁵² Eg *Lambie Trustee Ltd v Addleman* [2021] NZSC 54; *McLaughlin; Burgess v Monk* [2017] NZHC 2424; and *Clement v Lucas* [2017] NZHC 3278.

⁵³ Eg *Carmine v Ritchie* [2012] NZHC 2279, *Harre v Clarke* [2014] NZHC 2533; *McLaren v McLaren* [2017] NZHC 161, and *Legler v Formannoji* [2022] NZCA 607.

⁵⁴ *Grand View* at [51]-[52].

⁵⁵ *Baba v Sheehan* [2021] NSWCA 58 at [5] per Brereton J and at [48] per Emmett AJA.

question in *Legler v Formanjoji*.

55. This is the legal context in which the Trust Deed is to be interpreted and the appellant's argument is to be assessed. The rules of property and trust law cannot simply be cast aside. Otherwise, the ambit of when a Court will and will not uphold the terms of a trust would have no clear or principled boundaries.

Part 3: Why *Clayton* does Not Apply to Marcus's Powers

Summary of argument

56. The argument put forward by Raewyn amounts to a radical extension of the principle in *Clayton*, in a way that undermines its jurisprudential underpinnings and creates injustice.
57. Raewyn argues that the only "potentially decisive" difference between the Trust and the VRPT is that the Trust requires a minimum of 2 trustees and, as Marcus also holds the power of appointment and removal of trustees, the 2nd trustee requirement is not a sufficient ground to distinguish *Clayton*.⁵⁶
58. The focus of the Submissions for the Appellant is on the breadth of the trustees' discretion to favour Marcus in the exercise of their powers, and the lack of substantive controls over the trustees that the appellant perceives.
59. This argument is misconceived because *Clayton* is about whether Mr Clayton's "rights" and "interests" amounted to "property" within the meaning of the PRA, not the breadth of the trustee's discretion or control. Trustee discretion is nearly always broad. It is axiomatic that trustees control a trust's property.
60. More specifically, Raewyn's argument is flawed because:
- a. The dispositive powers held by the Trustees are special powers, not general powers.
 - b. The Trustees' powers are subject to fiduciary duties.
 - c. The Trustees must exercise all powers jointly and unanimously.
 - d. Marcus cannot exercise his power of appointment of trustees to

⁵⁶ Submissions for the Appellant at [4]-[5].

circumvent the 2-trustee requirement as this would be void for breach of the proper purpose rule.

- e. The scope of the power of amendment is limited to changes to the management and administration of the Trust. Any attempt to vary the Trust Deed to alter these provisions would also be void.

- 61. The PRA has its feet firmly in property law. It is premised on beneficial ownership of property, not control of property. *Clayton* preserved this distinction. There is no authority to support an argument that perceived de facto control (in breach of a trust deed) amounts to “property” within the PRA.
- 62. The Courts have a broad inherent jurisdiction over the administration of trusts and the beneficiaries would have a remedy if their rights were breached.

The Judgment in *Clayton*

- 63. The definition of “property” in s 2 of the PRA includes “any estate or interest in any real property or personal property” and “any other right or interest”.
- 64. In *Clayton*, this Court held that:
 - a. in combination, Mr Clayton’s powers amounted to a general power of appointment over the property of the Vaughan Road Property Trust (**VRPT**);⁵⁷ and
 - b. applying “worldly realism” in the statutory context, Mr Clayton’s general power of appointment amounted to “rights” that gave him “interests” and was therefore “property” within the meaning of s 2 of the PRA.⁵⁸
- 65. The clauses of the VRPT deed that were “decisive” to the Court’s reasoning were all dispositive powers in relation to VMPT’s property, held by Mr Clayton as sole trustee: the power to pay or apply capital, the power to direct who would receive capital on vesting day, and the power to resettlement the trust fund.⁵⁹
- 66. Typically, a trustee’s powers to dispose of trust property would be subject to fiduciary obligations, requiring the interests of the beneficiaries to be

⁵⁷ *Clayton* at [68].

⁵⁸ *Clayton* at [80].

⁵⁹ *Clayton* at [52]-[55].

considered. However, Mr Clayton's dispositive powers were interpreted in light of three clauses negating the usual fiduciary constraints:⁶⁰

- a. A clause negating the no-self-benefit rule (clause 14.1);
- b. A clause negating the no-conflict rule (clause 19.1); and
- c. A clause negating the duty to consider the interests of all beneficiaries (clause 11.1).

67. The effect of these clauses in combination was that when exercising his powers as sole trustee to appoint the VRPT's capital, Mr Clayton could simply appoint it to himself, and in doing so, he was not constrained in any real sense by any duties towards the final beneficiaries.⁶¹ In other words, the rights of the other beneficiaries to enforce the Trust through the courts were minimal.

68. This analysis is both conventional and sound. Clauses 14.1, 11.1 and 19.1 all negate the usual fiduciary duties that apply to trustees by virtue of their office.

69. Clause 11.1 is the most significant and the most unusual of the three. Clause 11.1 undermines the core of the fiduciary relationship, being the duty of loyalty. In effect, clause 11.1 expressly permitted Mr Clayton as trustee to simply ignore the interests of the other beneficiaries. (Today clause 11.1 would be overridden by the mandatory duty in s 26 of the Trusts Act, which requires a trustee to deal with trust property for the benefit of the beneficiaries.)

70. In all subsequent cases in which a *Clayton* argument has been attempted, the argument has either been rejected on the facts,⁶² or the case has been decided on other grounds.⁶³ That is not surprising because *Clayton* was a truly exceptional case. This case is a useful opportunity for this Court to clarify the principle from *Clayton* in the interests of legal certainty.

The trustees do not have a general power of appointment of the Trust's property

71. At this stage it is helpful to compare the two trust deeds. The respondent's

⁶⁰ *Clayton* at [56].

⁶¹ *Clayton* at [58].

⁶² *Da Silva v Da Silva* [2016] NZHC 2064 at [53]; *Findlay v Findlay* [2017] NZHC 2797 at [104]; *Cannon v Cox* [2017] NZFC 5741 at [52]; *Buxtone v Buxton* [2017] NZHC 131 at [36].

⁶³ *Casey v Casey* [2018] NZHC 1930 at [27] and *Kwok v Rainey* [2020] NZHC 923 at [166].

comparison is included in Schedule B.

72. There are three key differences between the VRPT and the Trust, which are relevant to the determination of this case:
 - a. The Trust Deed does not permit the addition (or exclusion) of Discretionary Beneficiaries, whereas the VRPT permitted Mr Clayton as Principal Family Member to extend the class of Discretionary Beneficiaries (clause 7.1).
 - b. The VRPT expressly limited the fiduciary duty of loyalty by confirming that the Trustee need not consider the interests of the beneficiaries and could act contrary to the interests of the beneficiaries (clause 11.1). There is no such clause in the Trust Deed.
 - c. The power of removal of trustees in the Trust Deed cannot be exercised if removal will result in fewer than 2 trustees (clause 15(d)).
73. On behalf of Raewyn, it is argued that the combination of Marcus's power of appointment and removal of trustees, and the broad powers of the trustees, effectively gives Marcus control of the Trust, such that *Clayton* applies.
74. This proposition is mistaken because, even if Marcus could appoint himself together with another trustee who is directly or indirectly controlled by him (he cannot – see below), the Trustees powers do not amount to a general power of appointment over the Trust's property.
75. Consistent with a standard New Zealand discretionary trust, the Trustees have broad powers and discretions over the Trust's property. These include:
 - a. The power to pay, apply or transfer the whole or any part of the capital to or for the benefit of the Discretionary Beneficiaries – clause 6.
 - b. The powers to appoint the property amongst the Discretionary Beneficiaries on Vesting Day – clause 11.
 - c. The power to bring forward the Vesting Day – clause 1(c)(ii).
76. For the Trustees' powers to amount to a general power of appointment of the Trust's property, these powers would need to enable the Trustees to appoint it to anybody in the world, including themselves, free of fiduciary duties.

77. This case is not analogous to *Clayton*. The Trustees do not have a general power of appointment (either discretely or in combination) because:
- a. The Trustees may only exercise their powers in favour of persons who come within the class of Discretionary Beneficiaries;
 - b. There is no power to add (or remove) Discretionary Beneficiaries;
 - c. The power of alteration is confined to changes to the management and administration of the Trust and cannot be used to alter the beneficial interests (clause 12);
 - d. The Trustees are expressly precluded from using the power of alteration to extend the class of Discretionary Beneficiaries to include spouses or domestic partners (clause 12);
 - e. The core fiduciary duty of loyalty is not excluded by the Trust Deed;
 - f. The mandatory duties in the Trusts Act apply; and
 - g. Exercise of the trustees' discretions are subject to review by the Courts.
78. In contrast to *Clayton*, the dispositive powers of the Trustees are special powers of appointment, which can only be exercised in favour of members of a defined class. The *Clayton* analysis does not apply to special powers of appointment and should not be extended in this way.
79. In exercising their powers, the Trustees are required to have regard to the context and objectives of the Trust.⁶⁴ They are required to exercise their powers in accordance with the Trust Deed.⁶⁵
80. The Trustees are subject to the mandatory duties under the Trusts Act, and the default duties, to the extent that they are not modified or excluded by the Trust Deed. The mandatory duties include the duties to act honestly and in good faith,⁶⁶ the duty to act for the benefit of the beneficiaries,⁶⁷ and the duty to exercise powers for a proper purpose.⁶⁸ These duties cannot be excluded

⁶⁴ Trusts Act, s 21.

⁶⁵ Trusts Act, s 24.

⁶⁶ Trusts Act, s 25.

⁶⁷ Trusts Act, s 26.

⁶⁸ Trusts Act, s 27.

by the terms of the trust.

81. The modification of the duty to consider the interests of the other beneficiaries that was part of the VRPT deed and so important in *Clayton* is not part of the Trust Deed, either implicitly or explicitly. In addition, the Trusts Act makes it clear that the Trustees cannot lawfully exercise their powers under the Trust Deed without considering the interests of the beneficiaries.
82. *Clayton* determined that cases like these depend upon analysis of the powers created by the Trust Deed, and not an analysis of the way they are exercised in practice. Should the Trustees of the Trust act in breach of their duties under the Trust Deed or the Trusts Act, the beneficiaries would have a remedy in the Courts. That was not so in *Clayton*.
83. Raewyn's argument that Marcus (or even the Trustees) has unconstrained powers effectively invites this Court to express a lack of faith in the ability of the High Court to deliver justice in New Zealand. There is no reason or justification for this. To the contrary, this Court has every reason to have faith in the ability of the High Court to exercise its inherent jurisdiction over trusts and estates, and its jurisdiction under the Trusts Act.

Marcus cannot circumvent the 2-trustee requirement

84. The only power Marcus has individually is the power to appoint and remove trustees. In *Clayton*, the Supreme Court found this power to be of "contextual significance" only.⁶⁹
85. The appellant puts great emphasis on this power and argues that it is a personal power that can be exercised by Marcus for selfish purposes, free of any substantive controls,⁷⁰ to render meaningless the 2-trustee requirement.
86. Given that the trustees' powers are limited and subject to supervision of the Courts, the characterisation of Marcus' power of appointment of trustees is not determinative of this case.
87. In any event, the appellant's argument is contrary to the established approach in New Zealand, that the power of appointment of trustees is a fiduciary power

⁶⁹ *Clayton* at [52].

⁷⁰ Submissions for the Appellant at [17]-[18].

that must be exercised in good faith and for the benefit of the beneficiaries.⁷¹ This is because, “the subject matter of the power is the office of the trustee which lies at the core of the trust and carries fundamental and onerous obligations to act in the best interests of the beneficiaries as a whole.”⁷² This was recently confirmed by the Court of Appeal in *Brkic v White*.⁷³

88. While it is generally the case that a power of appointment of trustees is fiduciary, it is not argued that any absolute rule applies.⁷⁴ The question is whether there is a relationship which gives rise to a legitimate expectation that one party will not use their position in a way that is adverse to the interests of the other.⁷⁵
89. In considering whether a power of appointment of trustees is fiduciary, the words of a trust deed are given their ordinary meaning, and any ambiguity is resolved by reference to the context, including intentions of the settlors.
90. In this case, the context supports an interpretation that the power of appointment of trustees is fiduciary. While it may be exercised in Marcus’s favour (because he may appoint himself), the existence of the 2-trustee requirement, and the context in which the Trust was established as an intergenerational inheritance trust intended to support not only Marcus but his children, and potentially his grandchildren, points against an interpretation that the power is personal to Marcus.
91. The hypothetical scenario that the appellant imagines, in which Marcus exercises his power of appointment and removal to put in place a “compliant trustee” and then proceeds to distribute the capital to himself only serves to illustrate why Marcus’s only power is fiduciary in nature. This situation would not comply with the expectations of the Pinney Trustees to see that the

⁷¹ *New Zealand Maori Council v Foulkes* [2016] 2 NZLR 337 at [26]-[27]; *Carmine v Ritchie* at [66], *Harre v Clarke* at [24]. Raewyn attempts to distinguish these cases on the bases that they did not involve a domestic relationship or a trust that concentrated control in one beneficiary. The former point is irrelevant and the latter begs the question before the Court.

⁷² *Carmine v Ritchie* at [66].

⁷³ *Brkic v White* at [29]-[35].

⁷⁴ The appellant relies on *obiter dicta* in the minority judgment of Brereton J in *Baba v Sheehan* to argue that powers of appointment of trustees are not necessarily fiduciary: Submissions for the Appellant at [32]-[36]. However, Brereton J accepted that the doctrine of fraud on power would apply: at [5].

⁷⁵ *Chirnside v Fay* at [80] per Tipping J.

interests of all the beneficiaries are protected.⁷⁶ Marcus's children can legitimately expect that he will not undermine their interests.

92. Even in cases where there is doubt expressed as to the generality of any rule, it is acknowledged that the power of appointment and removal of trustees has some limitations on its exercise.⁷⁷ Most obviously, any “workaround” would be void for breach of the proper purpose rule, which the Court of Appeal recently accepted applies to powers to appoint and remove trustees, regardless of their fiduciary character.⁷⁸
93. The proper purposes rule prevents the use of a power to achieve a goal that is repugnant to the purposes for which the power was granted.⁷⁹ While much of the case law relates to exercising a power to indirectly benefit a non-object, the rule is not restricted to that context, and applies to the use of a power for a collateral purpose more generally.
94. The proper purposes rule is concerned with abuse of power (rather than excess of power – acting beyond the scope of a power).⁸⁰ However, the concepts are closely related. When a person uses a power to benefit a non-object indirectly, the power will be ostensibly exercised within its scope, but the effect will be to benefit a non-object, contrary to its purposes.⁸¹ Historically, this has been known as “fraud on power” but this language has fallen out of favour because it extends to cases where the person exercising the power has acted in good faith and with a view to benefitting the beneficiaries.⁸²
95. Considering an allegation that the proper purpose rule has been breached involves considering whether the purpose for which the power has been exercised is within the purposes for which the power was given.⁸³
96. Identification of the purpose of the power is achieved by analysing the instrument creating it. In the case of a power within a trust deed, it is a matter

⁷⁶ HC Judgment at [10] and 301.0431 at 0342.

⁷⁷ See *Fitzwood Pty Ltd v Unique Goal Pty Ltd (in liquidation)* [2001] FCA 1628 at [98] and *Baba v Sheehan* at [5] per Brereton J.

⁷⁸ *Brkic v White* at [35].

⁷⁹ *Wong v Burt* [2005] 1 NZLR 91 (CA) at [30]; and *Legler v Formanjoji* at [29].

⁸⁰ *Eclairs Group Ltd v JKX Oil & Gas plc* [2015] UKSC 71 at [15].

⁸¹ *Kain v Hutton* at [47] per Tipping J.

⁸² *Grand View* at [56]; *Kain v Hutton* at [46].

⁸³ *Grand View* at [55].

of ascertaining the intentions of the settlor.⁸⁴

97. It is clear from the evidence that the Pinney Trustees did not intend to give Marcus unbridled power. The events which led to the creation of the Trust, and the objectives of the Pinney Trustees are set out in the evidence of Mr McIntyre.⁸⁵ These included:
- a. The intention to create one structure to consolidate distributions from the Pinney Trust and eventually from the estates of Marcus's parents.
 - b. The need to ensure that future inheritances from the estates of Marcus's parents could be resettled to the new trust (which required that its terms complied with the terms of Marcus's father's will by excluding partners and spouses, and the possibility of adding them as beneficiaries later).
 - c. The desire to balance protection for inherited assets and flexibility of management.
 - d. The facts that Marcus was a novice trustee and relatively inexperienced in business.
 - e. The importance of protecting the other beneficiaries of the Trust.
98. Mr McIntyre made it clear that Marcus was expected to engage an accountant and a lawyer for advice about his trustee obligations and reminded him that:⁸⁶
- The trustee role is to look to the interests of all potential beneficiaries and not just to your interest as a primary beneficiary.*
99. In this context, it is submitted that the purpose of the 2-trustees requirement was to ensure that the interests of all beneficiaries were considered, and that Marcus did not have complete control over the Trust.
100. It follows that Marcus could not exercise his power of appointment of trustees to "work around" the 2-trustee requirement because this would amount to the exercise of a power for an improper purpose.

⁸⁴ *Grand View* at [61]. Including by considering contemporaneous external materials: at [63].

⁸⁵ HC Judgment at [10] and COA 301.0431.

⁸⁶ 301.0431 at 0432.

101. Neither can Marcus exercise his powers to bring about a distribution to himself in order to pay to Raewyn in satisfaction of her claims. That would result in the clandestine exercise of a power for a non-object.⁸⁷ If he did so, the beneficiaries (including Marcus' third child, though his mother) could seek a remedy from the courts.

The Trust Deed cannot be varied to enhance Marcus's rights and interests

102. Finally, the Trust Deed incorporates only a narrow power of amendment (clause 12), which only permits amendments to satisfy regulatory requirements or to advantage the management and administration of the Trust.

103. The power of amendment can only be exercised by the Trustees jointly and must be exercised in the interests of the beneficiaries and for proper purposes. There is no prospect of the Trust Deed being varied to alter its core provisions and give Marcus the rights and interests that Raewyn imagines he has.

Part 4: Analysis of Raewyn's Claims under the PRA

Marcus's powers as property

104. Marcus's primary submission is that the decisions of the High Court⁸⁸ and the Court of Appeal majority⁸⁹ were right: he does not have rights in relation to the Trust which are "property" for the purposes of the PRA.

105. However, if this Court determines that those judgments are wrong, then issues arise as to how his powers should be classified (i.e., whether they are relationship property or separate property) and how they should be valued.

Classification

106. Marcus received his powers when the Trust was formed in 2006, during his relationship with Raewyn. Therefore, as a starting point, the powers are relationship property pursuant to s 8(1)(e) of the PRA. This is the approach

⁸⁷ *Kain v Hutton* at [47] per Tipping J. In *Goldie v Campbell* the Court held that the use of the power of appointment to appoint a sole corporate trustee that Mr Campbell controlled in order that it may make distributions to him in breach of a no-self-benefit clause would be the use of a power an improper purpose: at [69]. See also *Brkic v White* at [35].

⁸⁸ At [97].

⁸⁹ At [108].

this Court took in *Clayton*.⁹⁰

107. Section 8 is subject to s 10. Marcus received his powers because he was a beneficiary of the Pinney Trust, i.e., a “trust settled by a third person”.⁹¹ Accordingly, the powers are his separate property under s 10(1)(a)(iv). Section 10 had no application in *Clayton*.
108. Raewyn’s only possible claims are therefore either:
- a. to a share of any increase in value of Marcus’s separate property powers during the relationship, pursuant to s 9A. (This approach appears to have been broadly adopted by Raewyn);⁹² or
 - b. for compensation pursuant to s 17 for sustenance of that property (as suggested by Miller J).⁹³

The value of a possible claim under s 9A

109. If the powers are Marcus’s separate property, then their value at the start of the relationship is his separate property, and it is the increase in that value during the relationship which may be relationship property.
110. The *Clayton* analysis, on which the appellant relies, equated the increase in value of Mr Clayton’s powers to the increase in value of the net assets of the VRPT.⁹⁴ The value of the VRPT had increased during the relationship.
111. Applying that analysis to these facts:

Net value of the powers at Date of Separation - Schedule A	\$1,572,758
Deduct the net value of the powers on settlement of the Trust	-\$1,652,992
Value of powers for PRA purposes	-\$80,234

112. When added to the total relationship property pool of -\$78,067.81,⁹⁵ the net result is that the relationship property pool decreased to -\$158,301.81.

⁹⁰ At [86].

⁹¹ PRA, s 10(1)(a)(iv).

⁹² Submissions for the Appellant at [79]-[91].

⁹³ CA Judgment at [96] per Miller J.

⁹⁴ *Clayton* at [104]-[107].

⁹⁵ See paragraph 11 above.

Why the appellant's proposed approach to s 9A is flawed

113. Miller J found Raewyn was entitled to a share in the increase in value of the farm because of her direct and indirect contributions to that increase.⁹⁶ In other words, he would have made an award pursuant to s 9A(2) of the PRA.

114. The appellant seeks orders in accordance with Miller J's calculation to determine the remedy which he thought Raewyn should receive.⁹⁷

Increase in value of the farm during the relationship	\$445,000.00
+ Family chattels	\$45,000.00
= Property pool	\$490,000.00
½ share	\$245,000.00

115. There are four flaws with this analysis:

- a. Miller J did not apply the principle expounded in *Clayton* that the value of the powers = the net value of the Trust's assets. Instead, he considered only the gross value of one asset.
- b. As illustrated in Schedule A, there was no increase in the net value of the Trust's assets during the relationship, there was in fact a diminution in the value of its net assets from \$1,652,992 at the start of the relationship to \$1,572,758 at the hearing date; there is no factual basis for any award under s 9A.
- c. Miller J did not assess the comparative contributions of Raewyn and Marcus to the increase in value of the farm, as required by s 9A(2)(b).
- d. He added to the pool chattels with a value of \$45,000, when the High Court had found that there were no chattels in the pool.⁹⁹

116. Should this Court depart from *Clayton*, and uphold Miller J's approach in only considering the farmland rather than the net assets of the Trust then, the application of s 9A needs to be considered in more detail.

117. The Court of Appeal in *Nation v Nation* held that when approaching claims under s 9A, the Court should look at matters in the round, and not take an

⁹⁶ CA Judgment at [97]-[98].

⁹⁷ Submissions for the Appellant at [116].

⁹⁸ *Clayton* at [107].

⁹⁹ HC Judgment at [129].

overly technical approach. While there is still an onus on the non-owing spouse, what needs to be established is easier to prove.¹⁰⁰

118. The PRA makes a distinction as to how any increase in separate property is shared between partners. Where any increase is caused by the application of relationship property, the increase is relationship property and shared equally – s 9A(1).¹⁰¹ There is no evidence to support any award under s 9A(1).
119. Where, as Miller J found in this case, the increase in value is caused by the direct or indirect contribution of the non-owner spouse, the increase in value is shared “in accordance with the contribution of each spouse or partner to the increase in value...”¹⁰²
120. The issue of how to assess the respective contributions of spouses to increases in value of separate property under s 9A(2)(b) was considered by this Court in *Rose v Rose*.¹⁰³ In relation to such claims the Court said they required “careful assessment”. In relation to how the Court should value increases in value caused by inflation,¹⁰⁴ the Court considered determined that it should treat inflationary increases as a contribution by the owing party.¹⁰⁵
121. For that reason, in *Rose v Rose*, the Court held that, but for the facts of that case,¹⁰⁶ most of the increase in value would have been a contribution by the husband.
122. In this case, the increase in the value of the farm was \$445,000. The only evidence as to the likely cause of the increase in the value of the farm is:
- a. The Trust's expenditure of \$176,000 on extensions and improvements to the farmhouse and guest accommodation;
 - b. The evidence of Mr Hancock, Raewyn's valuer that:

¹⁰⁰ *Nation v Nation* [2005] 3 NZLR 46 at [70].

¹⁰¹ PRA, s 9A(1).

¹⁰² PRA, s 9A(2)(b).

¹⁰³ *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1.

¹⁰⁴ *Rose v Rose* at [47].

¹⁰⁵ *Rose v Rose* at [47].

¹⁰⁶ Long relationship, growth in relationship debt to support separate property, Mrs Rose's off-farm relationship property income being applied to keep the farm going.

- i. the driving factor for farm prices in 2014 was the dairy price;¹⁰⁷
- ii. between 2014 and 2018 there was a decline in the market;¹⁰⁸
- iii. the value of the work carried out on the property between 2014 and 2018 was \$25,000.

123. Considering the above, it is submitted that the parties' respective contributions to the increase in value of the farm were at best Marcus 90% (\$400,500) and Raewyn 10% (\$44,500).

124. It would be unjust for this Court to stop there and ignore the debts of \$132,908, secured against the farm in considering the value of its increase. If Raewyn were entitled to 10% of the increase in the farm's equity, she should be liable for 10% of the increase in the farm's debt i.e., \$13,290.

125. The outcome would therefore be an award in Raewyn's favour of \$44,500 - \$13,290 i.e., \$31,210.

126. Justice would also require that Raewyn's entitlement be applied to offset her half share of the negative relationship property pool of -\$78,068.

Section 17 – Sustenance of separate property

127. Section 17 provides a remedy where separate property has been sustained by the application of relationship property or the direct or indirect contribution of the non-owner partner.

128. The potential argument is that the value of the powers = the net value of the Trust's assets; Raewyn / relationship property sustained the value of Trust assets, therefore Raewyn is entitled to compensation pursuant to s 17.

129. In *Mclraith v Mclraith*, the High Court noted that the Court of Appeal in *Hebberd v Hebberd*¹⁰⁹ had explained that the concept of sustenance as meaning "something more than to merely render assistance and to play a role in the running of the farm"¹¹⁰ and had said:¹¹¹

¹⁰⁷ 306.1596 at 1633, para 108.

¹⁰⁸ 306.1596 at 1637, para 123.

¹⁰⁹ *Hebberd v Hebberd* [1992] 3 NZLR 517 (CA).

¹¹⁰ *Mclraith v Mclraith* [2015] NZHC 2758.

¹¹¹ At [43].

The wife's contribution to the marriage partnership by the work she did from time to time on the farm no doubt contributed to the farm profits over the period. It should be noted, however, that personal expenses, including income tax and car expenses, exceeded the net farm profit ... In our view, the wife's contribution must be regarded as having been reflected in the living expenses of the parties and in the standard of living which they were able to enjoy. The evidence does not establish that her contribution "sustained" the farm and its associated assets within any meaning which can properly be attributed to that word.

130. In *P v S*¹¹² Doogue J reviewed earlier authorities and held that the onus was on the claimant to show not just that she rendered assistance with the husband's separate property business, but that she preserved it, "in the sense of ensuring its continued existence or value".¹¹³
131. There is evidence that Raewyn "rendered assistance" in the business of the Company, but no evidence to show that she "preserved it [the farmland], in the sense of ensuring its continued existence or value". There is evidence, that the Company traded at a loss but, notwithstanding that loss, as in *Hebberd*, the Company paid personal expenses and provided the parties "the standard of living which they were able to enjoy" through drawing down increasing amounts of debt.
132. Therefore, there is no basis for any award under s17 in this case.
133. If the Court were to determine there should for an award, it is submitted that:
- a. The quantum of award is discretionary;
 - b. The Court of Appeal has warned against using the section to undermine the concept of separate property.¹¹⁴
 - c. Section 17 awards are modest e.g., in *Nation v Nation* where there was detailed evidence of the work done by Mrs Nation, the award was \$35,000.
 - d. When weighing up any award, the Court must consider that, as matters

¹¹² *P v S* [2019] NZHC 2608, [2019] NZFLR 448.

¹¹³ At [55].

¹¹⁴ *Hight v Hight* [1997] 3 NZLR 396 (CA).

stand, the parties' relationship property pool has a negative value of - \$78,067 and that Marcus alone is shouldering that debt. If the Court makes any award to Raewyn pursuant to s 17, it should direct that it be applied to offset Raewyn's share of the relationship debt.

Part 5: The relevance of Tikanga Māori

134. In her submissions of 20 September 2023, for the first time Raewyn raises the issue of tikanga and submits that it provides another “vocabulary” with which to consider the issues in this appeal.
135. Two procedural issues arise which the appellant has not addressed:
- a. First, this issue was not raised in the Leave to Appeal application.
 - b. Second, this Court has not granted leave to raise it.
136. For those reasons alone, the Court should not take the issue further.
137. Going beyond those technical issues, there are substantive reasons for the Court not to try and adopt a tikanga vocabulary to this proceeding.
138. In *Ellis v R (Continuance)*¹¹⁵ this Court reviewed the place of tikanga in the law of Aotearoa/New Zealand. Saliiently, before doing so, the appeal was adjourned to enable to Court to receive evidence as to what the tikanga was, and submissions as to its import in the particular case.
139. Members of the Court noted:
- a. Tikanga will need to be considered where it is relevant to the circumstances of the case. It will not have to be considered in cases where it is not or where considerations of tikanga will not assist;¹¹⁶
 - b. Challenging issues might arise when there is a difference between resolution of a dispute on tikanga principles compared with the resolution on common law principles, and those differences will need to be resolved on a case-by-case basis;¹¹⁷

¹¹⁵ *Ellis v R* [2022] 1 NZLR 239.

¹¹⁶ Glazebrook J at [117].

¹¹⁷ Glazebrook J at [119].

- c. The experts who provided the Court with the Statement of Tikanga raised a concern that there could be unintended consequences if the Courts who applied tikanga were not sufficiently familiar with it;¹¹⁸
- d. Tikanga itself is a complete system and care must be taken not to pick and choose elements, thereby depriving it of its essential value or distorting the concepts;¹¹⁹
- e. The relevance of tikanga is best addressed on a case-by-case basis;¹²⁰
- f. In any case, the relevance and weight to be accorded to tikanga will always depend on the context of the case.¹²¹

140. The Court's comments echoed the concerns of the Law Commission on the subject in its recent review of the PRA where it noted that identifying the relevant tikanga is a question of fact on which the Court may require expert evidence unless it is agreed or is so obvious that judicial notice can be taken.¹²²

141. The Law Commission Study Paper on tikanga, *He Poutama* states:¹²³

Tikanga is increasingly being woven into statute and the common law while, at the same time, gaining wider recognition within state law as being an independent source of rights and obligations. Yet tikanga is not well understood outside of Māori communities. The breadth and depth of tikanga is often overlooked and misunderstood.

142. In its introduction, the Commission talks of the complexity of tikanga and the assistance it received from external advisors in its attempt to ensure that its account of tikanga was done, "in an authentic way that maintains the integrity of tikanga".¹²⁴

143. The Commission writes;

¹¹⁸ Glazebrook J at [230]-[122].

¹¹⁹ Winkelmann CJ at [180].

¹²⁰ Winkelmann CJ at [183].

¹²¹ Williams J at [261].

¹²² Law Commission, *Review of the Property (Relationships) Act 1976*, NZLC R143, 2019 at 14.49.

¹²³ Law Commission Study Paper 24, September 2023 at v.

¹²⁴ At 1.38 & 1.39.

3.8 *It is important to understand that tikanga is a complete system of principles for “the right or correct way of doing things”. These principles order Māori affairs and so regularly influence behaviour that they have been referred to as Māori custom...*

3.9 *We agree with Tomas that “there is a need for a better understanding of how [tikanga] fits together as a coherent, principle-based system of law.” (footnotes omitted)*

144. In this case, there is no evidence as to the content, context, or relevance of tikanga. There is no way for the Court to know how it can maintain the integrity of tikanga or how it fits together as a coherent principle-based system of law with application to the facts of this case. Consequently, it would be wrong for this Court to use it as an “ingredient” when determining this appeal.

145. Notwithstanding the above, and subject to the above constraints, Marcus responds below to the tikanga issue as identified by the appellant namely “that legislative reform, in particular the PRA has displaced tikanga-based approach to support at the end of a marriage”,¹²⁵ by asking the following questions:

- a. Is there a tikanga-based approach as to support at the end of a de facto relationship?
- b. If so, what is the tikanga-based approach as to financial support following the end of this relationship between these two Pākehā parties?
- c. Has the PRA displaced tikanga as the basis for financial support at the end of a relationship?

146. The PRA is primarily about the “division of property” at the end of a relationship,¹²⁶ not ongoing financial support between parties following the end of the relationship. That issue is addressed principally by Part 6 of the Family Proceedings Act 1980 and only peripherally at s 32 of the PRA.¹²⁷

¹²⁵ Submissions for the Appellant at [100].

¹²⁶ PRA, ss 1C, 1G, 1M.

¹²⁷ PRA, s 32 (the Court must have regard to any orders made for maintenance under the FPA and may, as part of the PRA proceedings, make an order under the Family Proceedings Act 1980).

147. There is no basis for using this claimed tikanga principle to award Raewyn a share of property owned by the Trust.

Conclusion

148. The parties' relationship lasted 9 years; they have been litigating for the same length of time. The value of their relationship property was -\$78,067 and Marcus has been left with debt of \$128,962. Each of the parties has incurred significant legal costs and is now legally aided. There is scant prospect of either party receiving any costs from the other, even if an award were made.

149. During the course of the litigation, Raewyn's claim has gone from "half the farm"¹²⁸ to a share of the increase in its value, notwithstanding that the farm is only part of the assets (and liabilities) of the Trust and in the absence of any evidence of the value of her contribution to that increase. Throughout, she has resisted any suggestion that she should share any of the debt the parties incurred to meet their living costs.

150. This appeal is without merit. The principle of s 1N(d) – that questions under the PRA should be "resolved as inexpensively, simply and speedily as is consistent with justice" – has not been served to date. In the interests of justice, the appeal must be dismissed.

Dated 9th October 2023

I certify that the submissions do not contain any information that is suppressed and that the submissions are suitable for publication.

SN van Bohemen, Counsel for the Respondent
24 October 20223

¹²⁸ NOE 201.0212.

SCHEDULE A

TRUSTEES IN THE MRW PINNEY FAMILY TRUST

Statement of Financial Position

As at 30 June 2014 – Revised for the purposes of the PRA – all figures as per 301.0803 unless indicated as below

	Value \$	Case on Appeal
Current assets		
ANZ Bank / Te Taho Deer Park Ltd /Taxation	192,222	302.0703 at 0803
(Arguably this should be reduced by \$188,071 if Te Taho Deer Park is insolvent and it cannot pay its debt to the Trust)		
Non Current Assets		
Land & Buildings – value at hearing (s 2G, PRA)	1,545,000	306.1596
Furniture & Fittings	3,336	
	1,548,336	
Investments		
Te Taho Deer Park Limited	98	305.1372 at 1524
(Arguably this should be \$0 if company insolvent – see below)		
Total assets	1,740,656	
Current liabilities		
GST / Accounts payable /Beneficiaries Current accounts	-34,990	
Term liabilities		
Te Taho ANZ debt secured by mortgage over Trust farm	-132,908	305.1372 at 1528
Total liabilities	-167,898	
Net assets (with market value of land and buildings at date of hearing and inclusion of debts secured by registered mortgage over the land)	1,572,758	
Net assets as above, but if Te Taho Deer Park treated as insolvent	1,384,589	

SCHEDULE B

Trust Deed Analysis

	Vaughan Road Property Trust	MRW Pinney Family Trust
Settlor	Mr Clayton	Mr Pinney one of four settlors nominated on trust deed
Source of property	Mr Clayton	Property settled on trust by Trustees of Pinney Trust by Deed
Trustee	Mr Clayton	Mr Pinney one of three original trustees
Minimum number of trustees		"There shall at all times be at least two Trustees" – cl 15(d)
Role for settlor-control	Mr Clayton is Principal Family Member (PFM)	
Trust period	Cl 2.1 – 80 years or such earlier days as Trustees appoint	Cl 1(c) – 80 years or such earlier date appointed by the Trustees
Beneficiaries	Discretionary Beneficiaries: PFM Final Beneficiaries, issue, and spouses Any trust ... which includes ... any Beneficiary Any person appointed pursuant to cl 7(1)(a) Final Beneficiaries: Children of PFM	Discretionary Beneficiaries: Mr Pinney, children, and grandchildren Final Beneficiaries: Children and grandchildren of Mr Pinney
Power to add and remove beneficiaries	Cl 7.1 – PFM may appoint or remove members of the class of Discretionary Beneficiary	
Power to appoint and remove trustees	Cl 17 – PFM (who may transfer to another person, and exercise in favour of self)	Cl 15 – Mr Pinney during his lifetime and then Trustees or Executors of his estate Subject to requirement for a minimum of 2 Trustees
Power to distribute income during trust period	Cl 4.1 – to or for Discretionary Beneficiaries at the discretion of Trustees	Cl 4 – to or for Discretionary Beneficiaries at discretion of Trustees

Power to distribute capital during trust period	CI 6.1 – to or for Discretionary Beneficiaries at the discretion of Trustees	CI 6 – to or for Discretionary Beneficiaries at discretion of Trustees
Power to appoint capital on vesting	CI 10.1 (a) for Discretionary Beneficiaries at the discretion of the Trustees (b) Default – Final Beneficiaries with substitution of issue (c) Default – intestacy rules re PFM	CI 11 (a) for Discretionary Beneficiaries at discretion of the Trustees (b) Default – Mr Pinney's children with substitution of issue
Power to resettle	CI 8.1 – Discretion of Trustees to Trustees of any trust ... which includes ... Discretionary Beneficiaries	CI 7 – to or for Discretionary Beneficiaries at discretion of Trustees
Power of variation	CI 23.1 – Trustees with prior written consent of PFM Management and administration of the trust only	CI 12 – Trustees may vary trust deed: (a) to satisfy statutes, rules, or regulations; or (b) to improve management and administration.
Exercise of discretions	CI 12.2 – Except as otherwise provided, Trustees have absolute and uncontrolled discretion	CI 13 – Subject to express provisions, discretions and powers vested in Trustees shall be absolute and uncontrolled
Limitations on fiduciary duties	CI 11 – Contracts out of duty to consider interests of beneficiaries and permits trustee to act contrary to interests of beneficiaries CI 14 – Contracts out of duty not to self-benefit CI 19 – Contracts out of duty to avoid conflict of interest	CI 17 – Contracts out of the duty to avoid conflicts of interest CI 18 – Contracts out of duty not to profit
Interpretation	CI 2.2 – Interpretation favours broadening powers and restricting the liabilities of the Trustees	