IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 65/2024

UNDER	The Family Proceedings Act 1980
IN THE MATTER	Of an appeal against a decision of the Court of Appeal
BETWEEN	**Bartholomaeus Roland LASSNIG**, electrician, of Auckland *Applicant*
AND	**Qian ZHOU**, company director, of Auckland *First Respondent*
	Qian ZHOU and **Bartholomaeus Roland LASSNIG** as Trustees of the **LASSNIG FAMILY TRUST** *Second Respondents*

SYNOPSIS OF SUBMISSIONS OF THE APPELLANT

Dated 6 November 2024

Lawyer acting: Daniel Zhang

Tel: (09) 905 – 1493

Fax: (09) 969 - 1492

Level 6, 300 Queen Street

P.O. Box 68859 Wellesley, Auckland CBD 1141

DX CP24062

dzhang@adventark.co.nz

Counsel for the appellant certifies that this submission contains no suppressed information and is suitable for publication.

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MAY IT PLEASE THE COURT,

1. We file these submissions on behalf of the Appellant ("**Mr Lassnig**").

PART 1. SUMMARY OF ARGUMENT

2. This appeal concerns the application of s 182 Family Proceedings Act 1982 ("**FPA**"), in circumstances which this Court has not considered before.

3. In *Ward v Ward*[1] and *Clayton v Clayton*,[2] the parties had marriages of significant length and there were children from the relationship. The nuptial settlement in question was settled and its assets acquired, during the marriage. In those cases, orders were made effectively dividing the trusts' equity in two.

4. By contrast, *Preston v Preston*,[3] the parties' relationship was short and there were no children of the marriage. Furthermore, the nuptial settlement in question had been settled and most (if not all) of its assets acquired before the marriage. In that case, only a modest award was justified.

5. This case combines elements from both types of cases referred to above. On the one hand, like *Preston*, the parties' marriage was a short one and they had no children together. On the other hand, the parties settled the trust together, and through that trust, jointly acquired assets. There is no disagreement that the general approach is the three-stage test as set out by this Court in *Preston* – but the question is how that approach should be applied in this case's circumstances?

6. Broadly speaking, the Court of Appeal ("CA") erred in two ways:

    a. Firstly, it wrongly assessed the gap as required by stage 2 of the analysis. Most significantly, its assessment of the gap was based on its determination that the parties reasonably expected that they would only share the net equity of the trust in proportion to their respective financial contributions. The CA correctly reasonable expectations of the parties had to be considered objectively in the context of the circumstances surrounding the settlement of the trust. However, the CA did not consider the reasonable expectations of the parties in an objective way, ignoring clear evidence to the contrary and instead substituting its own value

[1] [2009] NZSC 125.
[2] [2016] NZSC 30.
[3] [2021] NZSC 154.

judgment.

b. Secondly, it erred in its assessment of the relevant factors under stage 3. In particular, the CA erred in its assessment of the parties' respective financial contributions. It gave too much weight to Ms Zhou's contributions, and wrongly ignored other financial contributions that Mr Lassnig made (i.e., jointly borrowing money to buy the properties). The CA also did not give any consideration to the fact that Ms Zhou has been living rent free in trust property to the exclusion of Mr Lassnig since 2016 – which amounts to an unfair benefit at the expense of Mr Lassnig.

PART 2. NARRATIVE OF FACTS

7. The parties entered a relationship on 27 July 2012.[4] At the commencement of the relationship, both parties held property interests of their own. The First Respondent's ("**Ms Zhou**") property interests at the commencement of the relationship were significantly greater than that of Mr Lassnig's:

   a. Ms Zhou was a beneficiary under the Zhou Family Trust ("**ZFT**"), which owned 557 East Coast Road. She also is the sole shareholder in Fields Parade Limited ("**FPL**"), which in turn owned various real properties, and Wiki Property Management Limited ("**Wiki**"), which operated a property management business.

   b. On the other hand, Mr Lassnig had an interest in land in Taranaki, which he had originally acquired with his former wife. He later became the sole owner after his former wife transferred her share to him.

8. On 30 November 2012, around four and a half months after the parties' marriage, the parties jointly settled the Lassnig Family Trust (the "**LFT**").[5] Ms Zhou's own evidence was that the LFT was set up "for our joint benefit for the purpose of providing a vehicle to purchase an investment property". She also said that setting up the LFT was to "show [Mr Lassnig] that I loved him and to help make him feel secure, and because I believed we were building a life together 'forever'".[6]

[4] 101.0069 at [73] and [74]. The parties accept the Family Court's finding on this point.
[5] 101.0061 at [14]; 301.0068.
[6] 201.0021 para 40.

9. The LFT Deed records that:

    a. Mr Lassnig and Ms Zhou were the trustees of the LFT.

    b. Mr Lassnig and Ms Zhou were listed as discretionary beneficiaries, but also as the "Primary Beneficiary". Ms Zhou's son, John, was also a "Primary Beneficiary", but this was only if both parties were deceased on the Day of Distribution.[7]

    c. The "Date of Distribution" is defined as either the last day of the period of "eighty (80) years beginning on the date of execution of this Deed", or "such earlier date…which the Trustees may in their sole and unfettered discretion at any time or times direct and appoint by deed in respect of the whole or any specific part of the trust fund".[8]

    d. From and after the Date of Distribution, unless provided otherwise in writing, the Trustees would hold the Trust Fund for "the Primary Beneficiary absolutely".[9]

10. On 12 December 2012, the LFT agreed to purchase the first of the three trust properties, 903 East Coast Road ("903 ECR"), for $670,000.[10] Mr Lassnig contributed $167,000, whilst FPL contributed $71,919.09, each by way of advance to the LFT. The balance of the purchase price (approximately $430,000) was borrowed by the parties (as trustees) from a bank. The bank borrowing on 903 ECR was subsequently reduced on 5 August 2013 using funds provided by a $124,000 advance from FPL to the LFT.[11]

11. On 19 April 2013, the LFT agreed to purchase 16 Jack Barry Road, Waitoki ("Jack Barry") for $985,000.[12] FPL provided $45,000,[13] whilst Mr Lassnig contributed $20,918.33.[14] Additionally, the ZFT lent $700,000 to the LFT,[15] and the parties jointly borrowed the rest of the funds from the bank. After settlement in June

[7] 301.0073.
[8] 301.0072.
[9] 301.0076.
[10] 301.0109.
[11] 101.0061 at [15]; 301.0124; 301.0125; 301.0127.
[12] 301.0129.
[13] 101.0061 at [16]; 301.0141.
[14] 201.0023 para 52; 301.0170. However, on appeal (in the High Court and Court of Appeal), Ms Zhou appears to no longer recognise this contribution.
[15] 101.0061 at [16]. The ZFT raised these funds by selling 557 East Coast Road to FPL.

2013, the parties moved into Jack Barry.[16]

12. On 26 February 2014, the LFT agreed to purchase 61 Young Access, Silverdale ("Young Access") for $1,700,000. On 20 March 2014, FPL advanced $100,000 to the LFT, and possibly a further $170,000.[17] The balance (of at least $1.43 million) was jointly borrowed from ANZ Bank. In July 2014, the parties moved to live at Young Access, where they lived until separation. Wiki occupied a portion of Young Access for its business and paid a monthly rental of $3,000. That rental was deposited into an FPL bank account was recorded as reductions of the loan the FPL provided to the LFT.[18]

13. Other than the contributions to the purchase price, the parties made further financial contributions to the trust properties. In particular, Mr Lassnig was the one who serviced the mortgage.[19] In total, the respective financial contributions to the LFT were approximately $1,256,000 (Ms Zhou) and $290,000 (Mr Lassnig).[20] These advances by the parties were interest-free and neither party sought interest even after proceedings had been commenced, or upon appeal.

14. John also made an advance of about $84,000 to the LFT.[21] That advance was treated as a loan by John (not Ms Zhou) to the LFT and it was also interest free.

15. Both parties made broadly equal non-financial contributions to the LFT. That finding has been repeatedly confirmed upon appeal and cannot be faulted.[22]

16. On 26 July 2015, following a domestic incident, the parties separated.[23] After separation, Mr Lassnig continued to live in Young Access until April 2016, when he left Young Access permanently.[24] Ms Zhou still lives at Young Access and

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[16] 101.0061 at [17]. Prior to this the parties were living at 557 East Coast Road.

[17] 102.0004 at [17]; 301.0198. The trust ledger appears to show that Ms Zhou had advanced another $170,000 on 16 July 2014 and 17 July 2014, although it is not clear where the funds were applied to, nor when these entries were added to the ledger. Ms Zhou has not produced any evidence showing the source of the $170,000, its application to Young Access nor has she explained these in her own affidavit.

[18] 201.0027 at para 71 and 134.

[19] 201.0024 at [55] and 301.0169-173. We do not understand Ms Zhou to dispute that Mr Lassnig was the one making most of the mortgage repayments.

[20] 101.0099 at [232].

[21] 102.0004 at [18].

[22] 102.0016 at [64], 102.0148 at [93] to [96].

[23] 101.0075 at [120].

[24] There was some attempt at reconciliation after the date of separation (for example the parties attended 2 counselling sessions), although ultimately the parties did not resume their relationship.

operates her companies from that address. She also retained possession of Jack Barry. Ms Zhou retained the rental income from Jack Barry and Young Access and has been using it to pay the outstanding loan.

17. In May 2016, after separation of the parties, 903 ECR was sold for $995,000. The net sale proceeds of $964,590.11 were used to pay down the existing bank loans, leaving Jack Barry mortgage free.[25] As of April 2023, the total lending owed by the LFT to the bank was approximately $640,000.[26]

18. On 6 April 2022, the Family Court delivered judgment ordering equal division of the LFT's net equity between the parties. Unhappy with that outcome, Ms Zhou appealed to the High Court.

19. On 30 September 2022, the High Court allowed Ms Zhou's appeal, instead ordering division of the LFT's net equity 60%-40%. Still not content, Ms Zhou appealed to the CA.

20. Pending the appeal to the CA, Ms Zhou sought a stay of the High Court judgment. The High Court granted a stay, but on terms, including that Mr Lassnig was able to pursue orders for the sale of Jack Barry and that he would be paid the sum of $406,000 (i.e., 10% of the LFT's net equity) plus capital contributions of $290,000 out of those proceeds.[27]

21. On 18 October 2023, Judge McHardy in the Family Court made orders for the sale of Jack Barry.[28] However, Jack Barry has not yet been sold, nor has Mr Lassnig received repayment of his capital contributions or the 10% net equity which Ms Zhou conceded Mr Lassnig was entitled to in the CA.

PART 3. JUDGMENTS BELOW

3.1 Family Court

22. There was no dispute in the Family Court that the LFT was a nuptial settlement. In fact, the parties were agreed that the discretion under s 182 FPA should be exercised by way of an order for a sum to be quantified and paid to Mr Lassnig.

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[25] 102.0004 at [20].
[26] *Zhou v Lassnig* [2023] NZHC 714 (the "Stay Decision") at [12].
[27] The Stay Decision at [23](a) and (b).
[28] *Lassnig v Zhou* [2023] NZFC 11546.

Rather, the question was how the discretion should be exercised – i.e., what sum should be paid to Mr Lassnig?

23. The Family Court said that the task under s 182 FPA was not to divide the LFT's assets as if it were a division under the Property (Relationships) Act 1976, but to have regard to the expectations of the parties of the LFT were it not for the dissolution of marriage, and the difference that now exists because of the dissolution of marriage.[29] In assessing the expectations of the parties, the Family Court had regard to:

    a. The fact that the parties *both* decided to settle the LFT.[30]

    b. Ms Zhou's own evidence in describing the rationale for the LFT, which was to make Mr Lassnig happy, show him she loved him and to build a life together. Ms Zhou also expressly said the LFT was settled for the parties' *joint* benefit.[31]

    c. Mr Lassnig's evidence of belief that after repayment of loan accounts the LFT's equity would be shared equally.[32]

    d. The reality that although each party had differing levels of contributions to the LFT, these sums were to be reimbursed as separate property to the party advancing the funds in the first place, thus significantly reducing the weight to be given to financial contributions.[33] That said, the Family Court expressly acknowledged that Ms Zhou's financial contribution to the LFT put it in a better position to acquire assets.[34]

    e. As a result of the dissolution of marriage, Mr Lassnig no longer had occupation of a home provided by the LFT, or any "fruit from the [LFT] than reimbursement of his financial contribution".[35]

    f. The interest free advantage to the LFT of the advances from each party and the desirability that there is no unjust enrichment of the remaining

[29] 101.0102 at [248].
[30] 101.0097 at [217].
[31] 101.0097 at [219].
[32] 101.0101 at [246].
[33] 101.0097 at [221] and [222]. See also 101.0082 at [139].
[34] 101.0098 at [223].
[35] 101.0098 at [226].

beneficiaries after Mr Lassnig is removed as trustee and beneficiary.[36]

g. The interests of other discretionary beneficiaries.[37] However, the Family Court noted that John's interest in the LFT was contingent on the parties predeceasing him.[38]

h. The reality that the parties' relationship was short.[39]

24. Based on the above, the Family Court came to the clear view that the parties' intent in settling the LFT was "for there to be reimbursement of capital contributions and then joint sharing of the resultant accumulated value of the [LFT's] assets",[40] and with the dissolution of marriage, that expectation was not met. So, the Family Court made orders that Mr Lassnig should be paid half the equity in the LFT after repayment of the parties' loan accounts and other third-party debt, saying this was "consistent with [the parties'] intent".[41]

3.2 High Court

25. The High Court considered that it was "not entirely clear" whether the Family Court applied the correct approach mandated by this Court in *Preston*. So, it decided to approach the matter afresh and reassess the gap between positions B and C under stage 2 of *Preston*. largely upheld the factual findings of the Family Court. But it said that it was not clear if the Family Court had correctly applied the test under stage 2, so carried out the reassessment afresh.

26. The High Court assessed the gap as follows:[42]

a. Under position C, Mr Lassnig would have continued to live in one of the LFT's properties and could have shared in surplus trust income and/or capital distributions during the course of his life.

b. Conversely, under position B, Mr Lassnig remains entitled to repayment of his loans to the LFT but would no longer be able to live in a trust

[36] 101.0100 at [236](f).
[37] 101.0100 at [236](g).
[38] 101.0100 at [239].
[39] 101.0100 at [236](h).
[40] 101.0102 at [249].
[41] 101.0102 at [252].
[42] 102.0014 at [57] and [58].

property and will have no ability to call on the LFT for income or capital distribution in the future.

27. Ms Zhou argued that Mr Lassnig was effectively in the same position whether under B or C, because he had to pay mortgage outgoings during the relationship (as opposed to rent for accommodation now they were separated). This argument was rejected by the High Court.[43]

28. The High Court then turned to consider the financial implications of a resettlement, comparing the amounts Mr Lassnig would receive under the Family Court judgment versus what Ms Zhou was proposing. However, the High Court's broad-brush analysis wrongly calculated bank debt of $1,115,000, when in fact bank debt was only $658,390 (as of 29 March 2021).[44] This meant that the net equity should have been $1,961,610, rather than $1,505,000 (based solely on March 2021 values). The LFT's net equity may be even higher now; as of March/April 2023 the LFT's net equity may be around $4 million.[45]

29. Turning to the stage 3 assessment, the High Court reaffirmed the Family Court's finding that the parties' non-financial contributions were broadly equal, and so focussed on the appropriate weight to be given to the unequal financial contributions made by the parties.[46] The High Court pointed out that the increase in the LFT's net equity came about because of inflation rather than any improvements the parties had made to the properties. Nonetheless, the High Court considered that the Family Court did not give sufficient weight to the fact that without Ms Zhou's initial financial contributions, the LFT would not have been in a financial position to have purchased all three properties.[47]

30. Against that, the High Court considered that the LFT was clearly intended to be for the benefit of both parties, and that it was a classic family trust established to primarily benefit and be used by the principal parties.[48]

31. Finally, the High Court considered that the Family Court did not give sufficient

[43] 102.0017 at [67].
[44] We do not know what the current level of bank debt is now, but as of March/April 2023, the bank debt was about $640,000: see fn 16 above.
[45] See the Stay Decision at [12].
[46] 102.0016 at [64].
[47] 102.0016 at [65].
[48] 102.0017 at [66].

weight to the short length of the relationship.[49] This factor, together with the level of financial contribution made by Ms Zhou, justified a 60-40 split (in favour of Ms Zhou) in the High Court's view.[50]

3.3 Court of Appeal

32. The CA took a completely different view of the gap under stage 2. It first considered the purpose of the LFT, stating that it was relevant to the assessment of the parties' expectations assuming a continued marriage. After considering the parties' respective evidence on this point the CA concluded that the purpose of the LFT was to provide for their retirement and a home for them to live in.[51]

33. In assessing Mr Lassnig's position C, the CA agreed that Mr Lassnig was able to live in one of the trust properties, but that this came with the obligation to contribute to the LFT's outgoings and upkeep.[52]

34. It also disagreed with the High Court that Mr Lassnig would be able to receive income and capital distributions in the short to medium term. It said that there was no reasonable expectation of capital distributions prior to the parties' retirement, noting the LFT's high level of borrowing and the need to service that borrowing and repay it over time. Rather, the CA considered that the expectation of sharing in surplus income and/or capital was premised on the relationship enduring into the parties' retirement, given its finding that the LFT's purpose was to provide for the parties' retirement.[53]

35. The CA then went on to consider how the parties could reasonably expect to share in the LFT's net equity. It concluded that Mr Lassnig could not reasonably expect equal sharing of the LFT's net equity, but only a percentage share based on contributions. This was for three reasons.

36. First, the CA considered the hypothetical situation where the trust property values fell in value to the point where the equity after repayments of bank loans would be insufficient to fully pay off the loans advanced by the parties. The CA considered that in this scenario, the parties would reasonably expect repayment

[49] 102.0017 at [68].
[50] 102.0017 at [69].
[51] 102.0135 at [54].
[52] 102.0136 at [57].
[53] 102.0136 at [58].

of their loans pro rata, i.e., the loss would be shared in proportion to their advances rather than equally. By parity of reasoning, the parties must also have reasonably expected to share gains pro rata.[54]

37. Second, the CA had regard to Ms Zhou's evidence that if she had not met Mr Lassnig, she would have kept investing in properties through FPL, and by investing through the LFT instead, she (or more specifically, FPL) forewent such investment opportunities. The CA considered that this demonstrated that Ms Zhou was unlikely to have intended to only limit her return to an equal share, but rather sharing pro rata.[55]

38. Third, the CA noted that this was a case where there was a significant degree of financial separation. It noted this court's comments in *Preston* that financial separation was not necessarily decisive, but distinguished *Preston* from the present case. The CA said that in *Preston* the parties were operating as a family unit, notwithstanding that they maintained a degree of financial separation. But here, the parties were not operating as a family unit analogous to that in *Preston*. The level of financial separation justified the conclusion that the parties' reasonable expectations would share the LFT's net equity pro rata.[56]

39. As for the assessment of Mr Lassnig's position C, the CA accepted that Mr Lassnig would be entitled to repayment of his advances. It acknowledged that Mr Lassnig no longer had use of LFT property, but said that correspondingly, he no longer had any responsibility for servicing the external debt or upkeep of the properties. It also acknowledged that Mr Lassnig will not be able to call on the LFT for income or capital distribution under position B but considered that this was of no import given that it did not think there was any realistic expectation of payment in the short to medium term anyway.[57]

40. Therefore, the CA determined that gap between B and C was narrow and would become negligible once Mr Lassnig is repaid his financial contributions and receives a pro rata share of equity in the LFT assets.[58]

41. Having assessed the gap as being small, the CA went on to consider the exercise

[54] 102.0138 at [64].
[55] 102.0138 at [65] to [67].
[56] 102.0139 to 102.0140 at [68] to [69].
[57] 102.0141 at [72].
[58] 102.0142 at [77].

of the discretion at stage 3. It focussed on the disparity of financial contributions, noting the short duration of the marriage, and the fact that non-financial contributions were broadly equal. The CA did not consider any other factor to be relevant in the present case.

42. The CA considered that the High Court was focussed on making sufficient provision to Mr Lassnig to enable him to purchase a home. However, the High Court had attributed a significantly lower net equity to the LFT. So, to still achieve the goal of providing Mr Lassnig with a home, the High Court ordered a 60/40 split. The CA surmised that had the High Court used the correct figure, it would likely have made orders for a 70/30 split instead.[59]

43. The CA noted that one of the purposes of s 182 FPA is to prevent a party from benefiting unfairly from the settlement at the expense of the other in the changed circumstances. It considered that a 60/40 split would have resulted in a significant windfall to Mr Lassnig because the resulting award would have allowed Mr Lassnig to purchase a mortgage-free home. Furthermore, the gap between positions B and C was negligible; the marriage was a short one; there was no disparity in non-financial contributions; Ms Zhou had put in considerably greater financial contributions (with greater opportunity cost); and those financial contributions enabled the purchase of the three properties.[60]

44. Ultimately, the CA ordered payment to Mr Lassnig of 20% of the net equity in the LFT. This was effectively a return proportionate to Mr Lassnig's total financial contributions with a minor uplift to "reflect the temporally distant contingency that if the marriage had continued until the parties' retirement, Mr Lassnig might have benefited to a greater extent from the [LFT's] net equity".[61]

PART 4. SUBMISSIONS

45. We now turn to addressing the CA's errors, starting with those that were made at stage 2.

4.1 Reasonable expectations of the parties

46. As outlined above; in assessing the gap at stage 2, the CA devoted a significant

[59] 102.0153 at [113] and 102.0154 at [115].
[60] 102.0154 at [116].
[61] 102.0154 at [117].

portion of its judgment to its assessment of the parties' reasonable expectations. It concluded that Mr Lassnig's reasonable expectations were that he could only expect to share the LFT's net equity pro rata; albeit such expectations might have changed had the marriage endured. However, we submit that the CA has erred in in its assessment of Mr Lassnig's reasonable expectations.

4.1.1 Mr Lassnig's expectations reduced by the burden of being a trustee?

47. The CA determined that if the marriage continued, the parties would have continued to live in one of the LFT's properties with an obligation to contribute to its upkeep and costs. It considered that there was a "clearly reasonable expectation" that the parties would financially support the joint venture.[62] Conversely, with the marriage dissolved, Mr Lassnig no longer has shared use of trust property, but he also no longer shared responsibility for servicing the LFT's debt, or for upkeep of properties.[63] The implication is that Mr Lassnig's expectation of having somewhere to live in was somewhat diminished.

48. The position is more nuanced than that. While it is probably true that Mr Lassnig was expected to contribute where he could, that did not necessarily mean that where Mr Lassnig could not contribute, he would be expected to vacate the premises. It is not difficult to think of a scenario where Mr Lassnig would continue to live in a trust property yet not be contributing. For example, what if Mr Lassnig through illness became unable to make contributions (whether financial or non-financial)? In that circumstance, it is difficult to imagine that Ms Zhou would then demand that Mr Lassnig leaves. It would certainly be at odds with Ms Zhou's own evidence that she wanted to make Mr Lassnig feel happy and to show him that she loved him and wanted to help make him feel secure.

49. Ms Zhou had run an argument in the High Court based on similar reasoning. She argued that the gap for Mr Lassnig was small, because there was no difference in substance between Mr Lassnig making mortgage repayments whilst living in the LFT properties and having to pay rent to live elsewhere. Venning J dismissed this argument, nothing that there is quite a difference between paying a mortgage on an asset in which a beneficiary is living as opposed to paying rent. We submit that Venning J must be correct on this point – the person paying off the mortgage

[62] 102.0136 at [57].
[63] 102.0141 at [72].

receives more than just a place to live; they are increasing their interest in the property and building their wealth.

50. The "obligation" to contribute to the LFT's upkeep and costs must also be considered against the fact that Mr Lassnig's mortgage repayments were credited to him as a loan to the LFT. Although Mr Lassnig has not received any refund for any of the payments during the marriage (and to date, for that matter), there is no dispute that Mr Lassnig would be entitled to be reimbursed for those repayments.

51. The short point to all this is that Mr Lassnig's contribution to the LFT's upkeep and costs does not (or at least not meaningfully) diminish the benefit that Mr Lassnig received in having use of trust property.

52. The CA's assessment also seems to overlook the fact that the benefit Mr Lassnig received was not merely that he had somewhere to live; rather, the LFT allowed Mr Lassnig to enjoy a particular lifestyle. We submit that the lifestyle and nature of the home which a trust provides to the parties is a relevant factor in the assessment of the gap at stage 2. For example, in *Bethell v Bethell*, Nation J took into account that the trust property in which the parties had been living was a "comfortable home", with a tennis court, swimming pool and other significant alterations, and that the trust also supported the parties' "expensive lifestyle".[64]

53. Ms Zhou had given evidence that Mr Lassnig confided to her that his childhood dream was to own animals and live rurally. She said it was "his lifetime goal" to be able to realise this dream.[65] The Family Court found that Jack Barry and Young Access were acquired to facilitate Mr Lassnig's desire to live rurally and have animals. Ms Zhou argued in the High Court that this finding was based on a mischaracterisation of her evidence, but it is difficult to read Ms Zhou's evidence in any other way than to say that their rural nature and the possibility of being able to keep animals was a factor in purchasing Jack Barry and Young Access.[66] There is otherwise no discernible reason for why the parties would purchase Jack Barry and Young Access if the sole consideration was capital gains/income generation, as Ms Zhou's other properties were all located non-rurally. Ms Zhou

[64] [2018] NZHC 3171 at [181](c) and (d).
[65] 201.0021 at para 39.
[66] In the paragraph immediately following her explanation of Mr Lassnig's childhood dream to keep animals, she goes on to explain that she wanted to make Mr Lassnig happy and show him she loved him, so she suggested setting up the LFT: 201.0021 at para 40.

also expressly admitted in cross-examination that the ability to keep animals was a factor in purchase of Jack Barry.[67]

4.1.2 No expectation of distributions until retirement age?

54. The CA erred in finding that Mr Lassnig could not have any reasonable expectations of any distributions of surplus income and/or capital in the short to medium term, and that he could only expect distributions upon retirement.

55. The possibility of distributions in the future must be a relevant factor in determining whether is a gap. In *Clayton*, this Court said that the comparison between positions B and C was "forward looking".[68] It also observed that benefits from a family trust not only included current distributions, but also "possible future distributions, including in case of need".[69] These comments were affirmed later by this Court in *Preston*.[70] In *Clayton*, this Court took into account the possibility of future distributions to Mrs Clayton when considering the exercise of the discretion. However, the CA distinguished *Clayton*, pointing out that Mrs Clayton also received wider benefits from the Claymark Trust. It said that by contrast, Mr Lassnig did not receive such wider benefits.

56. With respect, the CA missed the point somewhat – the point being that the mere possibility of distribution, even if remote, is still a relevant consideration. In *Clayton*, it seems that Mrs Clayton never received any kind of distribution (other than use of a car) from the Claymark Trust during the twelve years from its inception to the parties' settlement. So objectively, it seemed unlikely that Mrs Clayton ever was going to receive distributions from the trust. But it seems clear from this Court's reasoning that this mere possibility (even if unlikely) was nonetheless a factor that this Court took into account:

    a. At [75]: "It is reasonable to assume that the direct benefits to her from the Trust would be the continued use (without cost to her) of the vehicle… as well as the possibility of the Trustees exercising their discretion to

[67] 201.0166 at lines 14 to 20.
[68] *Clayton* at [53].
[69] *Clayton* at [50]. We note that this Court was speaking of looking at the situation through the perspective of the family unit, but we submit that these comments apply more generally to the perspective of the individual also.
[70] *Preston* at [32].

make a distribution in her favour in the future."

b. And later at [77]: "While Mrs Clayton remains a discretionary beneficiary…it seems unlikely that in the future she will enjoy distributions as a discretionary beneficiary."

57. Additionally, we submit that it is not necessarily correct to say that distributions were unlikely in the short to medium term. It might be correct to say that distributions were unlikely whilst the LFT continued to hold all three assets, and the level of debt remained high. And it may be correct to say that a major purpose of the LFT was to provide for the parties' retirement – so the parties may very well have been inclined to hold onto the properties until retirement. But the situation could conceivably change. Property prices could rise to a point where the parties decide it would be a good idea to sell and cash in. Or perhaps interest rates could rise such that the parties find it hard to keep up with mortgage payments, so it is easier to sell now. Alternatively, the parties may suddenly find themselves in need (for example, illness or injury). It is unrealistic to think that, if the situation called for it, the parties would not have sold one of the properties to meet such need. These are all reasonably possible scenarios, even likely. But the CA did not take these contingencies into account.

58. We also point out that Ms Zhou in her evidence had said she was "working hard to secure a good future for our family and so that [Mr Lassnig] could have more freedom around his work (he always complained about his job)".[71] That suggests that Ms Zhou at least did contemplate the possibility of distributions prior to retirement, if the opportunity presented itself. Otherwise, there would be no need to talk of freedom around work.

59. Furthermore, as indicated earlier, the CA erred in concluding that Mr Lassnig did not obtain other wider benefits from the LFT. Through the LFT, Mr Lassnig had the opportunity to acquire property. The building up of equity in the LFT afforded Mr Lassnig a degree of financial security, which he could fall back on in time of need. Also, this Court in *Clayton* noted that the separation of trust assets from personally held assets was a potential benefit.[72] The CA had overlooked these

[71] 201.0024 at para 54.
[72] *Clayton* at [50].

additional benefits to Mr Lassnig.

4.1.3 Sharing of losses?

60. The CA considered the hypothetical situation where the LFT assets were sold and used to pay off third-party (bank) debt. It seemed to accept that if the LFT assets were not sufficient to pay off the bank debts, then the parties would be jointly responsible for any shortfall. It was argued for Mr Lassnig that this was evidence of intention to divide the LFT net equity equally, but the CA said that this was a remote prospect and accordingly not a "material indication" that the parties did not anticipate pro rata sharing of gains. Instead, it had regard to what it considered to be a more realistic scenario – where the LFT assets were sufficient to pay off the bank debt, but not the debts owed to them personally. In that scenario, the CA considered that the parties would have expected to share the losses pro rata, and that was consistent with sharing gains pro rata.

61. First, the scenario proposed by the CA is only one possible factor out of many. And when weighed up against the totality of the circumstances in this case (which we will return to later), is not sufficient to draw the inference that the parties would not share any gains equally.

62. Secondly, the CA conflated liability as debtor, with risks as creditor. It is one thing to say that under the hypothetical scenario, the parties as creditor would have likely split the losses pro rata. But that overlooks that the parties as trustees remain liable to the parties as creditors for the full extent of the unpaid debt. And they remain equally liable to the parties as creditors.

63. As long as the parties, in their capacity as trustee debtors, have assets and/or are still capable of making money, the prospect of full recovery of their respective loans (in their capacity as individual creditors) is still intact. As creditors, they would only suffer a loss if they, as debtors, have no money to repay themselves. Only then might Ms Zhou suffer a heavier loss than Mr Lassnig.

4.1.4 Ms Zhou's opportunity cost

64. The CA noted that Ms Zhou gave evidence that she wanted to purchase properties as investment and could have done so on her own. From that it reasoned that Ms Zhou could reasonably expect that her share of the gains in value from the LFT properties to reflect the opportunity cost to her not making similar investments

through her own vehicles.

65. For starters, the evidence does not establish, factually, that Ms Zhou could have purchased the three properties on her own. At best, it might be said that Ms Zhou had enough equity to purchase 903 ECR on her own. Ms Zhou said:[73]

> "I note that at the time of the purchase of 930 [sic] ECR I had more than enough equity in the properties I owned through FPL and the Zhou Family Trust to purchase the property on my own had I wanted to do so…
>
> …in October 2012, just before 903 ECR was purchased, the total lending secured against FPL's properties was $865,677.04. The total value of those four properties was $2.4M. The loan to equity ratio was under 37% and so clearly I would have been able to borrow the funds myself."

But there is nothing in the evidence to suggest that Ms Zhou would be able to go onto purchase Jack Barry (which was purchased for $985,000) and Young Access (purchased for $1.7 million) on her own. It is speculative at best to say that Ms Zhou would be able to invest to the same extent on her own.

66. If anything, the evidence suggests the opposite. The CA referred to Ms Zhou's plan to purchase Young Access. It is evident that Ms Zhou would not have been able to purchase Young Access on her own – she initially planned to purchase it together with a business associate, who was meant to contribute half the funds, and so limit the debt she would have to take on.[74] And when that business associate pulled out, it was doubtful whether the purchase could still proceed.[75] Ms Zhou was able to come up with $270,000 but the remainder of the purchase price (some $1.43 million) was borrowed by the parties jointly from the bank.

67. But even assuming, for the sake of argument, that Ms Zhou would be able to finance the purchase of all three purchases, this would likely have required her to mortgage all her existing properties to the teeth, and to make much higher loan repayments every week. Correspondingly, she would have had much less disposable income to be used at her leisure. The married life with Mr Lassnig, would have been a very different one.

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[73] 201.0022 at paras 47 and 48.
[74] 201.0025 at para 60.
[75] 201.0025 at para 63.

68. As such, the opportunity cost to Ms Zhou does not provide much support (if any) for a reasonable expectation that the parties would share gains pro rata. In fact, we submit that opportunity cost will seldom (if ever) be indicative of an expectation to share gains pro rata. The CA's reasoning is implicitly premised on the idea that Ms Zhou could have and would have done better if she were to invest on her own, instead of through the LFT together with Mr Lassnig – so to compensate for that cost, she must have objectively intended to share gains pro rata. But as illustrated above, it is difficult to assess opportunity cost accurately at the best of times, and more often than not, to say one spouse would have done better alone would involve a great deal of speculation.

69. We also observe that this Court has been eager to avoid what are "unedifying and unhelpful debates" in the context of property disputes in a relationship breakdown.[76] It seems that engaging in an analysis of opportunity cost is likely encourage such debates as parties lead evidence and make arguments as to why they would have done better if they were to never have gotten married.

70. But even assuming opportunity cost is a relevant factor – the most appropriate way to assess opportunity cost is not what properties Ms Zhou could have but did not invest in by herself, or what she could be having at separation instead of the trust properties, as there was no evidence on this front. Instead, it is simply loan interest (on her contributions) that she has foregone. Looking at it this way, even if opportunity cost should carry some weight in a s 182 determination, it should not have carried the weight that the CA has given it, and it should perhaps only affect the stage 3 calculus.

4.1.5 The parties' financial separation

71. The CA pointed to the degree of financial separation between the parties as evidence that the parties expected to share the LFT's net equity pro rata. While it is true that the parties maintained a significant degree of financial separation, perhaps even more than in *Preston*, it does not provide strong support for an expectation of pro rata sharing.

72. This Court in *Preston* observed that where spouses bring their own children and accumulated wealth to a marriage later in life, some measure of ongoing financial

[76] See *Scott v Williams* [2017] NZSC 185 at [309] to [310] and [324]. See also *Preston* at [73].

separation is common. But that is not necessarily decisive for the purposes of s 182 FPA. We add that even where the parties maintain a significant degree of financial separation, it must be remembered that ultimately, the parties are in a marriage relationship, not a business partnership.

73. Perhaps because of the financial separation of the parties in other aspects of their married life, and the Family Court's description of the LFT as a "joint venture", the CA appears to have treated this marriage akin to a business partnership. But if the parties had remained together, and the LFT were to make distributions to the parties, for example, some money to Mr Lassnig so that he could buy some farm animals, one can hardly imagine that Ms Zhou would then demand a distribution to her of five times that amount, simply because she had put in that much more money into the LFT. That is not how most marriages work, even one with a high degree of financial separation.

74. But in any event, the CA's focus on the degree of financial separation simply overlooks the circumstances in which the LFT was set up. As pointed out, the LFT was set up by the parties *together*, and for their "joint benefit". The very term "joint" denotes equality, with neither getting more than the other. And Ms Zhou also gave evidence that they set up the LFT because she wanted to make Mr Lassnig happy, and they were "building a life together". It would hardly be conducive to building a life together if Mr Lassnig could only expect a proportionate return, or otherwise receive distributions in proportion to his contributions.

75. For his part, Mr Lassnig gave evidence that he believed that the parties would share equally in the properties after all the loans were repaid. This belief is also consistent with the terms of the LFT's deed, which designates both Mr Lassnig and Ms Zhou as the primary beneficiaries. As primary beneficiaries, the parties would receive any final distribution on the date of distribution. There is nothing in the wording of the LFT deed that would suggest that such final distribution would be pro rata; if anything, the natural interpretation would be that the parties were to share equally. Mr Lassnig's belief is also consistent with the parties' subsequent conduct, which was to jointly borrow funds from the bank and jointly acquire the LFT's assets.

76. Ms Zhou said that the parties never discussed sharing the net equity equally. That

statement is probably true insofar that the parties never expressly agreed to equal sharing (in the sense of splitting the assets between themselves). However, during cross-examination Ms Zhou repeatedly responded along the lines of "we're not talking about split, we're just thinking to have a life together".[77] Ms Zhou's response suggests that during the relationship the parties would benefit equally from the LFT; that is more consistent with equal distributions to the parties.

77. The terms of settlement and the subjective expectations of the parties are relevant factors;[78] and in the present case the intentions and conduct of the parties in settling the LFT are more consistent with equal sharing, as opposed to sharing pro rata. In fact, we submit that the terms of settlement and subjective expectations of the parties were the strongest indicators of the parties' reasonable expectations, as opposed to any hypothetical scenarios, opportunity cost or degree of financial separation. In this respect, we submit that the present case is like *Ward*. The CA recorded these arguments in its judgment, but with respect, it does not explain why these factors should be disregarded, or otherwise overridden.

78. Even if it was appropriate to treat Mr Lassnig and Ms Zhou's marriage as if it were a business partnership, it would still be unusual to divide the net equity of the LFT pro rata. Unless otherwise expressly agreed to, the law deems every partner to have an equal stake in the business, rather than working out their interest proportionate to their contribution. There is a good reason for this – current accounts fluctuate, so the amount of contributions is a rather complicated and uncertain way of keeping track of the parties' respective interests. Instead, if one party to a partnership has put in more than the other, the way of resolving the imbalance is to equalise the accounts, rather than adjusting the proportion of interest each party has in the venture.

4.1.6 Is the contribution difference relevant to assessment of the gap?

79. The CA did not expressly say that Mr Lassnig had no reasonable expectation of equal sharing because of the disparate levels of financial contributions between the parties. But that was Ms Zhou's argument in the courts below.[79] And it is difficult to escape the impression that the CA implicitly agreed with Ms Zhou in

[77] 201.0147 at lines 29 to 30. See also 201.0147 at lines 4 to 6 and 14 to 15; 201.0148 at line 5.
[78] *Clayton* at [48] and [58]; affirmed again in *Preston* at [35] and fn 88.
[79] See for example Ms Zhou's CA submissions at para 27: 102.0048.

finding that Mr Lassnig could only reasonably expect a pro rata share of the LFT's net equity.[80]

80. First, differing levels of financial contribution are generally irrelevant to the stage 2 exercise.[81] In the Family Court and High Court both considered the impact of the parties' financial contributions, but at stage 3 of the exercise. That accords with the approach in *Preston* – in assessing the gap for Mrs Preston, this Court did not appear to take into account the parties' financial contributions.[82] Rather, this Court took this factor into account at stage 3.[83] This makes sense in light of this Court's comments that whatever their origin, all assets in the trust are part of the nuptial settlement.[84]

81. Second, the level in disparity between the parties as to their financial contributions is not as great as assessed by the CA:

    a. The financial contributions made by the parties were to be treated as loans made to the LFT, for which they expected to be reimbursed. In light of that, the weight to be placed on them must fall significantly.

    b. Much of the funds was provided by way of the parties borrowing money from the bank. The CA did not take the borrowed funds into account. But borrowed money by the parties and injected into the relationship/trust is still a contribution. If the money borrowed from the bank is counted as the parties' contribution when assessing the respective levels of financial contributions, then the true level of disparity is in fact much lower.

    We will elaborate on the above two points further when we discuss CA's analysis of the contributions at stage 3.

82. Third, we submit that it does not follow that parties would reasonably expect to share pro rata because there is a disparity in contributions. We know of no other

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[80] See for example the CA's statement at 102.0142 at [77] and [79]: "The gap is negligible once the uncontested refund of Mr Lassnig's financial contributions and receipt of a pro rata share of the equity in the Trust assets is taken into account…We now turn to the third stage and what the division should be in the context of our finding that the gap between B and C is negligible."
[81] *Family Procedure* (online looseleaf ed, Thomson Reuters) at [182.08(1)], where the authors said that "the duration of the marriage and the *source of the assets* are not relevant to this stage of the process", citing [53] of *Clayton* in support.
[82] *Preston* at [76].
[83] *Preston* at [78].
[84] *Clayton* at [68].

area of law where it is assumed that the proportion of a party's contributions determines the proportion of that party's interest. In fact, it is usually the opposite – the law defaults to equal sharing in the absence of an explicit agreement otherwise. For example, parties listed as co-owners on a certificate of title is presumed to own the land equally. Also, as we have adverted above, in partnership law, the default rule is that the parties are deemed to share equally. In fact, in partnership law, where the parties did not contribute equally, the orthodox way to address disparity in contributions is to equalise the contributions, rather than adjust the proportions of interest. If general and broader contributions do not even result in disparity in shares, it is difficult to see how disparity in lending advances could result in disparity in shares. We are not suggesting that s 182 FPA is, or should be underpinned by commercial law principles, but we submit that the general principle is nonetheless applicable, especially in the present case, where the CA appeared to treat the LFT as a commercial joint venture.

83. Fourth, if the proportion of interest is determined by proportion of contributions made by way of loan, then it must follow that any repayment to one party would reduce that party's proportional share. So, if Ms Zhou were to be repaid part of her loan but Mr Lassnig were not, then this would mean that her share is reduced accordingly. In fact, we point out that Ms Zhou has been repaid her loan account, whilst Mr Lassnig has not. Wiki operates out of Young Access and so it has been paying rental at the rate of $3,000 per month. That $3,000/month is deposited into FPL's account in repayment of the funds provided by FPL and recorded as repayments of Ms Zhou's loan account.[85] So, if the proportion of contributions determines proportion of interest, then the calculation of proportions is wrong – it is no longer $1,256,000 to $290,000. And Ms Zhou's share continues to drop as she continues to repay her loan account.

84. Going a step further, if Ms Zhou were repaid *all* her loan but Mr Lassnig was not, then this would mean that Mr Lassnig is entitled to all the net equity. That cannot be what the parties were contemplating, nor that Ms Zhou would accept such an outcome. But that is the outcome if followed to its logical conclusion.

85. We also point out that Mr Lassnig made most of the initial contributions on 903

[85] 201.0027 at para 71; 301.0197.

ECR. Mr Lassnig advanced $167,000, whilst Ms Zhou advanced $71,909.09.[86] This equates to (approximately) Mr Lassnig contributing 70% and Ms Zhou 30%. If proportion of interest is determined by proportion of contributions, then if the parties never acquired any other properties and Ms Zhou made no further financial contributions, any net gain should be divided 70:30 in Mr Lassnig's favour. It is highly doubtful that Ms Zhou would have been content with such an outcome.

4.2 What is the gap?

86. In summary, we submit that the High Court's assessment of the gap was largely correct. However, to that we would add the following:

    a. At position C, Mr Lassnig did not merely have use of a trust property, but one that allowed him to pursue a particular lifestyle/hobby. He does not have that at position B.

    b. At position C, even if Mr Lassnig was unlikely to receive distributions of surplus capital and income, the equity in the LFT still provided him with financial security which he could fall back on, particularly in times of need. It is unlikely, if not impossible, that Mr Lassnig will be able to resort to the equity in the LFT should he have need now.

    c. At position C, Mr Lassnig could have expected to benefit from the LFT to a similar, if not equal extent to Ms Zhou. At position B, it is unlikely that he will receive any benefit whatsoever.

4.3 Stage 3

87. The CA had concluded that the gap for Mr Lassnig was narrow and was "negligible once the uncontested refunds and a receipt of a pro rata share is taken into account". It discussed several factors generally relevant to stage 3 of the process but went on to award Mr Lassnig the refund of his $290,000 in contributions, and a further 20% of the LFT's net equity.[87] In other words, the orders made by the CA effectively reflected the gap for Mr Lassnig. So, it does

[86] Ms Zhou subsequently advanced $124,000 to the LFT to reduce the bank debt owing on 903 ECR, but this was some 8 months later.
[87] Reflecting the proportion of money Mr Lassnig contributed to the LFT (without borrowing from the bank) and a slight uplift for the "temporally distant contingency that if the marriage had continued until the parties' retirement, Mr Lassnig might have benefited to a greater extent from the [LFT's] net equity": at [117].

not appear to be case where the various factors had any material impact on the exercise of the discretion. In any event, we will address the factors discussed by the CA in turn.

4.3.1 Financial Contributions

88. The parties' financial contributions received the most attention from the CA in its analysis under stage 3. It is also the only factor out of the three it discussed which the CA gave any weight to in its conclusion.[88] But the CA erred in its assessment of financial contributions, in four distinct ways.

4.3.1.1 The Weight to be Given to Financial Contributions Generally

89. For starters, while financial contributions are often an important consideration in the way the discretion is exercised, it is not invariably so. As this Court in *Clayton v Clayton* said:

> "We comment that characterisation of the assets placed in, or sustaining a trust as having a source outside of the marriage (from a third party or from separate property) may be a relevant factor in the exercise of the discretion but ***it would not necessarily be decisive or even material in all cases***. The assets in any trust (whatever their origin) are part of the nuptial settlement. As noted above, s 182 is not part of the Property (Relationships) Act regime. ***All relevant circumstances must be taken into account in considering the exercise of the s 182 discretion and it must be exercised in light of the purpose of that section***." (***emphasis added***)

90. This Court in *Preston* also said that "as the focus is on the gap in expectations, contributions are not a controlling factor of the s 182 discretion".[89] So, we acknowledge that in many cases, financial contributions may be relevant. But equally, they may not be material at all. In any given case, it is important not to overemphasize the importance of the parties' respective financial contributions.

91. However, in these particular proceedings, Ms Zhou has always run her case as though their respective financial contributions are the be-all-end-all of the inquiry. Implicitly, the CA agreed with her. But taking such an approach to its logical extreme, if Mr Lassnig had made no financial contributions to the LFT, then there

[88] For example, at 102.0154 at [117], the CA said: "While recognising that financial contributions alone should not dictate the resettlement, in the circumstances as discussed, we consider that this should be the starting point."
[89] At [36].

is no gap at all, and he should get nothing. That cannot be correct, and it does not accord with this Court's comments in *Clayton* and *Preston*.

4.3.1.2 The Weight to be Given to Lending Money to The Trust

92. Second, the contributions were advanced by way of loans to the LFT, which the parties were entitled to be reimbursed for. Both the Family Court and High Court thought this was significant (albeit in the context of stage 3 rather than 2). In particular, the Family Court said that the fact that the contributions were loans meant that they were "fiscally neutral". We submit that the Family Court (and High Court) were correct in reducing the weight they put on the parties' contributions by way of loan, not least of all because a lender acquires no interest in property which was acquired using his or her loan funds.

93. The CA disagreed, saying that there was a difference between provision of debt capital provided without cost and provision of debt capital which attracts interest. It may be correct to say that the forgoing of interest is a valuable contribution. But by the same token, there is a difference between gifting capital to the LFT outright and lending the capital to the LFT but still expecting to be repaid (albeit without interest). So, at the very least, even if some weight must be given to the parties' loans to the LFT, it must be reduced significantly. But the CA's analysis seems to give Ms Zhou's contributions the same weight as if she had transferred those funds to the LFT outright.

94. To the extent that it is still necessary to address the disparity in contributions arising from foregoing interest (or opportunity cost), then it would be sufficient by awarding the foregone interest to the parties. That is what the parties had given up in the first place; to award any more than that would be to allow one party (i.e., the one who had loaned more money to the trust) to obtain an unfair benefit at the expense of the other. There is no justification for giving the parties any more than that, and certainly not to the extent of altering each party's share.

4.3.1.3 Contribution by way of Bank Loan Wrongly Ignored

95. Third, in assessing the respective levels of contribution, the CA should have had regard to the fact that Mr Lassnig jointly borrowed money from the banks to acquire the LFT properties.

96. The CA's decision to disregard this contribution is not consistent with the existing

authorities. In *Illingworth v Illingworth*, the parties had been in a marriage of short duration. The main issue in that case was the effect of the Joint Family Homes Act 1964 in assessing the respective contributions of the parties and whether this justified unequal division under s 13(1) of the Matrimonial Property Act 1976. For present purposes it is sufficient to note that the husband was successful in his appeal, so the CA had to re-assess the parties' contributions. In doing so, the CA considered that the wife contributed by "the assumption of personal liability under the mortgages securing the bridging finance…and under the mortgage on the Orakei property".[90]

97. In *H v O*,[91] the family home was the only asset of significance from the relationship. Mr H had owned the house together with his former wife; after separation he agreed to purchase that house as his separate property. Mr H and Ms O (with whom he was in a relationship by this point), entered into a formal agreement with Mr H's former wife to purchase the property for $345,000. To finance the purchase, Mr H and Ms O jointly obtained a loan for $285,000 from the National Bank. This was used to pay off the existing loan secured against the property and to pay out Mr H's former wife's half share of the net equity ($60,000); Mr H chose to leave his half share in the property. After Mr H and Ms O separated, the Family Court ordered 70-30 division of the house's sale proceeds in favour of Mr H.

98. The Family Court concluded that Mr H had contributed $202,500 to the property, being his half share of the net equity upon separation from his former wife ($60,000), and a half share of the loan funds borrowed from National Bank ($142,500). On the other hand, the Family Court concluded that Ms O contributed $142,500, being the other half share of the National Bank funds. This worked out as a 59% financial contribution by Mr H and a 41% contribution by Ms O; the Family Court later rounded this to 60%-40%.

99. Mr H was not content with that division and appealed to the High Court, contending he should have received more than 90% of the sale proceeds. Mr H argued that the Family Court wrongly held that Ms O made a financial contribution to the purchase of the property by assuming liability under the

[90] [1981] 1 NZLR 1 at 9 line 45 (Richardson J's judgment). See also Somers J's judgment at 15 line 22. Woodhouse J concurred with both Richardson and Somers JJ.
[91] HC Auckland CIV-2008-404-1891, 9 June 2008.

mortgage. This was roundly rejected by the Lang J. His Honour said that:[92]

> "The loan that the parties obtained in the present case formed a significant part of the payment that they made to the previous owners in order to complete the purchase of the property. In those circumstances, and notwithstanding the fact that it was made possible through the loan, that payment must be regarded as a cash contribution that the parties made jointly. **Any other conclusion would mean that the National Bank, and not the parties, contributed that portion of the purchase price**."

100. Lang J also pointed out that both parties remained jointly and severally liable to repay the loan, and that liability remained intact throughout and beyond the term of the relationship.[93] His Honour upheld the Family Court's conclusion on this point that Ms O had contributed 40% of the purchase price.

101. In the present case, the CA was referred to the case of *TN v AK* [2019] NZHC 2466, as authority for the proposition that assuming a liability counts as a contribution. In that case, Fitzgerald J implicitly considered that money borrowed by Ms K and used to purchase the family home, was properly Ms K's contribution.[94] However, the CA purported to distinguish *TN v AK* by saying it was decided in a different context, involving "an assessment under s 14A of the PRA of the parties' respective contributions to the relationship in order to divide the property in accordance with those contributions."

102. With respect, this reasoning is unclear, and we do not see how the different context detracts from the fundamental principle that incurring a liability is a contribution. The principle (that funds, even if obtained by loan, is a contribution) is one of general application. In *H v O*, the Family Court had relied on the reasoning of the Panckhurst J in *Mills v McCall*, which had treated joint borrowings on a property as amounting to an equal cash contribution.[95] That case was not decided in the relationship property context. Counsel for Mr H argued that *Mills* was decided according to equitable principles, not the PRA, and so was

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[92] *H v O* at [71].
[93] *H v O* at [74].
[94] See for example, *TN v AK* at [19].
[95] *H v O* at [63]. Panckhurst J's judgment in *Mills* was overturned on appeal, but on a different point. In fact, Lang J in *H v O* observed that the Court of Appeal in *Mills* in dealing with this specific issue made statements to the effect that the joint borrowing should be treated as an equal cash contribution from both parties: at [69], citing [24] and [25] of *Mills* (CA).

not relevant. Lang J did not agree:[96]

> "Although Panckhurst J decided *Mills v McCall* according to equitable principles, those principles required him to assess the contribution that two parties had made to the acquisition of an asset. That is essentially the same exercise that forms a critical part of the reasoning process to be applied in the present case."

103. Further, this Court has observed that s 182 FPA is to be applied in the social context of the of the twenty-first century, where it is "recognised that parties to a marriage contribute in sometimes different but equal ways to the marriage and to the accumulation of assets during the marriage".[97] In substance, there is no material difference in how contribution is assessed under the PRA and s 182 FPA.

104. If the $2.09m jointly borrowed from the bank is properly taken into account, the disparity in financial contributions is far less than that assessed by the CA.

4.3.1.4 Contribution by way of Borrowing from the Parties Wrongly Ignored

105. Fourth, flowing from the above point, what the CA has also failed to take into account is that when the parties borrow from themselves and put the money into the trust, they, in their capacity as borrowers, are making that contribution. In this case, Mr Lassnig and Ms Zhou jointly and equally contributed about $1.546m when they borrowed $1.256m from Ms Zhou and $290,000 from Mr Lassnig and had put these funds into the LFT.

106. Therefore, the correct assessment of financial contributions is that the parties had jointly and equally contributed about $3.64m, with Ms Zhou forgoing more interest than Mr Lassnig in their capacities as lenders. The disparity is far less than what the CA had thought.

4.3.2 Post-separation distributions/benefits

107. There is one final factor which may warrant consideration under the stage 3 analysis. That is, since separation, Ms Zhou has been residing in a trust property potentially worth up to $4 million, rent-free. Also, she has not needed to pay anything for its upkeep out of her own pocket, as both Jack Barry and Young Access have had tenants during and after the marriage. This is a very significant

[96] *H v O* at [68].
[97] *Clayton* at [66].

benefit to Ms Zhou, and it should be taken into consideration in the stage 3 assessment in favour of Mr Lassnig.

108. Section 182(3) FPA directs the court to take into account any other matters which it considers relevant. On the face of it, there is no reason why the court cannot take into account the extent to which one party has already benefitted from the nuptial settlement, given the breadth of the statutory language. In fact, in *Ward* this Court said that one of the purposes of s 182 FPA was to prevent one party from benefiting unfairly from the settlement at the expense of the other in the changed circumstances.[98] So, if one party benefits from the settlement at the expense of the other after the separation, the court *should* take that into account.

109. An analogy can be drawn with the principles underpinning occupational rent. This concept initially arose out of the equitable jurisdiction of the court to order a party to compensate another where their occupation of a property has come at the expense of another. As explained by Millet J in *Re Pavlou (a bankrupt)*:[99]

> "I take the law to be to the following effect. First, a court of equity will order an inquiry and payment of occupational rent, not only in the case where the co-owner in occupation has ousted the other, but *in any other case in which it is necessary in order to do equity between the parties* that an occupation rent should be paid." (*emphasis added*)

110. As is clear from *Re Pavlou*, occupation rent is not limited only to situations involving co-owners. There is at least one example in which a discretionary beneficiary was ordered to pay occupation rent to another: *Simpson v Sax* [2015] NZHC 1466. In that case, Brewer J found that the trustees had granted the beneficiaries (a couple) a right to occupy the property rent-free; this right was never revoked, even after the parties had separated. This right to occupy gave both a shared possessory interest in the property, and by virtue of that interest they were analogous to co-owners. After separation, the occupation of the property by one party amounted to excluding the other party from their right to occupy. Thus, it was equitable for occupation rent to be paid.[100]

111. In the present case, the LFT was set up for the *joint* benefit of the parties, and

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[98] *Ward* at [20], cited again in *Clayton* at [44] and *Preston* at fn 50.
[99] [1993] 3 All ER 955 at 959, cited with approval in *Dyas v Elliot* HC AK CIV-2008-404-001021, 16 April 2010 at [16].
[100] *Simpson v Sax* at [31].

the LFT Deed envisaged that Mr Lassnig would benefit equally with Ms Zhou, and in priority to any other beneficiary. The parties then purchased three properties *together* (through the LFT). Ms Zhou repeatedly emphasises how her contributions enabled the LFT to do so; but equally the evidence suggests that Ms Zhou may not have been able to purchase Young Access on her own either. That was made possible by Mr Lassnig's joint borrowings from the bank. The LFT granted both parties the right to occupy Young Access rent-free. Indeed, that was one of the purposes of the LFT – to provide a home for both parties to live in. This occupation right was never revoked against Mr Lassnig. Yet Ms Zhou has been occupying Young Access since 2016 to the exclusion of Mr Lassnig. Furthermore, it seems that Ms Zhou has expended very little money out of her own pocket to maintain Young Access, as it appears that most (if not all) of the outgoings have been paid using rental income. Looking the circumstances overall, this amounts to a benefit to Ms Zhou at the expense of Mr Lassnig; we submit that this is unfair and so it should be taken into account in Mr Lassnig's favour. At the very least, it should justify some uplift from the 80-20 split the CA ordered if this division is otherwise correct.

PART 5. RELIEF SOUGHT

112. Mr Lassnig respectfully seeks that:

    a. The CA judgment to be set aside;

    b. To substitute the CA's division of the net equity (80/20) to one that the Court thinks fit. We submit that in the circumstances of this case, a 50/50 split is appropriate; and

    c. Standard costs in this Court, and to quash the CA's decision on costs.

113. As the Court pleases.

Dated this 6 November 2024

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D Zhang / E Tie Counsel for the Applicant

APPELLANT'S LIST OF AUTHORITIES

LEGISLATION

1. Family Proceedings Act 1980 s 182

CASES

1. *Ward v Ward* [2009] NZSC 125
2. *Clayton v Clayton* [2016] NZSC 30
3. *Preston v Preston* [2021] NZSC 154
4. *Zhou v Lassnig* [2023] NZHC 714
5. *Lassnig v Zhou* [2023] NZFC 11546
6. *Bethell v Bethell* [2018] NZHC 3171
7. *Illingworth v Illingworth* [1981] 1 NZLR 1
8. *H v O* HC Auckland CIV-2008-404-1891, 9 June 2008
9. *TN v AK* [2019] NZHC 2466
10. *Dyas v Elliott* HC Auckland CIV-2008-404-001021, 16 April 2010
11. *Simpson v Sax* [2015] NZHC 1466

TEXTS AND COMMENTARY

1. *Family Procedure* (online looseleaf ed, Thomson Reuters) at [182.08](1)