IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 65/2024

BETWEEN	**BARTHOLOMAEUS ROLAND LASSNIG**
	Appellant
AND	**QIAN ZHOU**
	First Respondent
AND	**QIAN ZHOU and BARTHOLOMAEUS ROLAND LASSNIG as TRUSTEES OF THE LASSNIG FAMILY TRUST**
	Second Respondents

SYNOPSIS OF SUBMISSIONS ON BEHALF OF THE RESPONDENT

Dated 3 December 2024

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

MAY IT PLEASE THE COURT:

A. INTRODUCTION – SUMMARY OF ARGUMENT

1. By its decision of 24 May 2024[1] ("**the Decision**"), the Court of Appeal ("**CA**") overturned the High Court ("**HC**") decision[2] which granted relief to the Appellant of 40% of the net assets of the Lassnig Family Trust ("**the Trust**"), with the Respondent to receive the balance. On appeal, the CA reduced the Appellant's relief to 20% of the net trust assets, with the Respondent to receive 80%. The Appellant is appealing against that finding.

2. This appeal addresses the issue of whether the Stage 2 and 3 tests under s 182 of the Family Proceedings Act 1980 ("**the Act**"), as refined by this Court in *Ward v Ward*,[3] *Clayton v Clayton*,[4] and *Preston v Preston,*[5] were applied correctly by the CA.

3. The Appellant's claim is that this case demands a different approach to that taken to the relatively short relationship in *Preston* because the Trust in this case was settled and trust assets acquired during the parties' marriage. That contention is rejected for the reasons that follow.

4. First, questions regarding the timing of a trust's settlement, or of subsequent settlements and acquisitions of rights and powers under a trust, are relevant to and most appropriately considered in relation to the question of whether the trust is a nuptial settlement under Stage 1 of the s 182 test. Then, once the jurisdictional threshold provided at Stage 1 of the test is met, it is incorrect to treat the settlements differently. To do so would have the effect of creating different types of qualifying nuptial settlements.

5. Second, whether the relevant financial contribution was made prior to, or following the marriage makes no difference to the nature of their source and/or character.

6. Third, the Appellant's claim that this case is on all fours with *Ward* and *Clayton* because of the timing of the acquisition of the Trust's assets (i.e. during the marriage) is incorrect. It disregards the fact that the Trust assets in this short

[1] *Zhou v Lassnig* [2024] NZCA 177 [Decision].
[2] *Zhou v Lassnig* [2022] NZHC 2475 [HC Decision].
[3] *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31.
[4] *Clayton v Clayton* [2016] NZSC 30, [2016] 1 NZLR 590.
[5] *Preston v Preston* [2021] NZSC 154, [2021] 1 NZLR 651.

marriage were not enhanced by the joint efforts of the parties before or after they were transferred into the Trust. In the long marriages in *Ward* and *Clayton*,[6] both parties made contributions to personally owned assets, albeit in different ways, and those contributions gave rise to significant increases in the values of the assets before they were then disposed of to the trusts in question.[7] By contrast, in this case, the Trust assets were directly acquired through separate contributions from each party and immediately disposed of to the Trust. The increase in value of the Trust assets was due to two factors: first, the ability of the Trust to purchase the assets in the first place — a contribution directly attributable to the Respondent, given that the HC held that without the Respondent's contributions the Trust would not have been in the position to purchase the three properties[8] — and second, subsequent market forces — a contribution which is directly attributable to neither party, but was only possible due to the Respondent's contributions.

7. As to the source and character of the Trust's assets, the position in this case is analogous to *Preston*: the source and character of the funding of the Trust assets is clearly from separate property sources. There were no subsequent contributions to the Trust assets by the parties during their short duration marriage that increased their value.

8. Notably, the parties' marriage — ending one day shy of three years — was shorter than that in *Preston*, which endured for nearly five years and resulted in a 15 % share of Trust assets for the claimant wife.[9] Unlike in *Preston*, *Clayton*, or *Ward*, in this case there was little time for any non-financial contributions to take hold or make an impact. The HC acknowledged, and the CA affirmed, that "the shorter the duration of the marriage or the relationship the more weight may need to be given to other factors".[10] It was appropriate in this case for the financial contributions of the parties to be given significant weight.

9. Additionally, in terms of the context of the "family unit", which is noted as an important consideration in both *Preston*[11] and *Clayton*,[12], the marriage here, in addition to being very short, was one which lacked the sort of mutual support

[6] In *Ward*, the duration of the marriage was 12 years and the parties had children. In *Clayton*, it was 17 years and the parties had 2 children.
[7] By analogy along the lines of s 9A(2) contributions under the Property (Relationships) Act 1976.
[8] HC Decision, above n 2, at [65].
[9] *Preston*, above n 5, at [78] and [81].
[10] HC Decision, above n 2, at [68]; and CA Decision, above n 1, at [108].
[11] *Preston*, above n 5, at [67] and [72].
[12] *Clayton*, above n 4, at [50].

contemplated in *Preston*[13] and was of poor quality[14] such that contributions made to the family unit were of little to no value.

10. The Appellant argues that the CA's approach to the Trust reflects more of a business partnership rather than a settlement by marriage partners.[15] However, the CA's approach to the Trust was informed by the factual circumstances here: the short duration of the marriage, the parties' consensus that the Trust had an investment purpose for retirement, the Trust's investment in property for rental and capital gains, and the parties' ledger record of the separate (and unequal) financial contributions. To approach the settlement on the Trust otherwise would have been to treat this marriage as comparable those in *Clayton* and *Ward,* where the parties had children together and whose contributions to the family unit and to the trust's assets occurred over a three or fourfold period of time. Such an approach in this case would result in a financial windfall gain for someone in the Appellant's position.

11. Additionally, the fact that the parties were married does not preclude the conclusion that they were considering the distribution of the Trust's assets on a calculative basis. Indeed, the evidence of the Trust ledger, which meticulously recorded the parties' respective contributions to the Trust demonstrates that they were doing precisely that.[16]

12. In terms of the short length of the parties' marriage, this Court held in *Preston* that the duration of the marriage "becomes a more significant factor if the marriage was short than if long".[17] Importantly, there is nothing in this case which militates against the short duration of the marriage being considered an important factor, along with financial contributions, in terms of how the discretion at Stage 3 of the test in *Preston* should be exercised.

13. It is accepted that the principles of the Property (Relationships) Act 1976 ("**PRA**"), and in particular the presumption of equal sharing or any other fractional division of the trust property, do not underpin s 182 of the PRA.[18] However, the concepts underlying the statutory provisions of the PRA have properly crept in over time, including in *Preston* where the analysis of non-

[13] *Preston*, above n 5, at [67].
[14] Noting that this was the Family Court Judge's finding in respect of the period subsequent to the assault on the last day of the marriage, 26 July 2015. See *Zhou v Lassnig* [2022] NZFC 2747 [FC Decision] at [128].
[15] Appellant submissions at [73].
[16] FC Decision, above n 14, at [221].
[17] *Preston*, above n 5, at [80].
[18] *Clayton*, above n 4, at [65].

financial contributions is redolent of s 18 of the PRA and the calculation under s 15 of the PRA was borrowed and applied in the exercise of the discretion under Stage 3 of the test.[19] In this case it is appropriate to consider the parties' short duration marriage by analogy with the cases under s 14 of the PRA, particularly as the short duration links in with other relevant considerations, such as the nature and importance of financial/non-financial contributions and the social context of the family unit in which the contributions are made.

14. Under s 14 of the PRA, marriages of short duration are dealt with in a relatively matter of fact manner. Section 14(2)(c) provides that the family home and chattels will not be equally shared if "the contribution of one spouse to the marriage has clearly been disproportionately greater than the contribution of the other spouse". If this section applies, the relationship property is simply to be divided in accordance with the contribution to the marriage partnership.[20]

15. In such cases, financial contributions take primary importance.[21] As Barker J said in *Clarke v Clarke*, that is because:[22]

> … the reality is in a marriage of short duration with no children, the non-monetary contributions are not of long enough duration to offset the predominance of the husband's 80:20 contributions to the matrimonial home, which is the major item of matrimonial property.

16. By analogy here, in a marriage of shorter duration than that in *Preston*, where the parties did not contribute to the Trust assets via the family unit in any way which increased their value, the parties' financial contributions must assume primary importance. But for the Trust, the parties would have simply been refunded their contributions and the equity divided proportionately according to their contributions to the marriage.[23]

B. FACTUAL BACKGROUND

17. The factual and procedural background is accurately summarised in the Decision.[24]

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[19] *Preston*, above n 5, at [77].
[20] Property (Relationships) Act, s 14(3)(a).
[21] *Burgess v Beaven* [2010] NZCA 625, [2011] NZFLR 609 at [32].
[22] *Clarke v Clarke* HC Auckland HC104/92, 2 August 1993.
[23] Property (Relationships) Act 1976, s.14 (3)(a) As the contributions by the Respondent are disproportionately greater than that of the Appellant, each party's share is to be determined in accordance with their respective contributions.
[24] Decision, above n 1, at [1]–[42].

C. SUBMISSIONS

18. In *Preston* this Court set out the three-stage test to be applied under s 182:[25]

> (a) The first stage is to determine whether there is a nuptial settlement.
>
> (b) The second stage is to assess whether there is a difference between the position of the spouse under the settlement with the marriage dissolved (position B in the diagram set out above at [32]) and what the position would have been under the settlement had the marriage continued (position C). If there is a gap between B and C, the discretion under s 182 is enlivened.
>
> (c) The third stage is to determine how the discretion should be exercised in the particular case.

19. There was no dispute in the Courts below as to Stage 1.[26] The Appellant's submissions on appeal address Stages 2 and 3. The Respondent's submissions follow those of the Appellant.

Stage 2

20. It is understood that the Appellant in fact takes no issue in terms of the way the CA formulated the test that was applied at Stage 2 but contends that it was applied incorrectly. The CA described the Stage 2 test as follows:

> [48] As discussed, the purpose of s 182 of the Family Proceedings Act is to allow the court to remedy the consequences of the failure of the premise on which the settlement was made, the premise being the expectation of a continuing marriage. The second stage assessment requires the court to assess the extent of any disparity between the position of the spouse under the settlement with the marriage dissolved as compared to the position assuming a continued marriage (positions B and C). **The focus is on the gap in expectations.** This provides a framework against which the discretion can be exercised at the third stage.

21. In referring to the "gap in expectations", the CA went on to assess the reasonable expectations of the parties. It is with this analysis that the Appellant takes issue.

Reasonable expectations of the parties

22. The Appellant contends that the CA erred in its assessment of his reasonable expectations, by (1) focussing on the disparity of financial contributions, noting the short duration of the marriage and that non-financial contributions were broadly equal, and (2) not considering any other factor as relevant in the case.

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[25] *Preston*, above n 5, at [39].
[26] Decision, above n 1, at [28], citing FC Decision, above n 14, at [217]–[218].

23. The CA summarised its objective approach to its assessment of reasonable expectations as follows:[27]

> [55] The reasonable expectation of the parties had the marriage continued must be considered objectively in the context of the circumstances surrounding the settlement of the Trust, including the source of the Trust's funds and the disparity in the parties' respective contributions, the parties' ages, and the fact they did not have children together. Relationships embarked on at a later stage in life often involve very different expectations from those associated with what used to be the norm of marriage at a young age when neither party had children, there was often little financial disparity between them and, even if there were, they were building a family unit together. …

24. The Respondent submits that this approach was correct. In *Clayton*, this Court made it clear that the term "expectations" as applied in *Ward* is an objective concept, "as the use of the term 'reasonable' expectations' in [25] denotes".[28] The Court confirmed that:[29]

> … subjective views of the parties (especially if mutual and set out in a memorandum of intention as in *Ward*) may be relevant to the assessment, but it is the circumstances overall that must be assessed.

25. In the Decision, the CA expressly noted that reasonable expectations must be assessed in light of the "circumstances surrounding the settlement of the Trust".[30] Whilst that statement was expressly inclusive in terms of the source of the Trust's funds, the disparity in the parties' respective contributions, the parties' ages and the fact that they did not have children together, it did not preclude the CA from taking into account other matters. The CA in fact did go on to address other matters, including those raised by the Appellant in this appeal.

26. In its assessment of reasonable expectations, the CA also took into consideration:

    a. The Appellant's interpretation of the Respondent's evidence of (1) the parties jointly settling the Trust (which the Respondent says does not equate to equality of sharing), and (2) that this occurred to "reassure and please" the Appellant and to "build a life together".[31]

    b. The Appellant's position regarding the parties' joint liability for the Trust mortgages, and also that if the properties fell in value such that the parties' loans could not be repaid in full, the reasonable expectation was that they would be repaid pro-rata: "so that the losses

[27] Footnote omitted.
[28] *Clayton*, above n 4, at [48], citing *Ward v Ward*, above n 3, at [25].
[29] *Clayton*, above n 4, at [48].
[30] Decision, above n 1, at [55].
[31] Ibid at [62].

would be shared in proportion to their advances, rather than equally".[32]

c. That "each of the parties' respective contributions was meticulously recorded", which pointed away from the marriage operating as a "family unit".[33]

27. The CA also noted that the Law Commission's *Review of the (Property) Relationships Act 1976 | Te Arotake i te (Property) Relationships Act 1976* recognised that an approach to the classification of relationship and separate property whereby the family home and chattels are always divided equally is not likely to be just in our changing society where people are more likely to marry later, separate, and re-partner.[34]

28. The CA concluded that the Appellant's reasonable expectation in the circumstances of a continuing marriage were that he would continue to live in a Trust property, with the accompanying obligations as to debt and maintenance of the Trust's assets. The CA considered that there was no reasonable prospect of distributions from the Trust in the short-term, and if there was, any distributions must have been expected to be pro-rata to the parties' contributions.

29. The CA held that at the time of the parties' separation, a return on a basis proportionate to contributions would have been expected, and that an expectation of a return of 50% was unlikely "at least until the marriage had lasted for quite some time".[35] The reverse, that the parties would have likely contemplated a 50/50 division had the purpose of the Trust been fulfilled (investment for retirement), was expressly addressed and accepted by the CA, as follows:[36]

> It is reasonable to conclude that, had the marriage been of considerably longer duration and survived until retirement, enabling the Trust's purpose to be fulfilled, then the parties might well have envisaged joint sharing of the benefit from the growth in value of the trust assets. But we do not consider that was what was envisaged in the shorter term: the parties' reasonable expectations involved an approach that would evolve overtime assuming the marriage continued.

[32] Ibid at [63] and [64].
[33] Ibid at [68]–[69].
[34] Ibid at [55], n 64, citing Law Commission *Review of the Property (Relationships) Act 1976 | Te Arotake i te Property (Relationships) Act 1976* (NZLC R143, 2019) at [3.30]–[3.31].
[35] Decision, above n 1, at [67].
[36] Ibid at [69].

30. The CA considered that the gap between this position and the position with the marriage ended was "negligible".[37] The only material differences identified were:[38]

> (a) in scenario B Mr Lassnig will not have shared use of a Trust property to live in — and will also no longer share responsibility for servicing the Trust external debt, and for the upkeep of the Trust properties;
>
> (b) in scenario B Mr Lassnig will not enjoy the possibility of a longer term sharing of benefits from the Trust's investments, premised on the marriage continuing.

31. Finally, it is accepted that, as the Appellant contends, subjective expectations may be relevant to the assessment of reasonable expectations. The issue however is that the Appellant has unjustifiably elevated the importance of subjective expectations, wrongly criticised the CA as to its assessment of the parties' reasonable expectations, and exaggerated the extent to which reasonable expectations featured in the CA's assessment of the gap.

Appellant's expectations reduced by the burden of being a trustee?

32. Under this ground, the Appellant is in essence asking this Court to give little weight to the facts underpinning the parties' marriage and place greater weight on the Appellant's subjective expectations in various hypothetical scenarios.[39]

33. The CA's objective assessment based on what occurred during the parties' marriage was that under position C both parties would have continued to live in one of the Trust properties with an obligation to contribute to its upkeep and costs.[40] The CA referred to the parties "financially supporting what the Family Court Judge described as the joint venture".[41]

34. The Appellant is critical of this finding as, he says, it diminishes his expectation of having somewhere to live.[42] During the marriage, however, the accommodation provided to him by the Trust came at a cost, and this position was unlikely to change for many years to come as the total lending of the Trust at

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[37] Ibid at [77].
[38] Ibid at [73].
[39] Appellant's submissions at [47]-[53].
[40] Decision, above n 1, at [57].
[41] Ibid at [57].
[42] Appellant's submissions at [47].

separation was approximately $2.163m.[43] Without the expenditure on Trust costs the Appellant is freed up to source similar accommodation.

35. In support of his argument the Appellant raises a hypothetical scenario: that he would not have been required to vacate the Trust property had he not been able to meet the mortgage payments, as he did during the marriage.[44] This however is not relevant to the assessment of the gap under Stage 2, and bears no relation to what occurred during the marriage. It also leads to any number of other answers (and hypotheticals), including that the Appellant's inability to pay Trust costs may have made the property unaffordable for the Trust, leading to a forced sale, perhaps even at a loss. Or it could have caused a terminal breakdown of the marriage with the Appellant's inability to meet his obligations as an investor through the Trust compounding the already poor quality of the marriage.

36. The Appellant also relies on the comments in the HC judgment to the effect that there is a difference between paying rent compared to paying towards a mortgage for the property being occupied.[45] However, the CA expressly considered this issue. The CA concluded that the orders made by the HC would result in a "windfall" to the Appellant because it would enable him to purchase a property mortgage-free.[46] The CA's orders would allow him to purchase a modest property with a mortgage, which the CA considered was more consistent with the Appellant's reasonable expectations.[47]

37. Under this ground the Appellant also raises his "obligation" to contribute to Trust upkeep and costs and how these contributions were recorded as a credit to him in his Trust ledger account.[48] However, that he would ultimately be credited those payments does not negate the expectation that payments were required to be made by him to reduce the principal on the mortgage thereby reducing the interest cost of the lending, nor the fact that he consistently made those payments during the marriage. In fact, as is discussed below, the fact that these payments were recorded as a loan supports the Respondent's position that the parties did not intend to share equally in the Trust's assets.

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[43] Decision, above n 1, at [58]. Respondent's affidavit of assets and liabilities dated 12 July 2018 CB Vol 1 p 201.0009-10.
[44] Appellant's submissions at [48].
[45] Ibid [49], referring to HC Decision, above n 2, at [67].
[46] Decision, above n 1, at [116].
[47] Ibid at [118].
[48] Appellant's submissions at [50].

38. The Respondent submits that the CA's award met any expectation by the Appellant as to lifestyle, including the nature of the house and keeping animals, by bringing his entitlement of 18.75% up to 20%. This proportion recognised more than his initial contributions and included financial contributions by way of income earned during the marriage.[49] Moreover, the lifestyle afforded by the Trust home at 61 Young Access, Silverdale (**Young Access**), where the parties resided at separation, was not luxurious.[50] The home was divided into two self-contained 2-bedroom apartments/units. These were not of an elevated standard.[51] Thus, the Trust did not provide accommodation that is out of reach for the Appellant to obtain himself given that he is no longer required to pay towards the Trust's costs. Additionally, some 9 months after separation, the Appellant vacated the property; as he states in his submissions, his informal right to occupy was never revoked.[52]

39. It is stretching matters to claim that the Respondent's aim to make the Appellant feel happy, loved, and secure meant that she intended the marriage to be a personal financial cushion.[53] Rather, it shows that the Respondent had expectations for the marriage that it would last into the future, which gave rise to the Trust's purpose of investing for retirement. Those expectations and purpose failed with the abrupt ending of the marriage.

No expectation of distributions until retirement age?

40. The Appellant incorrectly contends that the CA did not consider the possibility of future distributions as part of its reasonable expectations assessment. The CA explicitly did so, holding that "consideration of the possibility of any distributions in the short to medium term was an error" and "any expectation of a capital distribution was remote given the reality of the Trust's borrowing, and the need to service it and repay it over time".[54] The CA cited the significant external

[49] Decision, above n 1, at [117]. The CA held: "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. We increase the award by a modest amount, to 20 per cent, 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 Trust's net equity. No greater adjustment can be justified in this case."
[50] Contra Appellant's submissions at [52].
[51] Respondent's narrative affidavit dated 12 July 2018 pp 201.0026 at [66], noting that the tenant, Phillip Taylor, started paying rent of $400/week and was paying $500/ week by the time proceedings were issued in July 2018. See also the floor map of Young Access, and a description of P Taylor's unit, in Respondent's affidavit dated 23 September 2020 p 201.0085 at [11] and exhibit "D" at p 302.0191.
[52] FC Decision, above n 14 at [32] p 101.0063.
[53] Appellant's submissions at [48] and [53].
[54] Decision, above n 1, at [58].

borrowing at the time of separation, being $2,163,000 and approximately $1,198,400 after 903 East Coast Road, Northcross (**903 ECR**) was sold.[55]

41. It is accepted that the assessment of the gap is "forward looking" as stated in *Clayton*, and clearly set out in the Decision.[56] However, possible future distributions must be considered from the perspective of whether that expectation was reasonable in light of all the circumstances surrounding the Trust. Where the Trust's purpose has not been fulfilled due the short duration of the marriage, any such an expectation could not be considered to be reasonable.

42. Additionally, in *Clayton*, the Supreme Court ("**SC**") was able to consider distributions that Mrs Clayton might have received in the future in the context of wider family benefits received during the course of the marriage from which Mrs Clayton indirectly benefited. As the CA noted, these included: the availability of the assets of the trust if needed for family purposes; any distributions that may have been made to other members of the family and in particular to the children; the protection of assets and isolation of them from the business borrowings; and financing of the business Mr Clayton would continue to use (assuming a continuing marriage) to provide for the family.[57] Benefits of this nature were plainly neither available nor relevant to the Appellant in this case.

43. In his submissions, the Appellant cites paragraphs [75] and [77] in *Clayton* to argue that an expectation has validity even where that expectation was a "mere possibility".[58] Respectfully, the Respondent submits that this is misunderstanding the position in *Clayton*. The SC in *Clayton* said:

> [75] The first task is to assess the position Mrs Clayton is likely to have been with regard to the Trust, assuming continuation of the marriage. 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 and any substitute vehicle, as well as the possibility of the Trustees exercising their discretion to make a distribution in her favour in the future. Even if Mrs Clayton was unlikely to distributions from the Trust (other than the vehicle) in the near future, this is not determinative. The wider benefits to her of the Trust must be considered.

44. The SC then went on to consider those "wider benefits" which Mrs Clayton had been receiving. So, the SC was not saying that the mere possibility of distributions from the Trust was relevant, but rather that this was not

[55] Ibid at [58]
[56] Ibid at [21]; and *Clayton*, above n 4, at [53].
[57] Decision, above n 1, at [60], n 69, citing *Clayton*, above n 4, at [76].
[58] Appellant's submissions at [56(a)] and [56(b)].

determinative — implying that it otherwise may have been — because Mrs Clayton had been receiving other benefits during the relationship.

45. Further, whilst the "mere possibility" of distributions may be considered, the Respondent submits that the CA was correct to give very little to weight to this here. It is clear that not all "possibilities" should be considered equally in the context of assessing the parties' reasonable expectations. The likelihood of a possibility eventuating is also relevant.

46. In *Clayton*, the SC held that the expectations of an Appellant must be assessed from the perspective of the family unit.[59] This was endorsed in *Preston,* where the SC rejected the argument that the parties did not act as a family unit in terms of blended finances as there was evidence of the parties operating as a family unit to which they both contributed.[60] However, in this case the CA rightly found that (1) the parties did not act as a family unit, a finding that firmly available on the facts,[61] and (2) the Appellant did not enjoy wider family benefits during the marriage.[62]

47. In the context of a childless short duration marriage where both parties agreed that the Trust's purpose was to invest for retirement, any benefit that the parties could have expected simply had not come to fruition. As pointed out by the CA, before any benefits could have been received, significant third-party lending of over $2.163m,[63] and the parties' loans ($1,256,000 to the Respondent, $290,000 to the Appellant, and $84,477 to the Respondent's son, John) had to be retired. These factors were integral to the CA's finding that there was no reasonable expectation of capital distributions prior to retirement.[64]

48. The Appellant resists this position, again providing hypothetical scenarios and claiming that "it is not necessarily correct to say that distributions were unlikely in the short and medium term" whilst also conceding, "[i]t might be correct to say that distributions were unlikely whilst the Trust continued to hold all three assets,

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[59] *Clayton*, above n 4, at [50].
[60] *Preston*, above n 5, at [71] and [72].
[61] Decision, above n 1, at [69]. The CA held that the evidence supports the conclusion that the parties' objective expectations were to respect their individual contributions to the Trust and keep them separate, which is reasonable based on the parties' respective financial contributions being "meticulously recorded in the Trust's ledger, their age and stage, that they had both been married before and had children from previous relationships, they came to the marriage with assets.
[62] Decision, above n 1, at [60].
[63] Ibid at [58].
[64] Ibid at [58], [69], and [70].

and the level of debt remained high".[65] The second statement is pertinent and reflects the relevant factor for consideration under Stage 2 of the s 182 test when a court is undertaking an objective assessment of expectations, as the CA did.

49. In relation to the Appellant's claim regarding the Respondent's evidence of "working hard to secure a good future for our family",[66] at the time of the parties' separation, that was still at an incipient stage and too remote for any expectations to attach. Additionally, the Respondent's evidence is that while she was working hard to this end, she was repeatedly confronted by the Appellant's threats that the Trust properties would have to sell, thereby putting an end to her hard work.[67]

50. The Appellant contends that "other wider benefits" from the Trust should have been taken into account by the CA, citing as examples the ability to acquire property and financial security.[68] However, the CA correctly held that any such benefits were contingent on the marriage continuing.[69]

51. Finally, the Appellant raises the benefit of "the separation of trust assets from personally held assets", as per *Clayton*.[70] However, in *Clayton* that was a benefit which shielded assets from business borrowings. There was no business activity in this case from which the parties needed protection, and therefore no such benefit could be conferred.

Sharing of losses

52. The Appellant submits that:[71]

> The CA considered the hypothetical situation where the Trust assets were sold and used to pay off third-party (bank) debt. It seemed to accept that if the Trust assets were not sufficient to pay off the bank debts, then the parties would be jointly responsible for any shortfall.

53. The Appellant is critical of this reality check by the CA, stating that it is but one "possible factor out of many" and not "sufficient to draw the inference that the parties would not share any gains equally".[72]

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[65] Appellant's submissions at [57].
[66] Ibid at [58].
[67] Respondent's narrative affidavit dated 12 July 2018 at [54].
[68] Appellant's submissions at [59].
[69] Decision, above n 1, at [76].
[70] Appellant's submissions at [59].
[71] Ibid at [60].
[72] Ibid at [61].

54. In fact, the scenario posed by the CA was the most likely as the Respondent's financial contributions were so significant that it would be difficult to imagine the circumstances where the bank lending could not be repaid upon sales of the properties.[73] In any event, the CA considered that the issue of "joint liability would only arise if the value of the properties fell to be less than the external debt with the result that the parties were liable on their personal covenants".[74] The CA rightly held that to be a "remote prospect".[75]

55. The CA's assessment that the risk was remote was correct in that the Respondent's significant financial contribution and taking on of liability/debt through her company Fields Parade Limited (**FPL**) meant that there was little risk that the Trust properties' value would fall below the amount of the external debt, which was $2.163m at the time of separation.

56. By this submission the Appellant is in essence asking this Court to apply risk of loss and benefit differently, despite his own position (as stated in his submissions at the CA hearing)[76] that he would share any loss/risk on a pro-rata basis, but share benefits equally (regardless of timing). There is no justification for adopting this approach, and the Respondent submits that doing so would be unjust.

The Respondent's opportunity cost

57. The issue of opportunity cost was only one of the matters to which the CA had regard in formulating its assessment of reasonable expectations in terms of the gap. This was but one of the bases for the CA's finding that it was objectively unlikely that the Respondent would have intended to limit her return on her investments to "50% growth in value and instead that, at least until the marriage had lasted for quite some time, she would have expected a return to her personally on a basis proportionate to her contributions".[77]

58. This finding by the CA included considerations of the Respondent's evidence that she would have continued to purchase properties on her own as investments, as

[73] As at the time of purchase, her contributions of $1.211m comprised 36% of the overall value of the three Trust properties of $3,355,000. (The total cost of the Trust property purchases for $670,000 (903 ECR), $985,000 (16 Jack Barry Road, Waitoki) and $1,700,000 (Young Access).
[74] Decision, above n 1, at [64].
[75] Ibid at [64].
[76] Contrary to the Appellant's submissions at [60], the position of pro rata sharing of losses was not simply an objective finding by the Court, it was a concession made at the CA hearing. See Decision, above n 1, at [64].
[77] Decision, above n 1, at [67].

she had done through FPL,[78] that she had enough equity in the properties she owned through FPL and Zhou Family Trust **(ZFT**) to purchase the property,[79] and because she drew down funds through FPL to assist the Trust, she/FPL lost investment opportunities that would otherwise have been available.[80]

59. Importantly, the Appellant recognised in his own evidence the importance to the Respondent of buying properties for investment, confirming that the Trust was "a vehicle to enable [the Respondent] to fulfil her desire for property ownership".[81]

60. The evidence establishes that the Respondent could have purchased the three properties on her own. The Appellant's income, approximately $60,000/annum during the marriage,[82] could only be taken into account in relation to the $430,000 borrowed to fund the purchase of the Trust's first property, 903 ECR. It is unlikely that the Appellant's income would have supported that lending on its own.

61. Contrary to the Appellant's submissions,[83] the Respondent's contributions to 16 Jack Barry Road, Waitoki (**Jack Barry**) were so significant that it is clear she could have acquired this property and Young Access on her own. As found in the HC and CA, it was the Respondent's "financial contributions which enabled the purchase of the three properties and the resulting capital growth".[84] Those findings are correct as Jack Barry cost the Trust $965,000, with the Respondent paying the $45,000 deposit and $700,000 towards the purchase price.[85] The remaining lending against Jack Barry was only $220,000.[86] In August 2013, the Respondent paid a further $124,000 against 903 ECR,[87] reducing its lending to approximately $307,000.[88] Young Access was purchased for $1.7m and left with lending of $1.43m after the Respondent contributed funds of $270,000 to the

[78] Ibid at [65].
[79] Ibid at [65].
[80] Ibid at [66].
[81] Ibid at [53].
[82] Affidavit of Matthew Kemp dated 22 August 2019 p 303.0087at [11.10] which states the Appellant's income from third party employment over the period of the marriage as "typically" ranging from $1000 and $1300/week.
[83] Appellant's submissions at [65]-[67].
[84] Decision, above n 1, at [116]. HC Decision, above n 2, at [65].
[85] Which amount was advanced by ZFT with the mortgage for the advance being raised by FPL. FC Decision, above n 14, at [16(b)].
[86] HC Decision, above n 2, at [16], taking into account the $20,918 contributed by the Appellant against Jack Barry, which contribution is disputed by the Respondent.
[87] Decision, above n 1, at [8].
[88] $431,000 less $124,000. See Summary of Funding of Trust Property Purchases from Report of M Kemp dated 22 August 2019 on behalf of Appellant p 303.0073 – 303.0178 at 303.0176.

purchase through FPL.[89] It was the significant equity in the Trust's properties to which the Respondent largely contributed, which provided the Trust with the ability to raise borrowings.

62. Opportunity cost was but one factor that the CA took into consideration in assessing the parties' reasonable expectations and it was reasonable in this short duration marriage for it to do so.

The parties' financial separation

63. As the CA found, and it is undisputed, the parties maintained a significant degree of financial separation during their marriage. Whilst the SC in *Preston* held that factor was not decisive for the purposes of s 182, that was because in that case the focus on financial separation ignored a range of other relevant considerations arising from the parties operating as a family unit "to which each contributed" that were not present in this case.[90]

64. The Appellant submits that the CA's focus on the parties' significant financial separation indicated that it was adopting the Family Court's description of the Trust as a joint venture,[91] an approach which treats the parties' marriage as a business partnership. This is incorrect and overlooks the approach in *Preston*.

65. First, the CA considered the marriage in terms of both the evidence of the factual background and the parties' subjective views to objectively assess the parties' reasonable expectations arising from the marriage. The marriage was short. Given this, there was an attendant difficulty in terms of time for contributions to be equalised. Additionally, as the CA found, the marriage lacked contributions of mutual support in the nature of a family unit.[92]

66. Secondly, in *Preston* this Court held that while the degree of financial separation is not a determinative consideration,[93] it is still a relevant consideration.[94]

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[89] HC Decision, above n 2, at [10].
[90] *Preston*, above n 5, at [72]. Described by the SC to be Mrs Preston's loans to the business; an overseas holiday funded by Mrs Preston which the parties enjoyed together with some of their children; the use of her funds to buy cars for Mr Preston's children; and the family unit benefited from the dividends paid to Mr Preston from the company.
[91] Appellant's submissions at [73].
[92] Decision, above n 1, at [69].
[93] *Preston*, above n 5, at [72].
[94] *Preston*, above n 5, at [54] and [56], in the latter paragraph citing *Wylie v Wylie* [2019] NZHC 2638 [*Wylie* (HC)] and also *Wylie v Wylie* [2021] NZCA 52.

67. The Appellant contends that the focus on the degree of financial separation overlooks that the Trust was set up by the parties "together" and settled for "joint benefit", with the Appellant claiming "joint" denotes "equality".[95] These factors were expressly taken into account by the CA.[96]

68. The Appellant's contention that "joint" equates to "equal" is rejected.[97] The reference to "joint benefit" reflects that the parties were both primary discretionary beneficiaries of the Trust; it is not synonymous with equal division. In the parties' oral evidence, the Respondent confirmed that the parties had not discussed equal division of the Trust's equity,[98] and the Appellant confirmed that equal sharing was merely an assumption on his part, not an issue discussed between the parties.[99] He further indicated that this assumption possibly crystallised after separation.[100]

69. Furthermore, detailed accounting was kept by the Respondent of the parties' respective financial contributions in the Trust ledger and in the Trust's financial statements, which is inconsistent with an intention of equal sharing, evidencing instead an intention to be compensated for unequal contributions.[101] The Appellant notes in his submissions that the payments he made toward the mortgage were credited to him as a loan.[102] The Respondent submits that this is a further factor supporting the fact that the parties intended to keep their finances separate; had they intended otherwise, the Appellant's payments towards the mortgage would not have been a loan, but rather a contribution towards an asset that was intended to be shared. Clearly it was not.

70. Importantly, there is nothing in the wording of the Trust deed to suggest that the final distribution of the corpus of the Trust would be shared equally. There is no memorandum of wishes to support that position either. Indeed, the subsequent conduct of the parties in terms of funding the purchases of the Trust properties, which was substantially unequal, does not support a "belief" by the Appellant that that the trust corpus would be shared equally.

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[95] Appellant's submissions at [74].
[96] Decision, above n 1, at [62].
[97] Appellant's submissions at [74].
[98] NOE lines 4-30, CB Vol 1 p 201.147.
[99] NOE lines 16-34 CB 202.0230 up to lines 1-18 CB Vol 2 p 202.0231.
[100] Ibid.
[101] The parties' MYOB loan account ledgers as produced in the respondent's expert's (Matthew Kemp) report, exhibit "F" of affidavit dated 22 August 2019 Vol 3 p 303.0171-0175.
[102] Appellant's submissions at [50].

71. Finally, the plain meaning of "joint" does not denote "equal". At best, it means "belonging to, two or more persons",[103] "belonging to or shared between two or more people". A search of synonyms does not provide the result "equal".

72. The Appellant submits that the strongest indicators of the parties' reasonable expectations are the terms of the settlement and their subjective expectations.[104] In addition to those factors being weak for the above reasons, this argument overlooks (1) the fact that the Trust had a long-term goal: to invest for retirement, and (2) the fact that because the marriage ended well prior to retirement, the Trust's purpose was never achieved.

73. The CA correctly held that if the Appellant shared the Trust's assets equally, or even on a 60/40 basis as held by the HC, that would result in a windfall to him.[105] This is contrary to one of the purposes of s 182, which is to prevent one party from benefitting unfairly from the settlement at the expense of the other in the changed circumstances.[106]

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

74. Contrary to what the Appellant asserts,[107] the difference between the parties' respective financial contributions is a factor that is relevant to assessing the parties' reasonable expectations which in turn is relevant to the assessment of the gap at Stage 2 of the s 182 test, particularly in a short duration marriage where the Trust did not have a chance to fulfil its purpose: investment for retirement.

75. The Appellant seizes on the approach of the Family Court Judge that as the parties' financial contributions were to be treated as loans and reimbursed, the weight to be placed on them "must fall significantly".[108] However, this approach is erroneous as it ignores the critical ways in which those contributions made the Trust's investment in property possible in the first place, and that they have continued, nine and a half years since separation, to have significant financial

[103] Tony Deverson and Graeme Kennedy *The New Zealand Oxford English Dictionary* (online ed, Oxford University Press, 2005).
[104] Appellant's submissions at [77].
[105] Decision, above n 1, at [116].
[106] Ibid at [116], citing *Clayton*, above n 4, at [44].
[107] Appellant's submissions at [80].
[108] Ibid at [81(a)], relying on FC judgment, above n 14, at [222].

impacts for the Trust including through principal and interest savings, and meeting the costs necessary to maintain and retain the properties.[109]

76. As is addressed in detail below, it is also incorrect that the Respondent has been "repaid her loan account, whilst [the Appellant] has not".[110]

77. The Appellant is intent on focusing on bank lending, and characterising that as a joint contribution reducing the disparity of contributions, even though the authorities that he cites (and omits) do not support that proposition. These authorities are addressed below. In directing the focus in this way, he overlooks other relevant financial contributions in addition to the crucial factor of making the property purchases possible,[111] including:

    a. The Respondent's financial contribution significantly lowered the mortgage interest payable by the Trust over the past 12 years.

    b. The interest advantage to the Trust from the respective advances from the parties and the other beneficiaries. In the Respondent's case, the sums she advanced related to specific borrowings raised by her company (FPL) for the purchases of the properties. It then became FPL's obligation to meet the loan and interest payments on those advances.

    c. The Respondent is more exposed to the risk of financial loss if bank debt is not paid given her significantly greater financial contribution.

78. The Appellant's claim that his role as a joint debtor/mortgagor for the loans used to purchase the Trust's properties lessens the disparity in financial contributions

[109] The Respondent's expert found that the mortgage interest savings for the Trust up to 31 December 2021, without taking into account the Respondent's son's (John) total contribution of $84,477, was $716,860 (due to Respondent's capital contributions totalling $1.211m) and $117,090 (due to Appellant's capital contributions totalling $178,990). If John's contribution is factored in, that is a further interest saving of $35,360. (Affidavit of Marnus Beylefeld dated 2 March 2022 at 203.0085-86 at [9], [13] and [18]). The Appellant's expert found that the mortgage interest savings, without taking into account the Appellant's asserted rental adjustment, or the Respondent's son's total contribution of $84,477, was $729,119 (due to Respondent's contribution) and $181,380 (due to Appellant's asserted contribution of $310,328 (incorrect, because the Appellant's contribution was held to be $290,000). (Affidavit of M Kemp dated 8 March 2022 at 203.0031 at [1.12] (table)).

[110] Appellant's submissions at [83].

[111] Recognised by the HC, see HC Decision, above n 2, at [65].

between the parties is further rejected.[112] In practical terms, there was little financial risk from the mortgage lending as:

a. the capital contributions to the properties by the Respondent resulted in there being considerable equity in the properties held by the Trust;

b. rental income substantially met the mortgage repayments;[113]

c. any shortfall in mortgage payments was managed by the parties.[114]

79. The Appellant is incorrect that the Respondent has been repaid her loan account.[115] Whilst the Respondent had paid $3,000/month to FPL representing the Respondent's property management company's (Wiki Properties Ltd) rent for the Young Access office, that ceased when the accountant chosen by the Appellant to do the Trust accounts advised that the payment could not be treated as rent to the Trust.[116]

80. In any event, these matters were raised in the evidence before the Family Court. After a four-day hearing, there was a finding that the amount currently owed to the Respondent is $1.256m.[117] That finding was not appealed and therefore the Appellant cannot assert otherwise now.

81. The Appellant's hypothetical claim that if the Respondent was repaid all her loan account but the Appellant was not, he would be entitled to all the net equity in the Trust makes no sense. Firstly, this is not what happened, and the trustees would never have agreed to do so. Secondly, on the facts, there was significant bank lending of $2.163m[118] at the time of separation which would have had to have been repaid before the parties could be repaid, and repayments of those bank loans would have meant the sales of properties. Thirdly, if the Respondent had been repaid all her loans, the logical step would be to repay the Appellant what he is owed, and then divide the remainder in proportion to their contributions. Any

[112] Appellant's submissions at [81(b)].
[113] When the Trust owned the three properties, 903 ECR, Jack Barry and Young Access, the Trust received a modest annual profit from the combined rental income. See appellant's affidavit dated 31 August 2020 at [6(d)], CB Vol 1 p 201.0078.
[114] HC Decision, above n 2, at [57], confirming that the Appellant contributed to mortgage payments.
[115] Appellant's submissions at [83].
[116] Respondent's affidavit 31 August 2020 at [16].
[117] FC Decision, above n 14, at [232].
[118] See above at [34].

repayment of the Respondent's loan would not have the result that the Appellant's "contribution share" increases.

82. Finally, contrary to the Appellant's submissions,[119] had the Trust only purchased 903 ECR, the proportionate split of that asset on a 30/70 basis in his favour would logically have been the appropriate division.

What is the gap?

83. It is the Respondent's position that the CA's assessment of the gap as "negligible"[120] is unassailable. The Stage 2 test was applied correctly, and the conclusion is supported by the facts.

84. In terms of position C, the continuing marriage, the CA held the Appellant's position to be:[121]

> [70] In our view, Mr Lassnig's position, assuming a continued marriage, was that he and Ms Zhou would have lived in a house owed by the Trust but subject to a mortgage that he would have had a shared responsibility to service. He had neither any reasonable expectation of a mortgage-free home nor any reasonable expectation of distributions from the Trust in the short to medium term. In the unlikely event that there were any payments to the parties by the Trust in the short to medium term, we consider that it is likely they would have been made in proportion to the parties' respective financial contributions to the Trust by way of pro rata repayment of the advances made by the parties.

85. In relation to position B, the marriage having ended, the finding was:

> [72] We agree with the Judge that Mr Lassnig is entitled to repayment of his advances to the Trust in scenarios B and C. In scenario B he will no longer have shared use of a Trust property — but he will also no longer share responsibility for servicing the Trust external debt, and for the upkeep of the Trust properties. We agree that he will not be able to call on the Trust for income or capital distribution in scenario B, but as explained above we do not consider that he had any realistic expectation of payments from the Trust in the short to medium term, except perhaps by way of repayment of advances.
>
> [73] So the material differences between scenario B and C are:
>
> (a) in scenario B Mr Lassnig will not have shared use of a Trust property to live in — and will also no longer share responsibility for servicing the Trust external debt, and for the upkeep of the Trust properties;
>
> (b) in scenario B Mr Lassnig will not enjoy the possibility of a longer term sharing of benefits from the Trust's investments, premised on the marriage continuing.

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[119] Appellant's submissions at [85].
[120] Decision, above n 1, at [77].
[121] Decision, above n 1.

86. This conclusion is based on a consideration of the overall circumstances and in particular (1) that the Appellant could not expect to live in a mortgage-free home in the medium term given the costs of living in the Trust properties, (2) that his call on income or capital from the Trust was contingent on the parties' marriage enduring into retirement, and (3) a consideration of the Appellant's position after the return of financial contributions and a pro-rata share of the Trust's equity.

87. By contrast, the Appellant says that the HC's assessment of the gap was correct, although adding additional factors he alleges to no longer have the benefit under position B.[122] These are as follows:

    a. Lifestyle: This is addressed above. The Trust property in which the parties lived at separation is a two-bedroom unit within a single dwelling. That accommodation and the land that afforded an opportunity for the Appellant's pastural pursuits came at a cost to the Appellant, at a level that would have enabled him to obtain similar accommodation elsewhere after voluntarily moving away from the Trust property,[123] because he ceased contributing towards any Trust costs.

    b. Financial security: Again, there were no financial distributions to the parties during the marriage and those were unlikely to be made until sometime in the future upon retirement. In any event, the Appellant still has a form of financial security as a result of his interest in the investment through the Trust.

    c. Equal benefit: During the marriage, the parties both received the benefit of a home in which to live, which came a cost. At position B the Appellant will receive the return of his contributions and a proportionate share of the increase in value of those contributions, enabling the Appellant to purchase a home with a mortgage.

[122] Appellant's submissions at [86].
[123] The Appellant moved out nine months after separation in April 2016. FC Decision, above n 14, at [32].

Stage 3

Financial contributions

88. Financial contributions, and the source and nature of the trust assets, are contributions which are unquestionably relevant to the Stage 3 test.[124] However, contrary to what the Appellant implies,[125] the parties' respective financial contributions are also relevant to the reasonable expectations of the parties under position B, a dissolution of marriage.

The weight to be given to financial contributions generally

89. It is accepted that the source of assets is not necessarily "decisive or material in all cases", as held in *Clayton*.[126] That observation was particularly relevant in cases such as *Ward* and *Clayton* where the marriages endured for 12 years or more, the parties had children together, and where the partners made contributions (financial and non-financial) to the assets in question and within the family unit. Notably, however, in *Preston,* despite the express acknowledgement of the SC that "as the focus is on the gap in expectations, contributions are not a controlling factor of the s 182 discretion",[127] the source and nature of the Trust assets took on a primary importance.[128] That was so because, as with this case, the marriage was shorter than those in *Ward* and *Clayton*, and the source of the trust assets were traceable to separate property.

90. Drawing upon the SC's conclusion that "the length of the marriage likely becomes a more significant factor if the marriage was short than if long",[129] and the fact that the parties' marriage here was nearly two years shorter than that in *Preston*,[130] it can be concluded that the factor of the source and character of the Trust's assets becomes an even more persuasive, if not conclusive, factor in terms of the exercise of the discretion at Stage 3 of the test in this case. This is the conclusion reached, correctly in the Respondent's submission, by the CA in the Decision:

> [108] This was a marriage of short duration. The shorter the duration of the relationship, the more weight can be given to the disparity of financial

[124] *Clayton*, above n 4, at [57]–[59]; and *Preston*, above n 5, at [43]–[44].
[125] Appellant's submissions at [80] and [92].
[126] *Clayton*, above n 4, at [68]. See also *Preston*, above n 5, at [74].
[127] *Preston*, above n 5, at [36].
[128] Ibid at [78].
[129] Ibid at [80].
[130] The relevant dates are at [10] and [17] in *Preston*. The parties married on 4 December 2010 and separated on 27 September 2015.

> contributions. [The Respondent's] financial contributions to the Trust outweighed those of [the Appellant] by a considerable margin. [The Appellant's] non-financial contribution would need to have been significantly greater than [the Respondent's] to justify focusing on contributions other than financial in the circumstances of the case. The evidence does not support such a finding.

The weight to be given to lending money to the Trust

91. An interest allowance on financial contributions to the Trust would not be a sufficient "award" to the Respondent for the Trust's use of her funds for the following reasons:

    a. Her funds made the Trust property purchases, and therefore any capital gain, possible in the first place.

    b. The Respondent also had the cost (through FPL) of mortgage interest on the funds that she advanced to the Trust. This was a cost borne solely by the Respondent which otherwise would have been borne jointly by the parties if those funds had been obtained by way of third-party lending. As the CA said, "there is a fundamental difference between the provision of debt capital provided without cost to the Trust and the provision of debt capital which attracts interest",[131] with the latter properly being considered as a contribution by the Respondent.

    c. The funds the Respondent advanced significantly reduced the mortgage lending and therefore the cost of the loans to the Trust in terms of the mortgage repayments.

    d. Had the Respondent not contributed funds at the level she did, the rental from the Trust properties would not have sufficiently met the mortgage repayments, which would have made the venture unaffordable for the parties to maintain.

Contribution by way of bank loan wrongly ignored

92. This ground refers to joint liability for bank borrowing and claims that the Appellant's joint liability under the joint bank loans was not taken into account by the CA as a contribution by him.[132] The Respondent's position, which was recognised by the CA, is that there simply was no risk to the Appellant in terms

[131] Decision, above n 1, at [88].
[132] Appellant's submissions at [95].

of his mortgage obligations given the quantum of her contributions through FPL of $1,211,000.[133]

93. In terms of the authorities, the CA correctly distinguished the cases relied upon by the Appellant. *TN v AK* was held by the CA not to advance the Appellant's position as:[134]

    a. The context was different: In *TN v AK* the Court was undertaking an assessment of the parties' respective financial contributions.[135] Importantly, other than the joint loan, neither of the parties had contributed to the purchase of the property (although one of their parents had provided funds to otherwise assist with the purchase).

    b. The CA stated here that: "the prospect of equal liability on personal covenants was remote in this case given the cushion provided by the parties' advances".[136]

    c. And further, "[t]he parties' objective reasonable expectation would have been that they would share any losses, if there were a fall in the property market, proportionately to their respective contributions".[137]

94. The Court of Appeal case of *Illingworth v Illingworth*[138] was not raised in argument before the CA.

95. There are two areas of that judgment in which it is recognised that one of the wife's contributions was "her assumption of liability along with the husband in the provision of bridging finance for the new home before the Pines was sold".[139] The first is in relation to bridging finance, which carries with it inherent risk as the parties are carrying mortgages against two (or more) properties with a reduced proportion of equity. The second, and more important point, is that as is the case here, despite the mortgage contribution, the Court held that "the husband's contributions were clearly disproportionately greater than those of the wife".[140] As summarised by Nation J in *Bradford v Te Hei* (see below):[141]

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[133] See above at [54].
[134] Decision, above n 1, at [87], citing *TN v AK* [2019] NZHC 2466.
[135] Under s 14A of the Property (Relationships) Act.
[136] Decision, above n 1, at [87].
[137] Ibid at [87].
[138] *Illingworth v Illingworth* [1981] 1 NZLR 1.
[139] Ibid at 15, lines 22-23.
[140] Ibid at 16, lines 31-33.

> None of the Judges in the Court of Appeal approached matters on the basis of an arithmetical calculation as to the wife's financial contribution or on the basis such contribution was for half of that total mortgage liability.

96. The High Court case relied upon by the Appellant, *H v O*, was also not argued before the CA.[142] *H v O* is a 2008 decision which was subsequently addressed and distinguished by the High Court in the 2010 decision, *Bradford v Te Hei.*[143]

97. Both *H v O* and *Bradford v Te Hei* dealt with s 14A of the PRA. In *Bradford v Te Hei*, the parties made unequal initial cash contributions of $62,828 (Mr Bradford) and $15,419 (Ms Te Hei) to the purchase and borrowed the balance. Subsequently, they were found to have contributed to the joint account in proportions of 63% (Mr Bradford) and 37% (Ms Te Hei). Ultimately, after a consideration of both non-financial and financial contributions, and taking a "broad-brush approach" Nation J assessed a 60/40 split in favour of Mr Bradford as being appropriate.[144]

98. However, in relation to the impact of joint mortgage borrowing on the assessment of financial contributions, Nation J held:[145]

> [41] I do not consider that either Lang J's judgment in *H v O* or Blanchard J's judgment in *McCall v Wills* are authority for the proposition that, in assessing monetary contributions to a relationship when considering marriages or relationships of short duration under the PRA, the assumption of joint liability on a mortgage to acquire property must always be treated as an equal contribution to the relationship so as to be a contribution equivalent to half of the amount borrowed.

99. Nation J distinguished *McCall v Wills*, cited in *H v O*, not only on the basis of the legal context (under the PRA as opposed to under equitable principles), but because in the Court of Appeal in *McCall v Wills*, Blanchard J did not actually say that "the assumption of a joint liability under the mortgage was to be treated as an equal contribution by both the husband and wife to the extent of the liability they had assumed."[146] Nation J found that Blanchard J simply referred to Pankhurst J's (the High Court Judge in *McCall v Wills*) statement in setting out his reasons that led him to the finding that the wife had inherited the husband's interest in the jointly held property subject to a trust.[147] Of importance to Nation J

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[141] *Bradford v Te Hei* [2021] NZHC 3485 at [40].
[142] *H v O* HC Auckland CIV-2008-404-1891, 9 June 2008.
[143] *Bradford v Te Hei*, above n 141, at [25]–[61].
[144] Ibid at [88].
[145] Footnote omitted.
[146] *Bradford v Te Hei*, above n 141, at [45].
[147] Ibid at [45].

was that the Court of Appeal did not discuss the statement of Pankhurst J further as to the effect of joint liability on borrowings as being an equal contribution.

100. Nation J distinguished *H v O* from the facts of *Bradford v Te Hei* as in *H v O* one of the parties, O, was seeking a share of the increase in value in circumstances where she had not contributed cash in the acquisition of the property. Nation J noted that the "extent to which each party contributed to the initial purchase cost of a home will not necessarily determine the apportionment of relationship property at the end of the relationship", and factored in the parties' income contributions and non-monetary contributions in his decision to reach a conclusion of a 60/40 division.[148]

101. Applying *Bradford v Te Hei* and considerations under s 14 PRA by analogy, as the Appellant has invited this Court to do, the necessary approach in the absence of non-financial contributions as a line of consideration is to look at actual financial contributions of cash/equity as the guiding pathway for division.

102. Thus, given the foregoing, the CA's findings about the significance of the joint mortgage liability was available to it based on the authorities.

Contribution by way of borrowing from the parties wrongly ignored

103. There is no basis for the argument that the parties' respective contributions should be treated as joint borrowings totalling $1.546m equally contributed by the parties to the Trust. This was not argued in any of the lower Courts, where at all stages of the litigation the parties' contributions have been treated as separate loans to the Trust, which require reimbursement by the Trust.

Post-separation distributions/benefits

104. The Respondent's occupation of a Trust property on a rent-free basis was not argued in the CA and it ought not to be permitted to be raised now.[149] Had it been argued, in answer the Respondent would have raised countervailing circumstances such as the fact that her company FPL, which advanced the Trust much of the Respondent's contributions,[150] is still paying interest on bank lending it raised for that purpose. There is also the point that the level of financial contributions by the Respondent created an equity position for the Trust which enabled its rental income to cover the repayments on the third-party bank lending.

[148] Ibid at [56] and [88].
[149] Appellant's submissions at [107].
[150] See fn 109 above.

Had this not been the case, the Trust's investment model would have collapsed. The Respondent submits that it would be unjust to allow this argument to be raised for the first time now, when the case has already been heard by three courts and the Appellant has had ample opportunity to raise it.[151]

105. Furthermore, the parties' marriage endured for just over three years and the Trust was in place for just over two and a half of those years. It has now been nine and a half years since separation.[152] The Appellant will have the capital gain on his proportionate interest in the Trust's properties, none of which he would have been able to purchase himself had it not been for the Respondent's contributions.

CONCLUSION

106. In undertaking its assessment, the CA stood back and considered all the facts, including the parties' subjective reasons for settling the Trust, the terms on which the Trust was settled, and various financial matters including the Appellant's liability for joint mortgage borrowing and the Respondent's opportunity cost of foregoing investing properties on her own/through FPL and instead advancing money to the Trust to do so.

107. Taking account of the overall circumstances, as required by the SC in *Clayton*, the CA held that at the time of the parties' separation they had a reasonable expectation of dividing the Trust's assets on a proportionate basis. The division of the trust equity on an 80/20 basis was fair and recognised the specific nature of the circumstances of this marriage.

Dated 3 December 2024

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V Crawshaw KC / L La Mantia

Counsel for Respondent

[151] *Mahon v Waimouri Ltd* [2022] NZCA 96 at [61].

[152] Following his departure from Young Access, the Appellant made no further contributions to the Trust. See Respondent's narrative affidavit dated 12 July 2018 at [132]–[134], CB Vol 1 p 201.0039.