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

SC 10/2021
[2021] NZSC Trans 14

BETWEEN **KATHARINE ELIZABETH PRESTON**
Appellant

AND **GRANT LEE PRESTON**
First Respondent

GRANT LEE PRESON and FISHER PARTNERS TRUSTEES LIMITED as trustees of the Grant Preston Family Trust
Second Respondents

Hearing: 3 August 2021

Coram: Winkelmann CJ
Glazebrook J
O'Regan J
Ellen France J
Williams J

Appearances: V T M Bruton QC, I M Hutcheson and N L Walker for the Appellant
J M McCleary and R C Van den Broek for the Respondents

CIVIL APPEAL

MS BRUTON QC:

Tēnā koutou e ngā Kaiwhakawā. Ko Ms Bruton tōku ingoa. Ko ahau te rōia mō te kaīpira mātou ko ōku hoa Hutcheson ko Walker.

WINKELMANN CJ:

Tēnā koutou.

MR McCLEARY:

May it please the Court, counsel's name is McCleary, and I appear with Ms Van den Broek for the respondents.

WINKELMANN CJ:

Tēnā korua. Ms Bruton?

MS BRUTON QC:

May it please your Honours, I just first wanted to check that you have received my outline of oral argument, if not I've got extra hard copies.

WINKELMANN CJ:

Yes, we have it.

MS BRUTON QC:

Filed yesterday. So, what we have done between the three of us is split our oral presentation into three quite distinct parts. First of all, I'll deal with the core facts and then the policy issues that we submit they raise. Then my friend, Mr Walker, will deal with the appeal standard and where we submit both the High Court and Court of Appeal went wrong in this case. And then my friend, Mr Hutcheson, will deal with the relief sought, what we're asking

your Honours to do is make final orders to stop this, if we're successful, to stop this having to go back to the High Court.

WINKELMANN CJ:
Yes, and we need some assistance in understanding the figures in connection with that.

MS BRUTON QC:
Yes. So I'm going to leave that to Mr Hutcheson. So I've confirmed with my learned friend, Mr McCleary and we're hoping to be finished by 12.30 so he can start then, but obviously it's going to depend on what particular areas are of most interest to your Honours as between the three of us.

If I could say at the outset, there has been a lot of recent publicity about the difficulties that relationship property and trust cases cause litigants, the length of time, they go on, the cost and so I see this appeal as an opportunity for your Honours to say, yes, we have to determine these cases against the background of the principles that underpin the Property (Relationships) Act 1976 in terms of all contributions being treated equally, speedy access and cost effective access to justice, but also in a way that as Parliament has decreed, respects trust structures by reference to section 182 because section 182 is an opportunity for the Court, and indeed the parties, the trustees, to step into the shoes of what should be an independent fair-minded trustee and say, well, yes, usually the wife, but not always, you're no longer benefiting from the trust, what are you needs? What can we do to make this right? So that way the PRA regime and the trust structure can work in tandem and when I'm advising in these cases I always say, look, don't spend all your money on legal fees, spend it if at all possible on trying to ensure that both parties are re-housed. Both need a home, their kids need a home for whoever they're staying with and then if that approach is taken, these cases usually settle. But the problem is, because the law is in such a state of flux, there's uncertainty and it means that trust structures and general unkindness, as I'll come to, can be used to really thwart the poor party, usually the wife,

getting a just outcome and it commits these parties to years and years of litigation which is enormously damaging for everyone.

So, if I could just ask your Honours to start with the chronology because this is one of these classic cases where, while the marriage is good the husband treats the assets in the trust as his personally owned assets. The minute the relationship ends, he says, oh no, they're not my assets, there's a trust here, they're for the benefit of the beneficiaries so you are out in the cold, sorry. And so what we've ended up in this case is a situation where the husband has ended up with all the protections of a section 21 agreement, when there wasn't one, and as your Honours know, to have a valid section 21 agreement you have to lay all your cards on the table, you have to be honest and upfront, each party has to have independent legal advice and if one party doesn't like what's proposed they can leave the relationship or try and negotiate a better outcome.

So, in my submission it's a real anomaly and an injustice in the law in this country that trusts can be used to get the protections of a section 21 agreement in circumstances where while things were good, the assets were treated as personally owned assets. And, this isn't a sham case, I'm not saying that for a minute, but I note Justice Glazebrook in a couple of comments at the end of your judgment and *Official Assignee v Wilson* you said: "The question of alter ego might need to be considered another day in the relationship property context," and I'm not saying it's the day today, but that's part of the overall context where something is actually going wrong with these cases and how they're resolved. So, I think if this Court were to set out some general principles which would lay down some guidance, as is happened in *Clayton v Clayton [Claymark Trust]* [2016] NZSC 30, [2016] 1 NZLR 590, and *Ward v Ward*. So if you've got cases where it's a long relationship, the wealth has been created, all or mostly, during the relationship and there's children of both the husband and wife together, the result of *Ward* and then *Clayton* has been generally those cases are relatively easy to settle. So although there's no 50/50 presumption, that's been the guidance in those two cases.

Now, where the difficulties lie is these cases where you don't have your traditional relationships, you might have a second relationship, you've got a substantial amount of the wealth that's intergenerational. So, in my submission those are the types of cases, such as this, where we really could be assisted by some guidance from this Court.

So, if I could just run your Honours through some of the key facts in the chronology which support my submission, or two submissions really. First, that this was a joint enterprise between Mr and Mrs Preston. She put all her wealth from her previous relationship into this one and they were in this together. Secondly, Mr Preston effectively treated these trust assets as his own.

So, if I could ask your Honours to go to the chronology. So, we all know the trust is settled in 2004, before they meet. The home in Whakatane is purchased in 2005, again, before they meet. 31 March, Mr Preston, through his accountant John Fisher, who features quite a lot through these facts, values the business at 219,737 and that's important for reasons I'll come to. Then Mr Fisher on the 1st of April does another –

WINKELMANN CJ:
Sorry, what value did you say?

MS BRUTON QC:
At that point it's 219,737 for the enterprise value, and then the next important date is 1 April 2007 where he does an updated value with an enterprise value of $237,110. In mid-2007 Grant and Katharine meet. Then 22 January 2008, I say this an important date, when Mr Preston gives Katharine two diamond rings as a token of his love and commitment to her, and he says: "You don't buy rings for nothing, yeah." I'm not saying that was the start of the de facto relationship, Justice Fitzgerald found that was March 2009, but it's just part of what I say is evidence of this committed relationship starting in January 2008.

Now the next important date is 12 November 2008. So they're in this committed relationship. They haven't started living together, and Mr Preston transfers 99 of his 100 shares in the company to the trust, and the value used is the enterprise value of 237,110 assessed in 1 April 2007, and there's a deed of debt back to Mr Preston of 100,000,which has a discount for the non-voting shares. So that's actually your best evidence of value of the shares at the start of the relationship, and as will unfold as we go through this chronology, this is a story which is completely typical of accountants coming up with different numbers and different structures for purposes that generally suit the husband. So you have an enterprise value then of 237,000 and March 2009 is the start of de facto relationship. 12 September, and there's not in this chronology, but I think it's about, it's a few months later that Mrs Preston moves into The Fairway, the family home, 12 September – sorry, it's October 2009 the judge found, but 12 September 2009 they're engaged to marry. They move in, in 2009, or Katharine and their young daughter do, and the cleaner, who was previously employed, stops being employed, and that's another theme of this case really is even though we have *Rose v Rose* and the general principle that all contributions are to be treated equally, what happened in the High Court and in the Court of Appeal is there was a focus solely on financial contributions, and some quite significant contributions, as I'll come to, that Mrs Preston actually made, just got ignored and swept under the carpet. But in this day and age it's important, even on the 182 analysis, that it's recognised that all contributions are treated equally.

Then by the time we get to trial, Mr Shaw, the expert called for Mr Preston has assessed the enterprise value at 930,000, not the original 237, which is closer to the time. So that's my point there about creative accounting to suit the husband.

Then from October 2009, Mrs Preston takes over various office administration and account duties with the business. She's paid at a clerical wage, so right from an early time she's – and at this stage the evidence is, she's working out of an office in The Fairway, so she's living in the family home with her young

daughter. Mr Preston's older children come and go a little bit. She's working in the business so she's absolutely in this with Mr Preston.

WINKELMANN CJ:
Can I just ask you a point about the valuation of the enterprise, is your point that the evidence at trial tended to over-state it at that point, coming into the relationship?

MS BRUTON QC:
Well, that's not a, yes, and it's not a point that was taken on appeal, but the point is, if the court were to say, well, actually, what was really going on at the time when she moved in, enterprise value, that's the value the accountant, Mr Fisher, has assessed, that's the value at which the shares have been transferred. If you assess it at that point, and then you say when you get to the end of the relationship, Mr Shaw's value, I think, was 1.4 million, excluding debt. So that's a pretty significant increase in value but what Mr Shaw does to get around those increase in value and contribution arguments, he comes up with a figure at the start of 937, so you end up with a reasonably small, well a much smaller increase in value. So the point is, throughout Katharine or Mrs Preston's involvement is minimised by the evidence that's presented to the trial judge and then the approach that's taken by the High Court judge and the Court of Appeal judges.

O'REGAN J:
Does this affect section 182?

MS BRUTON QC:
I think it's a relevant factor because the court relied so heavily on contributions, i.e. Mrs Preston's financial contributions. I mean, on a 182 analysis I'm not suggesting you work things out to the last dollar, but in terms of general principle, I think the High Court judge, not just on this issue, there are a couple of others that I'll come to, completely downplayed her contribution. So when you're looking at – if you were stepping into the shoes

of a trustee, which I say your job is under section 182, one of the factors that ought to feature, in my submission, is the extent of her contributions.

O'REGAN J:

You haven't appealed against these findings, I mean, aren't these just background noise now, these filings?

MS BRUTON QC:

They are partly, but they're also important to how you exercise your discretion in the overall mix.

WINKELMANN CJ:

Can I just take you back to my question then, again, so is the fundamental point really that by stating this value at 937,000 when she brings 80,000 into the relationship, it makes it, it's quite a different thing her bringing 80,000 into the relationship and him bringing an enterprise worth 237,000 plus Fairway?

MS BRUTON QC:

Yes, that's part of, your Honour.

WINKELMANN CJ:

As opposed to her bringing 80,000 and him bringing –

MS BRUTON QC:

Yes.

GLAZEBROOK J:

I thought really though, your point was that the contributions should've been irrelevant anyway because, in terms of actual contribution, because what you should be looking at is an assumption of equal contribution and the *Clayton* test, but taking into account, on assumes, the fact that this isn't a long-term relationship and also one where there are existing children that are not joint children.

MS BRUTON QC:

I don't think I am saying that contributions are irrelevant. I think they should be relevant in the mix, but it's a question, as with all your relevant considerations and any trust deed decision-making process, what weight do you give to them. Because if, for example, the relationship had been two weeks, and I guess that does come back to length as well, but if the wife hasn't actually put in anything at all, and it's a two week marriage, then she's going to struggle to get relief. It just seems innately wrong. So I do think it's a matter of putting all the relevant factors in the pot and then weighing them.

GLAZEBROOK J:

But if you want something that's easy and that you're not going to have arguments about, contributions in terms of these actual contributions seem to be bring out the absolutely worse in people in terms of minimising the other's and maximising their own. And why would you want to encourage that, rather than starting from your presumption of equal contribution?

MS BRUTON QC:

Yes, so I accept that, your Honour. There should be a broad principle that contributions are treated as equal whether financial or otherwise, but your outcome might differ depending on the other factors in the mix.

WINKELMANN CJ:

So when you're talking about a contribution, you're talking about contributions to the trust assets?

MS BRUTON QC:

And the relationship. You see, under the Property (Relationships) Act, it says all contributions are treated as equal in *Rose v Rose* all contributions were treated as equal including her working on the farm, looking after the house, so he could go off and do his farming work, but there's something wrong with how 182 has been applied in this case, that only financial contributions to the assets are being looked at as opposed to the relationship.

So, continuing on with the chronology. 15 January 2010, and this is a file note from the accountant, Mr Fisher. "Katharine," that's a mistake in the note, that spelling: "Katharine has 120,000 cash," so that's what she is set to receive from her property division with her former partner which ends up being 107,000. "Grant asked for my advice about Katharine's investment in the family home or alternative options." Then what happens soon after that, on the 1st of February 2010, is the deed adding Mrs Preston: "As or any wife or widow for the time being of the settlor, any person who is living or has lived with the settlor of the opposite sex on a domestic basis in such manner as if they were legally married to each other," so on that definition, we say that she's still a beneficiary. It doesn't actually matter for section 182 purposes, but it's obviously, you get something else done by the accountant and it's reasonably curiously worded, but what you Honours can take from that, they're having discussions about her interest, looking after her, she gets added as a beneficiary of this trust and the evidence is the accountant explained that there were tax benefits in adding Katharine as a discretionary beneficiary. So my point is, you can't add someone as a beneficiary and say they get benefits for tax purposes, or any other purposes that might suit the husband, and then when the relationship ends say, off you go now with absolutely nothing. Because if we're respecting trusts, the whole purpose of a trust is to look after beneficiaries, not to use them when it suits the trustees or the husband and then say, well off you go now. So that's an important detail.

Then 30 July 2010, Katharine receives the 107,000 by way of her property settlement. Then 4 December 2010, they marry. 11 June 2011, Katharine, of her separate property money, this 170,000 she gives almost 5,000 to Mr Preston's son, Rhys, to help him buy a car. So this is my point that this is a joint enterprise. She's put in everything into it. She's a beneficiary of this trust. She's proceeding on the basis she's being looked after.

Then 18 January 2011, and look, I acknowledge that these advances were repaid, but she advances the company again of her separate money 10,000. 18 May 2011, another advance.

WINKELMANN CJ:

This is all interest free money, isn't it?

MS BRUTON QC:

Yes, it is, and then 17 August 2011, she actually, and this is in the evidence in the bank statements, she actually directly pays the staff wages from that money of hers. Again she gets repaid but it just demonstrates the point, that she's absolutely in this relationship with Mr Preston as a joint enterprise. Then November 2011 she spends 8,500 on a family holiday in Fiji with her husband, his mother, his daughter, and the daughter's partner, and her two children. So if ever this was a blended family unit, or ever there was a blended family unit, this is it.

Then we get to 16 January 2012, and this is with KJ appointed as a discretionary beneficiary, the trust can distribute at your discretion monies to KJ, that's her nickname, in the 2011 year the distribution was 38,800. She never got 38,800 but again that was done for tax purposes. A further interesting feature about this case is even though by this stage Mr Preston only holds one share, he basically gets most of the dividends, so the analysis is that over the course of the relationship he got 67% of the dividends, although he only owned one share, and he's the accountant, and I suppose technically speaking this is right, if Mr Preston is the only director of the company, the accountants are saying well at your discretion you can distribute money to her, and then the accountant works out what it is. So again it's just another example of Mr Preston just treating the trust assets as his own.

WINKELMANN CJ:

Where do the other dividends go, the ones he doesn't get?

MS BRUTON QC:

There was a few that went into the trust. But again I think, as in all these cases, he had access to the funds and actually she had access to the company accounts as well, and then at the end of the year the accountant just does whatever to make it work as well as possible from a tax point of view.

WILLIAMS J:

Doesn't that really mean that the 67% dividend is accurate on paper but in reality, the whole theory of your case is that this money is socially and economically blended, even if the accounts are separate, so doesn't that make this a red herring?

MS BRUTON QC:

It's a not a red herring because it's important to me persuading your Honours of that point, and also I think from a wider point of view because I mean this is a reasonably atypical case, how do we deal with this and provide some guidance for the future if your Honours are minded to go there.

WILLIAMS J:

I guess my point is, your theory of the case that all the money goes into a pool anyway, in social and economic reality in the family, whatever the accounts say, so the fact that the accounts say he gets 67% probably is a neutral factor for your case?

MS BRUTON QC:

Well I don't actually say its neutral, I think it serves to demonstrate that it was all his, it was his control, he did whatever he wanted and whatever the accountant told him to do that was for tax purposes, so sorry if I'm misunderstanding you.

WINKELMANN CJ:

Well can I ask a point of clarification? Do you accept that he only got 60 something per cent, or do you say that he got the 100%, because I think that might be what Justice Williams is asking?

WILLIAMS J:

No, no, my point is the opposite really. That you're saying this is a blended family in which everything is all in.

MS BRUTON QC:

Yes.

WILLIAMS J:

And this discussion and bickering over contributions is really beside the point. Although you don't say it's irrelevant it's, in terms of the basic theory of your case, beside the point.

MS BRUTON QC:

Yes, I do say that, and I didn't do the High Court trial, but the High Court judge didn't agree with that, and certainly the Court of Appeal wasn't having a bar of that argument.

WILLIAMS J:

No. But if you take that to its logical conclusion, whatever the accounts say, if you're right on that point, whatever the accounts say don't really matter because on your theory he's putting that 67%, or the 100%, or whatever it is, into the blended family unit anyway.

MS BRUTON QC:

Yes, that's right Sir. But then, I mean, that raises a wider question is, you know, why do you have a trust, and why do you have trust accounting.

WILLIAMS J:

Well, quite.

WINKELMANN CJ:

So what's not atypical is the fact that the family treated trust assets, he treated trust assets as his own, which is not atypical. Because trusts are used in that fashion throughout New Zealand, aren't they?

MS BRUTON QC:

Yes.

GLAZEBROOK J:

Although you could rather say he was, without being as pejorative as that, saying that, because they are obviously beneficiaries of the trust and they were using them in the sense as beneficiaries, so for the blended family.

WINKELMANN CJ:

Is he a beneficiary of the trust?

MS BRUTON QC:

Yes, he is. So next entry in the chronology is 13 February 2012, she advances $27,180 for an excavator and again, that's taken into account and he's notionally repaid but it's not what the office girl does. She doesn't advance her own money to pay wages or buy an excavator.

Then in November 2012, they sign an agreement in their personal capacity to purchase this property at Pauanui for 259,000. Now, how the accountant works out the funding for it, is he adds up those advances that I've previously gone through, totals them as 60,000 and says, well that can be treated as Mrs Preston's contribution, and then the company can chip in an extra 10,000, so that gives them the initial 70,000 equity. But what ends up being pretty unsatisfactory, from Mrs Preston's point of view in this case, is subsequently, and it takes over a year or two to actually be signed and completed, is there's a property sharing agreement done for Pauanui, and the effect of that is it preserves their initial equity as repayable if it sells or whatever, so her 60, his 10, and subsequent contributions, but the increase in value is shared equally.

So, it's a most unfortunate agreement from her point of view but the result of it is, is that she actually makes a six-seventh through her trust, Huntbos, contribution to Pauanui and, I mean, if you're going to maintain these separate property contributions, what should've happened is she should've got a six-seventh proportionate share of the equity. Sort of that was a major financial contribution she actually made to the Grant Preston Family Trust and so again, you end up with this funny situation where he's managed to preserve, for himself, or his trust, all the increase in value of The Fairway, this

Pauanui property and that's the one thing we did win on in the Court of Appeal in terms of date and prices of sale. But he's actually had the benefit of 50% of the increase in equity. So, every way you skin this, she comes off badly.

O'REGAN J:

The theme you seem to be giving us is, he's been really unfair to her and so we should be charitable to her. That's just not the way section 182 works. I just don't see where we're getting to with this level of detail about how badly she's been done by on all aspects of the PRA claim, because it's not before us.

MS BRUTON QC:

Well, with respect, what I say is when it comes to the exercise of your discretion in section 182, the relationship ends, so how do you, given they're divorced, she's got a 182 claim, how do you exercise your discretion to, if you're going to, to provide some benefit to her and what I say, and I understand Justice Glazebrook's point, that maybe the detail of the contributions is irrelevant, but what I say is you've got to put all of this in the mix and say, well, what is right that she comes out with? And what I contended –

O'REGAN J:

But on that basis you're saying section 182 is completely factually based, there's no principle involved at all. You just look at what's fair? That isn't right, is it?

MS BRUTON QC:

I think it's factually based, yes, so your outcome in any given case is going to depend on the facts, but there are principles that ought to guide the exercise of the court's discretion in the trustees, in the parties, so these things can actually settle and not go on for five or six years, as this case has.

O'REGAN J:

But you're never going to get agreement on the sort of things you're just talking about, are you, when you're trying to settle? You're not going to have a husband saying, yes, I agree, I got all the benefits and you didn't so I'll hand over everything –

WINKELMANN CJ:

Can I just ask, is your case, can I just re-cast what you're saying? Is your case that when you look at this in order to work out what is the appropriate order at the end, you have to look at how the trust, part of it is looking at how the trust assets were dealt with?

MS BRUTON QC:

Yes.

WINKELMANN CJ:

And your point is that really, they were part of this joint enterprise in which she was making very considerable contributions, and so you look at the whole picture, and the High Court didn't do that. It just sliced down invalid and unequal way her contributions to the trust assets. And also, I think you're saying that her contributions to the household were part of the contributions to the trust assets because she's there supporting the whole thing going. So joint enterprise, it's a relationship?

MS BRUTON QC:

Yes. Yes.

WILLIAMS J:

I would've thought the Pauanui story you told of one-seventh/six-sevenths, and that's unfair, may well be put in the reverse way to make your point which is the fact that post individual inputs, everything's shared evenly, indicates a relationship of equal contributions once it's established and during its course and there's no reason why that shouldn't apply also to The Fairway.

MS BRUTON QC:

Yes.

WILLIAMS J:

But it's not about the unfairness of six-sevenths/one-seventh, it's about the evidence that shows of what was truly going on economically and socially in this relationship.

MS BRUTON QC:

Yes, but I guess that the issue with that, Sir, is that there was a property sharing agreement. So I agree with you fundamentally, but when we have a trust deed, trust accounts, property sharing agreements, I don't know that the court can just ignore all of those.

WILLIAMS J:

But if we're looking at 182, what we're looking for is evidence of equality of perception, expectation and, if possible, contribution.

MS BRUTON QC:

Yes.

WILLIAMS J;

This might be one of those.

MS BRUTON QC:

Yes, yes, and what you're saying is, well, we need to find a way to cut through all that.

WILLIAMS J:

Absolutely.

MS BRUTON QC:

Which I agree with.

WINKELMANN CJ:

Can I just say, I think you're overstating the unfairness to her though, aren't you, because isn't part of each of their contributions the borrowing that they're liable on? So, they'd borrowed part of the purchase price, didn't they?

MS BRUTON QC:

Yes, and I think, as I recall, they were jointly liable for that.

WINKELMANN CJ:

Yes, so you'd actually say, the mathematical sum it's not that she should be entitled to six-seventh for contribution, it would be considerable diluted from that, I think. You know, in a truly fair universe, I don't think it would be right that she should get six-sevenths of the increase in value because, in fact, they went and borrowed jointly. So that was their joint contribution.

MS BRUTON QC:

Yes, but as I recall, they're actually paying the borrowings off equally.

WINKELMANN CJ:

Yes. I think my point still stands.

MS BRUTON QC:

They're making equal contributions.

WINKELMANN CJ:

Just if I was structuring how you'd share the profit, I don't think I'd say that she'd be entitled to six-sevenths because it's a different, it's mathematics.

MS BRUTON QC:

Look, if there was no trust and it's we're all in together, I mean, clearly Pauanui would be relationship property and when you come out at the end they'd both get 50% of the equity.

WINKELMANN CJ:

Yes, and I take that point.

MS BRUTON QC:

So, I don't want to bore you with all this detail, and I think I've made by point, that this was absolutely treated as a joint enterprise and there were other structures and accounts and things which didn't reflect the reality.

Just a couple of other documents that I wanted to point out to you is, his separation letter which is on page 6 of the chronology, at the top there, and he says: "I was so happy to have you as my partner, and all I have ever done is to look after you." And that's relevant to where we're getting to with what your Honours' ultimately have to decide is, well, what's the changed premise as a result of the dissolution and what he's saying in this letter: "I love Pauanui as much as you. The work we have done there is amazing. The time we have had has been amazing. We've made a little dream come true."

So that emphasises this joint enterprise. "What about the 30 or 40 grand EBT has paid for that I treat as our contribution to the value of Pauanui." And he was consistent with that in his cross-examination where he said: "As long as we were happily married, she'd enjoy a great life with me and all the benefits." He referred to "my business" so that's quite an important letter in those aspects of the cross-examination. Important on this point, that had the marriage continued, she would've continued to have all the benefits of benefiting from the business through the wages and dividends that he received at his discretion, his occupancy, or her occupancy of the family home rent free, and her occupancy of the holiday place at Pauanui which isn't flash. It's a couple of caravans and a utility shed. So, that's the basis of, you know, that's your best evidence on the changed premise post-dissolution, which is key on 182 obviously. I think also important is April 2016, he actually goes along and gets a crane and pulls out the spa pool and other fixtures from the Pauanui property, and that's obviously the behaviour of someone's hurt, but it's also the behaviour of someone who does not know what his trustee role is and how to act as a trustee.

Then the other thing that I wanted to point out, which isn't in the chronology, is his evidence at 203.0475, and he says: "Generally, however, the business is

healthy, the demand for infrastructure upgrades has really been the driving factor. The business is also doing well now because of my children who have taken over most of my role now. It's a bigger operation now than when I was with KJ. We are running two drilling crews now. Both kids are focused. They chase the work and do it well." So, Mr Hutcheson will develop things on remedy, but you're going to hear that Mr Preston's really suffering as well, but what has happened is – and we don't have up-to-date valuation evidence, but he's come out of all of this reasonably well. Got a thriving business, got this home in Whakatane which will have increased in value, and her evidence is she's earning I think it is 52 or 54,000 a year. She failed her clinical psychology doctorate exams so she's not a registered psychologist. So she continues to struggle.

So then that brings us to section 182 and how the discretion should be exercised and what the applicable principles might be. Now, what I've done, and if I could hand it up, I've done just a brief summary of the cases post-*Clayton* on 182 which my friend and I have mentioned in the submissions and I don't propose to take your Honours through any of them unless you wanted me to. But the point is, they show quite differing approaches, and that's why I say there's a need for guidance from this Court.

The focus in the first three of these cases, *Bethell v Bethell* [2018] NZHC 3171, (2018) 4 NZTR 28-032, *Stiles v Stiles* [2019] NZHC 3462, and *Oldfield v Oldfield* [2019] NZHC 492, (2020) 5 NZTR 29-015, *Oldfield v Oldfield* [2020] NZHC 8 is actually on the part, well in part, it's on the parties being re-housed so *Bethell* involved a family farm which had been in the family for three generations. That's a Family Court decision; wife got nothing under 182 there because in part because the judge found she hadn't made any contributions to the farm itself. And on appeal that was remedied by Justice Nation and what he did was he said: "Well, what does wife receive out of her relationship property entitlements, this is clearly a nuptial settlement, what does she need so that she and the kids can have a home of a reasonable standard and some measure of financial security?" So, his

Honour exercised his discretion under 182 to provide her with another 300,000 which was 20% of the trust equity.

Stiles was a Family Court decision appealed to the High Court and there it was a traditional relationship, but there the judge, and upheld by the High Court, unequally exercised a section 182 discretion to give the new trust for the wife 60% so that she would have sufficient funds to re-house herself and recognising her health and financial vulnerability. So these are good exercises of the discretion where they put all the relevant circumstances in the pot and come out with an outcome which is obviously not necessarily 50%.

WINKELMANN CJ:
So, I think the analysis you're suggesting is helpful. You're saying you really look at is as if you're the trustee, so with the circumstances you're looking at circumstances that a trustee might take into account.

MS BRUTON QC:
Exactly. Exactly. Then *Oldfield*, that was a case, that had been a 47 year marriage. There'd been a trust settled during the relationship. Justice Duffy ultimately – the husband wanted it split into two trustees, à la *Ward* and *Clayton*. Ultimately, in there the beneficiaries gave evidence. They didn't support the split, neither did the wife, and the judge decided in that case, given that there was a new independent trustee on board who was actively looking for a home for Mrs Oldfield, Mr Oldfield had maintained residence in the family home, her Honour there said: "Not necessary to exercise my discretion under section 182 and make any orders, because the trustee, who was Guardian Trust, will look after both Mr and Mr Oldfield and when you look to the long-term and the fact that they're nearing the end of their lives, there's no need to separate this into two trusts. It will just create more administration costs and so forth."

Then we've got *Preston v Preston* [2020] NZCA 679 and then we've got *Little v Little* [2020] NZHC 2612, (2020) 5 NZTR 30-022, which is a little, and I see your Honours' recently refused leave to do a leapfrog appeal from the

High Court to here on that, but that was a rather odd decision by the High Court, with respect, and it shows how the section 182 needs to be brought back on to track because in that case what the High Court judge, and I've set out the quote there at paragraph 30, he says: "The way to decide remedy under section 182 is to look at the increase in value of the trust assets since settlement, then you start with a presumption of equality but you might end up discounting that to take into account other factors like interests of other beneficiaries. I mean, if this is the test, you can imagine the forensic accounting costs, all the hassle, and what his Honour did in that case is he remitted it to the Family Court to decide section 182 by reference to that approach, when Judge Burns in the Family Court had just said, settle on two new trusts, and that's 11 years after they separated. What I've done in the second column is put the separation dates and all these cases, they're a good four years at least before these parties actually get a remedy, and if there's ever a situation where there should be speedy efficient justice, it's when these marriages break up.

Then *Dyer v Gardiner* [2020] NZFLR 293, that's a decision of the Court of Appeal which is understandable in the circumstances, but there the husband who was the one with the lesser wealth and not in control of the trust, he got some relief in the Court of Appeal under section 44 and 44(c) so he missed out under 182 and that was also understandable in that case because the trust was set up pre-relationship primarily for the benefit of her disabled child to ensure that he was looked after.

Then the last one is *Wylie v Wylie* [2019] NZHC 2638 which is another decision of Justice Nation but in that case there was a contracting out agreement where the wife's interest as a trustee and appointor, I think, of the trust of the home in which they lived were specifically protected as her separate property. So, his Honour said: "I'm not exercising my discretion under section 182," and this is a 182(6) I think it is, situation where there's a contracting out agreement. That's the whole point that I would emphasise, is if you've got assets in trust, or personally, if you want to protect them, have a contracting out agreement and be upfront about it.

So, this really brings me to the last part of my submissions which is how do we reconcile these approaches and what guidance might the Supreme Court give and what I would also say, is I think the reason these cases can go so off the rails and take so long is because there's a pretty mean-hearted approached to the poorer spouse. Examples of that in this case is in my friend's submissions he said: "By the addition of Mrs Preston as his beneficiary, the trust was contaminated." The Court of Appeal said the section doesn't authorise a grand march into the husband's separate property or third party property. I was never trying to do a grand march. I was saying the right result in this case is nothing like equal sharing and so that she can have a property of her own and all these cases, sometimes there's not enough money for that, but if there is, in my submission, that should be a guiding principle rather than throwing people to the mercy of lawyers who are willing to do this for free, as we are, in this case, or legal aid, or having these women end up on the DPB because it's too hard to fight when there's actually a pool of wealth there from which all the beneficiaries could actually be looked after. In these cases they cost hundreds of thousands in legal fees and if there was some guidance from this Court that you're better to spend that on re-housing both parties, I think we would be a long way ahead.

So that's really my point under fundamental precepts, number one, lawyers and the courts are there to provide access to justice, to assist the public to resolve disputes efficiently and cost-effectively, not perpetuate years of costs, appeals, uncertainty, and emotional difficulty. I think you've got to assess 182 and I'm not saying that section 182 is a way to get a result that you would've achieved had there been no trust under the PRA, but I think you've got to assess the application of PRA against those – sorry, section 182 against those PRA basic precepts which are that with a de facto relationship you end up with the same outcomes as a marriage, men and women are of equal status, all contributions to the relationship are equal. The search is for a just division and resolution should be as inexpensive, simple and speedy as is consistent with justice.

WINKELMANN CJ:

What page of your submissions are you at?

MS BRUTON QC:

On this hand-up, page 3, I'm over the page on page 4.

WILLIAMS J:

So, is your starting proposition, that except in exceptional circumstances presumably, if there's enough asset within a trust, bearing in mind the wider relationship property situation, whatever that might be in a case, the starting proposition is the parties must be re-housed then you work from there?

MS BRUTON QC:

Yes.

WILLIAMS J:

So that would be your non-negotiable except in exceptional circumstances?

MS BRUTON QC:

Look, I don't think you should say, ever, you can't ever – well, I think yes –

WILLIAMS J:

No, no, I wouldn't – I'd never say never.

MS BRUTON QC:

I think yes, Sir, because I mean, whatever you call it manaakitanga, human decency, people need a home.

WILLIAMS J:

Mana.

MS BRUTON QC:

The kids – mana – their kids need a home. So, yes, and as I say, when I'm advising on these that is my starting point, and then what we do is we go to a mediation and it's all about, what's the pool, relationship property and trust.

How do we actually carve this up, so at least both parties have a home and if there's some extra money there, the wife, if it's the wife, can have a measure of financial security and then, you know what, you get it settled and then sometimes you've got to have full disclosure, sometimes you've got to let the dust settle and people work through their emotional pain, but you get it done in a day and you don't have an eight day trial, as we had in this case.

O'REGAN J:

We know all this. The fact is we've got to, you're asking us to decide this on the basis of the law, so we have to do that, don't we? Everybody agrees it would be great if everything settled.

MS BRUTON QC:

Yes, but one of the reasons they don't settle these cases, as I said *Clayton* and *Ward* because you've kind of got 50/50 in these big pools, long relationships, they do settle because of the guidance that this Court gave in *Clayton* but its these cases with the non-traditional relationships where we need some guidance. So if one of your guiding principles was, if at all possible, other than in exceptional circumstances, get both parties rehoused, it would be a great start.

WINKELMANN CJ:

Well you don't set out as a principle, I don't think you do, what use of the trust assets were made during the relationship, which seems to be reasonably central to your case that basically this is joint enterprise.

MS BRUTON QC:

Yes, but I don't say that they were all created during the relationship. Obviously Mr –

WINKELMANN CJ:

No, no, the use of the house, effectively how central the trust assets were to the joint enterprise they created.

MS BRUTON QC:

Yes, well that, I suppose that should be, it's kind of part of (a) in my relevant factors: "The extent to which the claimant spouse would have benefited from the trust had the marriage continued." So those are the factors, those are set out in my submissions at paragraph 38, but what I say here is you can make the two regimes work in tandem. You can make your PRA regime work with your 182 but that does require – it requires, we're saying, trust to be respected, which obviously they are. It does require a pretty fair minded independent approach, not going along and ripping out a spa pool but saying, well, if it was Guardian Trust or Public Trust or whatever, how would we actually look after these beneficiaries, and the first point is, if at all possible, it's a home. But the reason I've set out these factors is because it's like with any trust and any trustee decision-making process, I mean if you've got a massive pool of wealth, the outcomes are going to be different than they are if you've got a reasonably limited pool, as we have here, and there's, for example, probably not enough to provide the wife with a capital base, but in this case, and in pretty much all these cases, a home would be a fantastic start rather than the hundreds and thousands on legal fees.

WINKELMANN CJ:

So what about if we have a different fact scenario, just testing that point about (a) and what we put in there, different scenario where he'd set up this trust and it had this business and it was resettled in the way it was with her added as a discretionary beneficiary, but he was very punctilious about keeping, it wasn't, it didn't provide the matrimonial home, it didn't provide the relationship home, it didn't provide any income above, you know, it didn't provide income, he kept all these things separate, what would that scenario be like?

MS BRUTON QC:

Well then I think she's got a harder case because in that case if you look at the, you know, with your ABC diagram in *Clayton*, if you look at the benefit she would have received had the marriage continued, well she never received the benefit of living in the trust owned home because he made sure it was separate. But I think the minute that these parties, even if the wife isn't a

beneficiary of the trust, and this isn't before your Honours, but I think the minute you let a spouse live in a trust-owned home, there's a nuptial settlement there at least in relation to the home, and what I say is the husband/trustees have got to take the good with the bad. So if you want to have the trust for tax purposes or any other purposes, you might think are a good idea, and use those assets as part of your relationship, as clearly happened here. When it ends, you've got to know, and the position is, well, section 182 is there to provide just orders to remedy the failure of the premise and the change in circumstances. So if you want to have a trust, that's your exposure, and it's just not right to say, well, the marriage is over so she can't get any benefit from the trust now. So she doesn't get anything under section 182 when that's the whole point, that section 182 was there.

WILLIAMS J:
I suppose your point is, economically what she got out of the relationship, if nothing else, was a home for her and her child and a job?

MS BRUTON QC:
That's right. And, as I say, the Pauanui property is very, very modest. It's not a modern new home.

WILLIAMS J:
In Pauanui though.

MS BRUTON QC:
Yes, that's right, Sir. What that does is it gives people security and an economic base, having a home or a bit of land.

WINKELMANN J:
Well, it's not really a home, it's a caravan.

MS BRUTON QC:
But it's an economic base, your Honour.

WINKELMANN J:

Yes, yes, it's an economic base, and that's the point

O'REGAN J:

But she's got that now, hasn't she?

MS BRUTON QC:

She does now, but she's got a $337,000 mortgage on it.

WINKELMANN CJ:

She had to pay Mr Preston out?

MS BRUTON QC:

Yes.

ELLEN FRANCE J:

Could I just check, the relevant factors that you list at paragraph 4, to what stage of the inquiry do you say they go because some of them seem to me to be potentially part of the sort of ABC exercise and then some of them are part of, well, there's a gap or a there are difference in the consequences, how do you then exercise the discretion? I'm just not quite sure how you're seeing all of that working.

MS BRUTON QC:

I actually don't think you can be too formulaic about it, because obviously your first inquiry is there a nuptial settlement and this appeal wasn't actually about this. But I think you can have a trust and some assets in the trust are a nuptial settlement and some aren't. So, for example, if the trust is settled pre-relationship, and it's got a whole lot of his business assets in it which aren't used for the benefit of the spouses, but then she moves into the trust's own home, you know, as I said, the home can become a nuptial settlement. So when you're looking at your ABC inquiry, I think, assuming you've got over your nuptial settlement hurdle and actually worked out what the nuptial

settlements are in terms of the particular trustee sets, then you, whether it's all or just some of them –

WINKELMANN CJ:

Aren't you confusing the settlement is when she's added as discretionary beneficiary, doesn't that –

MS BRUTON QC:

Look, in this case, I was talking more generally.

WINKELMANN J:

It's not the use that changes it, is it? Not post fact, after –

MS BRUTON QC:

I think I'd better just stick to the facts of this case. But when she gets added as a beneficiary in 2010 of the trust, then all the assets become part of the nuptial settlement, so I think to answer your question Justice France, when you're looking at your ABC, you say, so your first stage, you've got over question 1, it's a nuptial settlement. Then you're into question 2, so you say, well, what would her position be had the marriage continued. So she'd have a home, she'd have access to the business benefits including a job, with the business, if that was how they chose to structure things. So then I think that's got to be, well, as the law says, with *Clayton*, that's the first part of your stage two inquiry. And then you might do, it's sort of like a cross-check because even though, and a bit of wash-up in terms of looking at overall need and these other factors. I mean, it's like any trust deed decision-making, you identify your relevant factors and the weight that you give to them, bearing in mind that the directive from this Court is your ABC analysis. So then you look at your other ones, and then you say, well, what's the just outcome? In this case –

WILLIAMS J:

So this is your wise and just trustee as it turns out?

MS BRUTON QC:

It is, your Honour.

WILLIAMS J:

That's your cross-check?

MS BRUTON QC:

Yes. And I always do a cross-check and say, if there was no trust, what would be the outcome under the PRA and in this case, she'd be entitled to half the equity in The Fairway, half the equity, ignoring that property sharing agreement, half the equity in Pauanui and up to half the increase in value of the business. So I'm not saying you do that, but that also provides a cross-check.

O'REGAN J:

Do we actually know those figures? We don't, do we?

MS BRUTON QC:

No, we don't have up-to-date figures.

WINKELMANN CJ:

And is that a relevant cross-check anyway. Isn't the relevant cross-check, aren't you just introducing confusion because the relevant cross-check is the cross-check that this Court set out in *Clayton,* which is the status quo, as if the relationship continued and adding in another cross-check might be incredibly confusing.

MS BRUTON QC:

It might be but if you say the search is, when you look at the words of the statute, I mean, yes, in *Clayton* there was the cross-check but the words of the statute –

WINKELMANN CJ:

I mean you might say that in this case that's quite a useful cross-check but it only happens to accord with exactly how the thing was being run really.

MS BRUTON QC:

Yes.

WINKELMANN CJ:

But in another scenario it might be an incredibly confusing cross-check to say if it was, if the trust was only being used to a very small extent to support the relationship.

MS BRUTON QC:

Yes. And what subsection (3) of 182 says: "The court may take into account the circumstances of the parties and any change in those circumstances since the date of the agreement," so that's your *Clayton* ABC, "and any other matters which the court considers relevant." So I guess that's these other things that I say should come into consideration.

ELLEN FRANCE J:

Do you say all of your factors in paragraph 4 come in, in that second stage?

WILLIAMS J:

Can I just check that paragraph?

WINKELMANN CJ:

That's on the hand-up that's just come up with the cases. I was rather confused too, and it's on page 4.

ELLEN FRANCE J:

I'm thinking about it in terms of the factors that the Court took into account in this case.

MS BRUTON QC:

Yes.

ELLEN FRANCE J:

And thinking about those vis à vis the things that you've listed, and I just want to be clear that you're saying once you've decided there is some difference in terms of the consequences.

MS BRUTON QC:

Yes.

ELLEN FRANCE J:

BNC, you're saying you look at all of those factors in the next, whether we call it another stage or…

MS BRUTON QC:

Yes.

ELLEN FRANCE J:

But you then turn to look at all of these factors?

MS BRUTON QC:

Yes. Look, I think it will, if it's from the starting proposition if at all possible. There should be a home for both parties. I think absolutely.

WINKELMANN CJ:

Well isn't that also context specific because you're thinking about a scenario where – which maybe the most common scenario – where the trust assets are used as the relationship assets.

MS BRUTON QC:

Yes.

WINKELMANN CJ:

But what happens in the counterfactual, which is the one I suggested, where only some small part of it is used that might not be…

MS BRUTON QC:

That's right your Honour, and that's why these cases are also so fact-specific. So, for example, they've got their own home that they own jointly in their personal names. Now under the PRA regime she gets paid out part of the equity in that, say, and then you might look at ages of children, is she able to work, can she fund a mortgage, and if it's the case that dividends from the trust-owned business have been used to support the relationship, then you might say, well we'll give her a bit of an award under section 182, but it is always going to be very fact dependent because she'll have maintenance –

WINKELMANN CJ:

Yes, because the facts might be, for instance, that it's a new relationship – it's a blended family and say it's the wife who's got the business and the wife who's being very punctilious at making sure that dividends from the trust-owned business are paid into the caucus of the trust and held for the children in future, well then you might think – so it is really fact specific.

MS BRUTON QC:

It is your Honour, but where I think this case has gone wrong, and so many of them do, is once you – and most of them are actually about a home, once you actually let your partner, and while you're at it if you're with me at all and your judgment would be quite nice I say if you would actually say Parliament might amend section 182 so it applies to de facto relationships as well and you don't have to wait two years before you can bring your application, but it's the whole honesty point, right, so once you let someone have the benefit of your trust-owned assets, and live in your trust-owned home, and you haven't been upfront, that if it ends you're out on your ear with nothing, you're exposing the section 182. But look I accept completely that –

WINKELMANN CJ:

There is a fairness, your point is, not so much honesty but fairness. This was a relationship which was put, she came into this relationship on the basis that this was how they would live et cetera.

MS BRUTON QC:

Yes.

WINKELMANN CJ:

This was what he was providing, this is what she was providing.

MS BRUTON QC:

And he writes a letter saying, all I did was ever look after you, and so she goes and puts her 107,000 into this relationship and buys his kids a car each. So that is my – and I'm sorry I can't say I think you should actually lay down principles, you know, DEF, in addition to the *Clayton* ABC, but I mean that's the whole beauty of trusts that work properly, is that trustees do maintain discretion obviously to look after the beneficiaries or, even if a wife isn't included as a discretionary beneficiary, those who have benefited from the trust.

WILLIAMS J:

Can I just test you on I guess the question of need in the sorts of circumstances that occur. So the poorer spouse moves to another relationship where there is a home. What then?

MS BRUTON QC:

Well –

WILLIAMS J:

In other words, is need relevant to your bottom line of everybody gets a house?

MS BRUTON QC:

I think the enquiry has to be for a just outcome in relation to the particular relationship.

WILLIAMS J:

Yes, it's always that, it's just that that's hard.

MS BRUTON QC:

That has ended. So I don't think it's right to – and again it will be fact dependent, it's hard to do these in a hypothetical situation, but I don't –

WILLIAMS J:

But you wouldn't shrink from your default position?

MS BRUTON QC:

No I wouldn't.

WILLIAMS J:

Without a fight?

MS BRUTON QC:

I wouldn't.

WILLIAMS J:

Right, okay.

MS BRUTON QC:

So unless your Honours have any more questions of me I might hand over to Mr Walker to deal with where we say the Court of Appeal and the High Court erred on the 182.

MR WALKER:

Tēnā koutou rangatira. First your Honours I'm going to talk briefly to the standard on appeal. The appellant's submission is that the standards essentially are relevant here because there are clear errors of law, the same as the position in *Clayton*. The respondents' submissions make the point that this is a point from an exercise of a discretion. That's not necessarily challenged by the appellants but the submissions of the respondent focus on whether relevant considerations were not taken into account or irrelevant considerations were taken into account when the appellant's case is actually that there were errors of law. You may have noticed that the submissions

were a little bit ships passing in the night to that extent, and our strong submission is that there were errors in the lower courts and that you should correct them. I submit that it is open to this Court, if it wanted to, to hold that, although section 182 involves factual evaluation and value judgment, that it's not a true discretion. However, we say it doesn't matter for our case your Honours.

In terms of what we're asking the Court today, we're respectfully seeking correction of four errors of law, and then we are asking for final resolution of these proceedings. Of course the Court has jurisdiction to order final resolution of these proceedings. Section 79 of the Senior Courts Act. The respondent agrees with that, that there should be final resolution of these proceedings, save for one minor aspect, and submit that this Court should make a final decision on the information available to it. My friend Mr Hutcheson will talk about the figures. I understand there's a few questions there.

We submit that there is enough information for this Court to feel comfortable making a final order, accepting that given some of the information is slightly out of date there will be a little bit of uncertainty involved, and it's not uncommon for the Supreme Court to issue final orders in these type of cases. That was what happened in *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31. There the Supreme Court said referral back would have been appropriate only if absolutely necessary. In that case it wasn't. And then in *Clayton v Clayton* the indication was that a final order would have been made splitting the trust assets 50/50 but for the settlement.

The appellant submits, as Ms Bruton has covered, that an order should have been made in her favour. Mrs Preston should have had an order made in her favour on an application of the principles in *Clayton v Clayton* to non-traditional family units. So if the principles in *Clayton* were applied correctly, we say, Mrs Preston should have had an order in her favour, and as Ms Bruton has covered, this Court, by correcting the errors made, will provide

important guidance for practitioners. It's almost another working template in that sense outside the traditional family setting.

I was planning on going through *Clayton* in a little bit of detail but I'll skip through it because I suspect the Court is well familiar with it. Stage 1, stage 2, Ms Bruton has already discussed so I won't labour that. What I will talk a little bit is about stage 2 in the decision in *Clayton*. The first task of stage 2, the first task, so once you've got a nuptial settlement the first task is the comparison between the position under the settlement had the marriage continued and the position that pertains after the dissolution.

So if your Honours have *Clayton* in front of you, it's in appellant's bundle of authorities tab 4, there's the helpful diagrammatic comparison of A, time of settlement, and then the comparison of B and C. So what would Mrs Preston's position in our case have been had the marriage continued, what is it now, and I will come to that, your Honours, and in that way we say that this B versus C analysis is part 1 of stage 2, or you could say it's stage 2 in and of itself and then stage 3 is when the wider array of factors that Ms Bruton talked to come in, but in the language of the Court in *Clayton* that provides the basis for the exercise of the discretion.

So at paragraph 78 of *Clayton* the Court talks about the disparity and at 78 the Court says: "There is therefore a clear basis for exercising the discretion. The next question," almost the third question, "is how this should be exercised in the circumstances of this case," and there's other useful commentary in *Clayton v Clayton*. At paragraph 50, your Honours, and apologies to jump around somewhat, the Court talks about looking at it from the perspective of a continuing marriage, as part of the family unit. So that joint enterprise, that social and economic equality that was discussed before. What would that position as part of the family unit have been and what is the position now?

In *Clayton* the Court concluded that there was disparity as noted and then considered a number of factors. One of the factors, I think, and this answers your question earlier somewhat, Justice France, is I think the disparity of

B versus C is the basis for exercising the discretion but it's also relevant to the exercise of discretion. So if there is a really wide disparity, that's a threshold, but then I would say the width of that disparity is also relevant to the manner in which the discretion is exercised.

Some of the other factors discussed by the Court in *Clayton* were dependent children. Here the only dependent child is Mrs Preston's child. She is not a beneficiary of the trust, Mrs Preston's child, but she is 15 and lives with Mrs Preston. Need is not required but can be taken into account. The length of the marriage, and I'll come to that further, and then the source and character of the assets and in our submission, as we'll get to, this has been elevated improperly in the lower Courts. The Court in *Clayton* said that section 182 needs to be applied in the 21st century, parties to a marriage can contribute in different but equally valuable ways, and the characterisation of assets may be a relevant factor but is not necessarily decisive or material in all cases, and so that's *Clayton* at paragraph 68 and then it's repeated in footnote 149, that proposition. Then finally on *Clayton*, the Court there confirmed that section 182 is not part of the Property (Relationships) Act regime and there's no need to read it down in light of the PRA.

Moving to the four errors of law that we say occurred here, first, we submit that both the High Court and the Court of Appeal failed to follow the two-stage process set down in *Clayton* and so did not correctly apply section 182. In the High Court the Judge's analysis of consequences is limited to a single paragraph. There's a general observation that it would be reasonable to assume that, had Mr and Mrs Preston's marriage continued, direct and indirect benefits to Mrs Preston from the trust would have continued. We would say yes, it's very reasonable to assume that it was providing her with a house and a job. The High Court went on to say that this is to be compared with the position after dissolution, but there's no discussion or description of those benefits or of those changes. So the High Court says yes, we do need to compare the position without dissolution with dissolution, but they don't, but they did not, respectfully, properly consider what those benefits and the delta in those benefits meant.

In the Court of Appeal, your Honours, there simply was no comparison, we say, of B versus C. They essentially skipped part 1 of stage 2. The Court of Appeal at paragraph 27 refers to the state of affairs after dissolution but made no attempt to compare that against the state of affairs without dissolution, and we say that B versus C inquiry is truly central, and further in the Court of Appeal, when the Court is reciting the High Court's findings they also skipped the High Court's findings about the difference between B and C, as brief as the High Court's consideration was. So in paragraph 17 of the Court of Appeal's judgment the Court of Appeal notes the High Court's conclusion that there was a nuptial settlement and the very next sentence is considering whether the discretion should be exercised, and we say that there's a missing piece there which is the B versus C delta, and if the court below had followed the guidance in *Clayton* and undertaken the analysis, the results are stark. Do your Honours have our written submissions in front of you?

WINKELMANN J:
Yes.

MR WALKER:
There's a table at paragraph 62 where we set out the B versus C analysis, B being marriage dissolved, C marriage continuing.

WILLIAMS J:
Can you just give me that paragraph again, 62 did you say?

MR WALKER:
62, yes, Sir. It's the top of page 18 of our written submissions. So the starting point, it's very clear that the trustees of the Grant Preston Family Trust are not going to countenance any distributions to Mrs Preston. They say she is not a beneficiary. She's in fairly parlous financial circumstances. In row B, as if the marriage has dissolved, they've lost access to the warm, modern home. She's living in rental accommodation. She no longer has access to the trust funding. She can expect no assistance with funding for her study, to the

extent she takes that up again. No recourse to the profits of the business or growth. Her former job at the business is no longer feasible. And then these bottom two boxes, your Honours' apologies, that should be in the reverse position, such that the box on the right column should apply to the box on the left column, which is that although she does have Pauanui, has been marred somewhat by the events that Ms Bruton covered.

As against that, if the marriage had continued she would have continued to live at The Fairway, continued to receive trust funding as she did. Potential for trust funding to cover study. Benefits either directly from the trust, from wages from the business, all there being part of the family unit. She could have been offered the office job if she needed it and, of course, she would have had unencumbered peaceful access to Pauanui. So none of those consequences, as we understand it your Honours, is disputed. So that B versus C delta is established on the facts.

The economic disparity is significant. In the High Court economic disparity part of the judgment the judge accepted that there would be more than $500,000 of economic disparity between Mr and Mrs Preston over the three years to come. More than $500,000 is a significant amount and having failed to identify those consequences that I have just set out, we say the exercise of the discretion misfired and, in fact, the Court of Appeal focused on unfairness to Mr Preston at the conclusion of paragraph 27 which is the primary paragraph of the Court of Appeal's judgment on this and our essential submission is that's an error of law and I pause to say, this isn't sophistry, your Honour's, we say that the analysis of B versus C is absolutely critical in the language of *Clayton*. It's what provides the basis of the exercising the discretion and without having done that analysis, the discretion as I said, misfired.

WINKELMANN J:

I just wonder how, I mean, it's a very strange question to ask, but how do you factor into this analysis the relationship's at an end because a settlement was on the assumption of a continuation of a relationship, in this case the

settlement was in relation to assets that were not generated through the relationship?

MR WALKER:

So is the question, your Honour, how do you factor in the relationship is now at an end?

WINKELMANN J:

In exercising the discretion.

MR WALKER:

So, I would say to that, that –

WINKELMANN J:

Because you couldn't expect obviously, the trust to continue to provide for Mrs Preston as it did when the marriage was ongoing.

MR WALKER:

Yes, exactly. And we would say, well, that gives you your B versus C, your Honour. So, how do we factor in the fact that the marriage is at an end?

WINKELMANN J:

Well, if we use Ms Bruton's mental exercise, and pretending we were trustees, how do we factor in the fact the relationship is over?

MR WALKER:

So I would say that that is your C, so you are taking the role of responsible, just trustees and going, what would we have done had the marriage continued here? What would we have done? And that will be hypothetical but that's because the ABC exercise is a forward-looking one, your Honour.

GLAZEBROOK J:

I think maybe some of the confusion arises because we are not totally clear what we're talking about in stage 2. So maybe can we say, just for the

purpose of this hearing, but perhaps generally, that stage 3 is the exercise of the discretion.

WINKELMANN J:
Yes.

GLAZEBROOK J:
So stage 1, is there a nuptial settlement. Stage 2, what would have been the position between dissolution and a continuing marriage, and then stage 3 the exercise of the discretion.

WINKELMANN J:
Yes, so it's stage 3, how would that come in, is what I'm asking.

GLAZEBROOK J:
Yes. I just think it might have helped us slightly.

WINKELMANN J:
Yes, I agree. It is actually a three-stage test, yes. I mean, because the trustees wouldn't just exercise on the basis that she should continue to be provided for as if the relationship was ongoing, would they?

MR WALKER:
No, the trustees would have to accept that the relationship is at an end and so the question then is, well, what is just in the circumstances of this case for the leaving and normally poorer party to receive? So I don't think that the trustees then need to assume that the relationship is continuing, such that, you know, Mrs Preston would expect to be an ongoing beneficiary of the trust and continue to receive distributions in the medium term. It's not that at all. It's, how do we untangle these affairs when we have a trust involved?

WILLIAMS J:
Although *Oldfield* was a case where that wasn't necessary, is that right?

MR WALKER:

Yes, correct Sir.

WILLIAMS J:

So it will be fact dependent, won't it?

MR WALKER:

Yes, it will, yes and in *Oldfield* the very elderly, Mr and Mrs Oldfield, and so the thinking was there, I think, that it was unnecessary and would actually be value destructive to settle in on to two trusts and then similarly, monetary awards are countenanced as well, Sir, and so here, to the extent, your Honours are with us and a final order were made, we would expect that there would be, Mrs Preston would be written out of the trust which Mr Preston has the power to do per the various settlor-friendly trust deed.

WINKELMANN J:

You're not nearly finished, are you? How much time do you have to go, Mr Walker?

MR WALKER:

We should probably take the break. I suspect, your Honour, I've probably got –

WINKELMANN J:

You've got three more errors of law, have you?

MR WALKER:

Three more errors of law and then an application section.

WINKELMANN J:

So, we were hoping to be finished by 12.15. So finish all of you by 12.15 and if you took another 15 minutes, that would give Mr Hutcheson about 15, does that sound about right?

MR WALKER:
Yes.

WINKELMANN J:
We'll take the adjournment.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.46 AM

WINKELMANN J:
I have been told, Mr Walker, that I took time off you.

MR WALKER:
That may be the case, your Honour.

O'REGAN J:
He's used to it.

MR WALKER:
I'll endeavour to be as quick as possible and I have, perhaps, 20 minutes maximum left and then Mr Hutcheson has 10 to 15 minutes. So I think even with the slightly shorter time, we should be able to get it done.

WINKELMANN J:
Yes, right.

MR WALKER:
So I'd talked through, before the break your Honours, the first error of law we say happened here. I won't spend as long on second, third and fourth errors of law. These are all covered in our written submissions, but I will briefly note them.

The second error we say occurred here is that the Court of Appeal misunderstood the relevance of the equal but different principle, that is relevant to the section 182 analysis. So, this is paragraphs 66 to 73 of our written submissions. The Supreme Court in *Clayton* confirmed that the principle, that different work by spouses in a family unit ought to be treated equally, and confirmed that that principle's relevant to the section 182 analysis. Here, the Court of Appeal, again at paragraph 27, says that: "The assets were not contributed by or to by her," not contributed by or to –

GLAZEBROOK J:
Can I just check where you are in your submissions?

MR WALKER:
In the written submissions, your Honour?

GLAZEBROOK J:
Sorry, is that what you're referring to?

MR WALKER:
Yes, 66, your Honour.

GLAZEBROOK J:
66. I have a different version of your submission.

MR WALKER:
The quote from the Court of Appeal, sorry, your Honour, is not in our written submissions, but I was expanding on it, yes.

GLAZEBROOK J:
Okay. All right.

MR WALKER:
Yes. So I'll take your Honour to the paragraph in the Court of Appeal decision, which is volume 5, tab K, paragraph 27 of the Court of Appeal's

decision, and I'm skipping some words that aren't relevant to my point: "All the GPFT assets were acquired by Mr Preston…and were not contributed by or to by her."

WINKELMANN J:
It's quite an unusual sentence that one, isn't it?

WILLIAMS J:
It took me several reads before I got, I thought it was a typo.

GLAZEBROOK J:
Sorry, I now can't find it.

MR WALKER:
Paragraph 27 of the Court of Appeal. So it's about half way down, it's quite a long sentence. Yes, I think it's a five line sentence, and we would say that the approach to contributions here is unduly narrow and it ignores the family unit context. So Ms Bruton has covered the existence of the family unit in some detail. Mrs Preston worked in the family business, she loaned money to the business interest free, she accepted a modest salary sacrifice, she contributed to the family home, she did most of the housework. She made substantial gifts to Mr Preston's children. And we say in this case that the Court of Appeal failed to property uphold the principle that equal contributions can be different.

WINKELMANN CJ:
So this is beyond your point, that she actually did contribute directly to the assets through her work and through her funding of the enterprise?

MR WALKER:
Yes, your Honour, yes.

WINKELMANN CJ:

So you're saying she also ran the household whilst the business was being run by Mr Preston?

MR WALKER:

Yes, and the evidence is, or the findings of the High Court were that the cleaner was let go when Mrs Preston moved in and that she did most of the family housework.

WILLIAMS J:

So your proposition is equal contribution for five years?

MR WALKER:

Well, I would say longer than five years, your Honour. So, except that section 182 only applies to marriages, however, they were in a de facto relationship for a year and a half before the marriage. So it's actually closer to seven years.

WILLIAMS J:

But are we allowed to take that into account?

MR WALKER:

I would say, your Honour, in stage 3 that you are. That when you're looking at how you should be exercising this discretion as your just trustee, the length of the relationship before the marriage, particular if it is a long de facto relationship, is relevant to that discretion.

GLAZEBROOK J:

You'd accept, I assume, that if 27 is just read as saying, before the relationship there had been no, which is self-evident I suppose, but there had been no contribution to the assets as they were at that stage when the relationship began. So if it was just looking at the fact there was an existing business rather than relationship property being moved into the trust, there is a difference between the position in *Clayton* and other trusts where the nuptial

trust is effectively one of something that would have been relationship property. Sorry, I'm probably not putting that –

WINKELMANN J:
So, in other words, Justice Glazebrook is putting to you, if you read paragraph 27 you can read it as them simply referring to the fact that when the trust was initially settled, these were his assets, not hers.

MR WALKER:
Yes.

WINKELMANN J:
And she hadn't contributed to them?

MR WALKER:
And we don't contend that the source and character of the assets is irrelevant to stage 3. We say it shouldn't be given undue prominence and that an unduly narrow approach to contributions should not be taken either. And even here, your Honour, in the relationship property, if there wasn't a trust, as Ms Bruton covered, of course she would have access to half of the significant increase in the value of the business and half of the equity in the home.

GLAZEBROOK J:
And you obviously also accept that the interests of the two children, that were not of the marriage, but were part of the intended settlement before the marriage, are relevant?

MR WALKER:
Yes, they are certainly relevant, your Honour. We would say in this case that an order can be shaped that appropriately recognises and protects their interests, but it also provides justice to Mrs Preston.

The third error of law, which I will address even more briefly, is that the Court of Appeal, and this at paragraph 74 of our written submissions –

WILLIAMS J:
74?

MR WALKER:
Yes, 74, your Honour. The Court of Appeal seems to view section 182 within a PRA scheme, so this is at paragraph 23 of the Court of Appeal's judgment, they talk about section 182 having a relatively modest remit and then the Court of Appeal says: "Certainly section 182 does not authorise a grand march into the respondent's separate property or third party trust property." And we would say, there is no separate property that we're discussing here. There's a nuptial settlement and in the same way there isn't a third party trust property, there's a nuptial settlement, and that error of law is further explained in our written submissions.

The final error of law is related to the paragraph I was just reading, there was a nuptial settlement here, it's not live on appeal whether or not that's the case. Paragraph 23, which I just read out, the grand march sentence, at the very least suggests that some of the property that was being considered wasn't seen as part of the nuptial settlement and to the extent the Court of Appeal thought the nuptial settlement could be divided into separate property, your nuptial property, we would say that's an error of law that ought be corrected, and that's expanded on in paragraphs 82 to 92 of our written submissions, your Honours.

WILLIAMS J:
Well, I can see your point but you're not going to deny it is separate property held in a trust, are you? You've got to swallow that.

MR WALKER:
It's not the respondent's separate property though. It's property in a trust which forms part of a nuptial settlement is how –

WILLIAMS J:

Well, it's not relationship property I think is what the Judge was saying when he said "separate property". It's true that it was not the respondent's separate property either.

MR WALKER:

Yes.

WINKELMANN CJ:

Separate property has a defined meaning in relationship property terms, doesn't it?

MR WALKER:

Yes, it does.

WINKELMANN CJ:

And that's what you're railing against, I think, is it?

MR WALKER:

Yes, exactly, your Honour. So briefly to conclude my submissions, with those four errors of law we submit the discretion should be exercised modestly in Mrs Preston's favour so as to give her a home debt free, submit the application is as follows. Was there a nuptial settlement? Yes. What are the consequences of the failure of the premise? Stage 2, your Honour, the consequences are significant. We've already covered them in a lot of detail. I won't expand. I will note one point of correction though which is that the respondent submits Mrs Preston can earn up to $140,000 a year. That's not correct, as Ms Bruton noted. She unfortunately failed her doctoral exams and her current salary is $54,000 a year.

So nuptial settlement, significant consequences. In the language of *Clayton*, with that clear basis for exercising the discretion, the next question is "how", requires consideration of all factors.

The first factor, and I had originally headed this “the parties’ conduct” and it fits within subparagraph (a) of Ms Bruton’s hand-up that she talked about before, but I think I prefer “the social and economic reality” as a descriptive for this, so Mr and Mrs Preston lived their joint life with the shared understanding that the trust was the key funding source for the family unit, and Pauanui is a good example of this. There were the unequal investments. However, from then the gains were shared equally, somewhat unfairly. The trust gave Mrs Preston benefits and there’s a range of other factors that we say clearly demonstrate in any reasonable understanding of the term there was a family unit here, and it’s not unreasonable to think that Mrs Preston might have made different decisions if the trust was not involved. So, for example, it wouldn’t ordinarily be common for a wife, if she was keeping, or a husband, but a wife in this case keeping her affairs separate to loan money to the husband’s business, which was repaid, if she didn’t accept that there was a shared family endeavour, a joint endeavour, and Ms Bruton has also submitted extensively on the means by which Mr Preston operated the trust, and I won’t expand on those except to note one further point from the respondent’s submissions where they suggest that the second trustee, Fisher Trustee Company Limited, is an advisory trustee. The word “advisory” is used in brackets after that and we’re not sure what that means, but if they are simply an advisory trustee, which wouldn’t be clear on the face of the deed, that shows even more control we would say in the hands of Mr Preston.

The second factor, beyond the economic and social reality, is the terms of the settlement and how the trustees will exercise their powers. That’s been covered extensively.

Third is the source and character of the assets and a nuanced understanding of this factor. I submit here that yes, the assets pre-dated the settlement but for the reasons already described this should not be elevated to a determinative factor.

Fourth, as has been –

WINKELMANN CJ:

Sorry, what was second? I think I missed it.

MR WALKER:

So we've got the social and economic reality, first factor. Second factor, terms of the settlement and how the trustees will exercise their powers.

WINKELMANN CJ:

Yes. All right, got it.

WILLIAMS J:

Just a moment then. I missed that too. Right.

MR WALKER:

The third factor, the source and character of the assets, which I won't submit further on.

The fourth factor, children and other beneficiaries, and as already submitted, your Honours, there's one dependant child left, that's Mrs Preston's. the other beneficiaries are, of course, relevant. Both of them are, we understand, employed by the trust-owned business. An order in Mrs Preston's favour may diminish the trust assets somewhat, but we don't think that can sensibly be contended that the diminishment will mean the trust core assets need to be disturbed. The trust, on the respondent's case as I understand it, has $1.5 million of equity after debt is taken into account. It seems inconceivable that it couldn't raise the modest amount that Mr Hutcheson will talk to, to meet the order if your Honours so make that order.

The fifth factor, length of the marriage. I've submitted that it's not just the length of the marriage but the length of the relationship, and the seriousness of the relationship pre-marriage. The appropriate timeframe here, with marriage and the de facto period taken into account, is six years and seven months. I submit that that's not short in the scheme of things. It's not your hypothetical of a day, but it's also not 20 years.

The sixth factor, family home, mana, won't talk any further about that. The seventh factor, the PRA cross-check, again Ms Bruton has covered it, and then eighth is what we see is a stand back cross-check of the comparative financial circumstances. On the one hand we say very clearly that Mr Preston is not impecunious, and on the other Mrs Preston is.

We submit, finally, that the proper exercise of section 182 is in favour of a modest award for Mrs Preston.

If there were no further questions from your Honours, I'll pass over to Mr Hutcheson.

WINKELMANN CJ:
Thank you.

MR HUTCHESON:
May it please your Honours. I have a number of figures that I'm going to talk to, and I have a one page hand-up which, with your Honours leave, will give you those numbers so you don't have to transcribe the numbers. May it please your Honours, I propose to simply work through this table in my submissions, and at the top you'll see the heading "Subsequent to Court of Appeal decision". This isn't in evidence before the Court, it is evidence from the Bar, but it's not contested evidence, and this just explains what has happened in terms of the purchase of Pauanui. So the vendors of Pauanui were the Grant Preston Family Trust and the Huntbos Family Trust. The purchaser was Huntbos Family Trust. So HFT raised a mortgage for $337,000 plus a little bit to cover rates, that was 337,890. The ANZ mortgage was repaid, 141, 368. There were costs of sale of 3,800 and a bit, and there's a balance sitting in solicitor's trust account of 192,680.67. That's on undertaking, and that's held on behalf of both the Grant Preston Family Trust and the HFT, Huntbos Trust, and that amount, your Honours, is the disputed amount in trust.

If I can take you firstly to her Honour's High Court, the High Court judgment in that respect at paragraph 205. This was her Honour's judgment dealing with the partnership accounts, and at 205(e) on page 101.0115, her Honour made findings in respect to the partnership capital accounts, and her Honour referred to Mr Fisher confirming the numerical accuracy of the accounts, save for two changes, and she noted two changes. One was a deduction of $2,500 from the Grant Preston Family Trust capital account and that being added to HFT. Then secondly, to add to each partner's capital account the amount of their original contribution because that hadn't been taken into account in the partnership accounting prior to that point in time.

At 207 her Honour found in the absence of any challenge to the numerical accuracy of the accounts, that she found the 2018 accounts were correct. Her Honour has made a further comment about this issue in her recent costs judgment which is on the case law –

WINKELMANN CJ:
Can you just clarify why you're taking us to this? Is it to make us confident we can proceed on this basis or?

MR HUTCHESON:
Yes, it is, your Honour. I'm trying to give you the overview of the 192 which is in dispute.

WINKELMANN CJ:
Yes.

MR HUTCHESON:
And with the intention of saying, you can use a broad brush here and decide this matter now, rather than remitting it back to the High Court. So, in her –

O'REGAN J:
Why does this finding about the accounts help us with that?

MR HUTCHESON:

Sorry, Sir?

O'REGAN J:

Why is the judge's finding that the accounts are accurate help us with that? Is there some dispute about their accuracy?

MR HUTCHESON:

There was and there remains a dispute about their accuracy. Counsel for the respondent has submitted this Court make final orders but for this account, this disputed accounting issue. Our submissions, your Honour, is that this Court can fairly use a broad brush and decide this accounting issue so that it does not need to be remitted and the parties don't need to spend further money on it. There is a –

O'REGAN J:

Is this alive to the section 182 claim?

MR HUTCHESON:

Yes, it is in terms of the relief that we seek, Sir, it is.

O'REGAN J:

I mean, relief under section 182 isn't dependent on the accounts being accurate in relation to this, does it? It's a different issue.

WINKELMANN CJ:

Would it help if you just zoomed back out, Mr Hutcheson, and take us to the end point that you're going to get us to and then back around through this?

MR HUTCHESON:

Absolutely, your Honour. I'll do that right now. So, your Honour, if your Honours –

WINKELMANN CJ:

With the relief you were going to seek, I think.

MR HUTCHESON:

You'll turn to our written submissions at paragraph 99, and that identifies the orders sought, 99(a) that the Grant Preston Family Trust pay to HFT a sum equivalent to the mortgage payment that was made to ANZ on settlement, sort of thing that's the $141,000 figure that I've already identified. Secondly, (b) that any assets held jointly by the two trusts i.e. funds related to the Pauanui property including the balance of the purchase price of the Pauanui property be transferred to HFT in full and final settlement. So those are the orders that we seek that we say will finally resolve these matters.

ELLEN FRANCE J:

So would it be 141 plus the 192?

MR HUTCHESON:

Yes, your Honour.

O'REGAN J:

That's plus her share of the 192, isn't it?

MR HUTCHESON:

I was just about to identify that. I'll take you through that in my table because her share's not identified clearly which is where I say that your Honours can use a broad brush to do this fairly. We say it's $90,000 of the 102. But I'll explain why I say that in a moment. Of the 192.

WILLIAMS J:

Nine zero, you said 90?

MR HUTCHESON:

90, yes, your Honour, and what I was about to take your Honours to was the costs judgment of Justice Fitzgerald, 25 June, 2021. It's a case on appeal under tab 14 and the relevant comment is at 101.0162, paragraph 36, where her Honour, having made an amended costs award as a result of the Court of Appeal's finding, then made a comment about the ongoing dispute between the parties as to the accuracy of the partnership accounts.

ELLEN FRANCE J:

Just pause a minute, Mr Hutcheson.

GLAZEBROOK J:

Yes, so I've got to find this electronically. Sorry.

MR HUTCHESON:

Supplementary case on appeal, it's called, your Honour.

GLAZEBROOK J:

Can you give me the number again?

MR HUTCHESON:

Page 101.0162, paragraph 36.

O'REGAN J:

It's tab 14 in that bundle.

GLAZEBROOK J:

Unfortunately, I don't have a tab. Yes, right, so what paragraph?

MR HUTCHESON:

36, your Honour. So her Honour, Justice Fitzgerald, makes comments there in relation to the ongoing dispute between the parties as to the accuracy of the partnership accounts and half way through that paragraph her Honour says: "For my own part, I do not consider it would be possible or appropriate

for the parties to seek to ‘re-litigate’ the issue of the accounts to 2018 before this Court, findings having already been made on that issue and which have not been overturned by the Court of Appeal. And if the ongoing dispute relates to the accounts from 2018 up to the time of settlement of the sale of the property…I endorse the Court of Appeal’s observations as to common sense needing to prevail,” and then her Honour goes on to say she doesn’t think it’s appropriate to take it back to the High Court but the appointment of an independent accountant would be recommended. That’s to highlight to your Honours the fact that we have an ongoing issue over the capital accounts and how this $192,000 surplus is to be divided between the two trusts.

O’REGAN J:
How much is at stake in the dispute? What are the differing views? Presumably no one is claiming all of it.

MR HUTCHESON:
Well, I think Mr Preston may be claiming all of it but if I can take you to the next part of my table, Sir, I’ll explain to you how we propose it’s dealt with, and her Honour found, subject to those two corrections that I’ve taken you to, that the 2018 capital accounts were correct.

So if we go to the 2018 capital accounts, I’ve given there in my table the figures that appear in those accounts for the respective current accounts of the two trusts: 134,276, the Grant Preston Family Trust, and then 63,770 for the Huntbos Family Trust. I then make those two adjustments that her Honour found at paragraph 205 of her substantive judgment. So that makes those changes of 2500 and then adding in the initial contributions of $10,000 and $60,000 which provides figures of Grant Preston Family Trust 141,776 adjusted and Huntbos $126,270 adjusted. Now that I think is the best that we can do at this stage. The ratio of those two is 0.53 and 0.47, so the ratio applied to the funds in dispute of 192,680 gives figures of 101,760 or rounded $102,000 to Grant Preston Family Trust and $90,000 to Huntbos Family Trust. So the appellant submits that applying the ratio of the capital

accounts at 2018 with the adjustment provides a sound basis for dividing those funds.

I then set out an analysis of Grant Preston Family Trust equity. The Fairway, which there is at $715,000, was an agreed valuation at date of hearing, so that was July 2019. The 99 shares held by the trust in EBTL had an enterprise value at date of hearing of 1750. That was a finding by Mr Shaw in his analysis, he was giving evidence for Mr Preston, and then I've noted funds held on trust for GPFT and HFT subject to contest. I've added that $102,000 back further down in my table.

Dealing with GPFT debts, there's a mortgage on The Fairway of $90,000 and then there was a figure of debt that Mr Preston provided in an affidavit given to the Court of Appeal post-hearing on 12 August 2020, a figure of approximately $800,000. If I might just take you to that briefly…

WILLIAMS J:
You mean the affidavit?

MR HUTCHESON:
I'm just seeing if I can find that, your Honour. It's at 305.0847, your Honour. It's a table that was an exhibit C to an affidavit Mr Preston's sworn on the 12th of August 2020. The Court of Appeal invited some further evidence to try and deal with this partnership current account issue and then resiled and didn't deal with it, so this affidavit was filed for that purpose.

Mr Preston has provided there, the top half of the page, total Eastern Bay Thrusting Limited debt of $829,000 but that does include two entries for legal fees of $180,000 and $10,000, so 191 approximately of legal fees are included in that debt, so for the purpose of my table I have presented a debt figure of $800,000 but with the flag that that includes legal fees of $191,000. So in essence, this is attempting to be conservative and fair and favourable to the respondent because what we've done here is taken a Fairway valuation at date of hearing but accepted for argument purposes a post-hearing debt

figure. So total GPFT funds $1,570,000, adding back in now the ratio split we propose of the funds held on trust of 102 gives a total GPFT equity of $1,672,000.

In contrast, your Honours, I've set out the Huntbos Family Trust position. So it has taken out a mortgage to fund the purchase of Pauanui for $337,000. If the Court was minded to make the orders that we sought at 99(a) and 99(b) of our submissions, that would be a payment of $141,000 in cash and a release of $102,000 being the Grant Preston Family Trust share, we say, of the funds in trust. Huntbos would also have its share of those funds in trust, $90,000. It's net position would be a debt of $4000. As a cross-check, your Honours, I have…

O'REGAN J:
What about the value of the Pauanui property?

MR HUTCHESON:
There's no up-to-date evidence of it, Sir.

O'REGAN J:
It must be more than zero, mustn't it?

MR HUTCHESON:
There was a – the date of hearing, there's an agreed value at date of hearing of $477,500.

WINKELMANN CJ:
That was 2017? Which hearing?

MR HUTCHESON:
That was a date of hearing, agreed value date of hearing, I think it was paragraph 226 of her Honour's judgment.

O'REGAN J:

Doesn't that have to be counted as an asset?

MR HUTCHESON:

Absolutely, Sir.

O'REGAN J:

Well, why isn't it here?

MR HUTCHESON:

That was just an analysis of the debt position. It wasn't an analysis of the overall HFT asset position. It was just looking at debt, your Honour.

O'REGAN J:

Well, to compare apples with apples don't we need to know the HFT's equity position?

MR HUTCHESON:

Well, if your Honour adopts the date of hearing valuation, which I think was…

WINKELMANN CJ:

It's at 226 of the High Court judgment. It's 477,500.

MR HUTCHESON:

Yes, that's right, so it's a simple calculation to use that valuation which is consistent in terms of date with the valuation adopted for The Fairway.

GLAZEBROOK J:

And what paragraph is that?

MR HUTCHESON:

226 of her Honour's judgment. Finally, your Honours, at the bottom of my table I've done a cross-check where I've taken the figure assessed for GPFT equity 1,672,000. The orders sought are the 141,000 and 102,000 which is a total of 243,000, and the percentage is 15%. So the orders sought amount to

what we say, generously, is no more than 15% of the value of the GPFT equity. To the right-hand under the notes, your Honours, I've noted if one were to add back in the legal fees, because the 800 figure includes legal fees of 191, the equity would increase to 1,863,000, the percentage would change to 13%.

So the submission for the appellant is that the orders sought amount to 13 to 15% of the value of the GPFT. It's a modest order in our submission, your Honour, and what it does is it would enable the appellant to have the security of the Pauanui property, the section and two caravans, almost mortgage free, or effectively mortgage free.

My learned friend has just noted that if one looks at the total assets of the two trusts added together, that it would be 22% of the total assets of the two trusts added together. Sorry, I misunderstood. If Pauanui is added into the mix at 477,500, it would give a total asset figure of $2,105,000 and 22% is the percentage.

WINKELMANN CJ:
Why would we do that?

MR HUTCHESON:
Well, that just looks at total asset position of both trusts together. It's a cross-check. It's not something that's required in terms of section 182. It's just a stand-back cross-check fairness type tool if your Honours were minded to go there.

I think my friend's position was, in response to Justice O'Regan's comment about looking at the value of Pauanui, and looking at it in an overall sense, that that is the figure that one would adopt for that. So in the appellant's respectful submission this modest award of 13 to 15% of the value of the Grant Preston Family Trust would enable the appellant to have financial security in the sense of Pauanui relatively mortgage free.

ELLEN FRANCE J:

Could I just check. So in terms of the value of the shares, you're taking the position advanced for the respondent in relation to that?

MR HUTCHESON:

That's right your Honour, and that's set out at footnote 45, paragraph 45(b) of our written submissions. So unless your Honours have any further questions on the numbers, those are my submissions.

WINKELMANN CJ:

Thank you Mr Hutcheson.

MR McCLEARY:

May it please your Honours. I'll be making all of the submissions on behalf of the respondent. Just to take things slightly out of order, but just to ensure that we can capitalise on these numbers being fresh in everyone's minds, I'll make a brief submission in respect of my learned friend Mr Hutcheson's submission in respect of the mathematics. The respondents' position coming into this appeal was that they would not consent to orders in respect of the division of cash held in a solicitor's trust account in respect of Pauanui because that was still subject to accounting scrutiny. I do appreciate the pragmatism in what the appellants are trying to do in order to be able to give the Court sufficient information that if orders are made, that they can be made finally, and I would ask the Court to enable me to take instructions over the lunch time adjournment to perhaps put these figures, if they can be, to the accountant to see if they're close enough and whether Mr Preston and the trust are prepared to accept them for the purposes of having some common agreement in respect of the numbers that would then enable the Court to make an order.

WINKELMANN J:

That would be very helpful, thank you.

MR McCLEARY:

Now, I just intent to loosely follow my written submissions but before doing so I don't intend to recap all of the facts other than just highlighting what I consider to be the core facts. First of all, as you have heard, this was an atypical marriage and relationship in comparison to other section 182 cases that have typically come before the court. It was a short marriage. Even compared to something like *Dyer v Gardiner*, where the discretion was refused, that was a 12 year marriage. This was six and a half years including the de facto relationship and only four years and nine months as far as the actual marriage was concerned.

I also want to accentuate the fact that there, of course, were no children from this marriage. There were children from previous marriages and in particular that is relevant for Mr Preston because his two children from his previous marriage are the sole primary beneficiaries of the trust that he settled in 2004, sometime before these parties met.

There has only ever been three assets of the trust, that being The Fairway, the 99 shares in Easter Bays Thrusting and a half share of Pauanui which we say is an independent arrangement, quite separate to this appeal given that it has been governed by a property sharing agreement.

Now there are some objections in respect of the core facts as submitted by my learned friend, Ms Bruton. The first one being, this loose embrace of there being an eight year committed relationship. I object to that submission, your Honours on the basis that there is no legal definition of "commitment". You know, what we are dealing with here is –

WINKELMANN J:

Well, we proceed on the basis of a six and half year de facto though, aren't we, I think?

MR McCLEARY:

Very good. The next point is the submission as a core fact that Mr and Preston turned The Fairway into their family home. Now, the High Court found that this, in fact, did not happen and at paragraph 74 of the High Court judgment the Court said: "Mrs Preston's contributions were exaggerated. There was not a joint effort to turn The Fairway from a shell into a home." So there has been a very specific factual finding on that point.

WINKELMANN J:

Yes, I thought Ms Bruton's submissions were no more than that they used it as their matrimonial home.

MR McCLEARY:

I interpreted that submission as being, that Mr and Mrs Preston turned The Fairway into a family home.

WINKELMANN J:

Well, all right.

MR McCLEARY:

The next point is in respect of the family unit. I will flesh these submissions out later on, but I make the point now that again, this was very atypical on the basis that these parties undertook very deliberate ring-fencing of their assets. And that follows on to the fourth core fact which is submitted by the appellants in respect to this relationship having the usual incidents of a committed life with equal contributions. And as I will flesh out in my submissions, that was not the case at all. This was a relationship where very deliberate steps were taken to ensure that these parties were not financially blended.

Moving now to my written submissions. Talking on the standard of appeal, where the appellant submits that the standard is immaterial because there were clear errors of law, and citing paragraph 30 of *Clayton*, the reference that the appellant has given is that there was a conflation of the test. In my submission, your Honours, the High Court application of the *Clayton* test was

impeccable. There was no conflation whatsoever and there was no error of law. Having found a prima facie basis for the exercise of that discretion based on the relative parties', position of the parties, being the ABC diagram as set out in *Clayton*, Mrs Preston won that point. If we were to look at the three steps that we've agreed that we can –

GLAZEBROOK J:

Do you want to take us to the particular passage you say shows that in the High Court judgment?

MR McCLEARY:

It's footnote 9, so that would be paragraph 159 to 168.

GLAZEBROOK J:

So where exactly do you say that finding was made?

MR McCLEARY:

As far as applying the *Clayton* test was concerned, the first point, which is not appeal, was the finding that there was a nuptial settlement and Justice Fitzgerald found that there was. The second part is in relation to the application of the ABC *Clayton* diagrammatic model. What is the position of these parties going to be post a solution as opposed to what they would have been had the marriage continued, and Mrs Preston won that point also.

GLAZEBROOK J:

Yes, but I was asking you to show me exactly where in the High Court judgment that's said and that test is set out, because what's said against you is that wasn't done, so where do you say it was done?

MR McCLEARY:

At paragraph 163, having found that there was a nuptial settlement the Court then says: "In *Clayton*, Glazebrook J stated that in considering whether there is a basis for intervention, the appropriate approach is a general comparison between the position under the settlement had the marriage continued, and

the position that pertains after the dissolution. In this way, the Court noted that it is not backward looking to the time of settlement, but rather is *forward* looking," and that paragraph continues.

The appellant has been critical of the fact that the High Court only spent one paragraph –

GLAZEBROOK J:
I don't think that's the paragraph you should be referring us to. You should be referring us to 166 which is the – because you can state that but you've then got to apply it.

MR McCLEARY:
Yes.

GLAZEBROOK J:
So I think you should be referring us to 166 and the argument against you is that that again just states the test without applying it.

MR McCLEARY:
In 166 the High Court said that "it was reasonable to assume that, had Mr and Mrs Preston's marriage continued, direct and indirect benefits to Mrs Preston from the trust would also have continued," and then it recognises the fact at the end of that paragraph that given that the marriage is at an end that the trustees will not exercise that discretion in her favour. So the criticism of there being only one paragraph in relation to an assessment of that I think is unwarranted, in my submission, because Mrs Preston won that point. I'm not sure what more the High Court needed to have done on the basis that they got to that point very quickly. If there was a real debate to be had as to whether or not there was going to be a delta between B and C in that diagram, in the *Clayton* diagram, then perhaps the High Court would have been justified in spending more time on it, but in my submission, your Honour, it seems that the High Court has moved swiftly to that point because they found in Mrs Preston's favour.

WILLIAMS J:

Well, I would have thought your problem is that in order to apply that test you've got to size it. How big is that gap? That's how a court would discipline itself in terms of what the magnitude of the judicial response should be, and there is a point, isn't there, in the fact that the Judge doesn't do that? She skips straight to "but there are these other factors" without having sized the problem in the first place.

MR McCLEARY:

If the Court simply recognises that the problem exists but has decided that the exercise of the discretion is not going to be applied then it doesn't seem to me, respectfully, that there is the need to quantify that gap because it would be theoretical. If the Court decides that as a result of other factors the exercise is not going to be, sorry, the discretion is not going to be exercised, then we get into a point where there is a theoretical assessment as to what that gap might have been but to no avail because it wasn't going to be addressed anyway.

WILLIAMS J:

Yes, I think Ms Bruton's point was you can't leap to that because you don't yet know whether the gap is theoretical. You have to size the gap and then apply the counter-considerations to see whether there is, in fact, no gap or not. That's how you discipline the exercise of that discretion.

MR McCLEARY:

Well perhaps it's just the order in which the paragraphs have been delivered in the judgment which leads us to that, or leads your Honour to that conclusion.

WILLIAMS J:

That's not my conclusion, I'm just putting Ms Bruton's case to you.

MR McCLEARY:

Yes, yes, I can't take the point any further, your Honour, other than I think that the exercise would've been theoretical and hypothetical if the exercise of the discretion was not going to produce a remedy for Mrs Preston. Whether they had decided that there was going to be a gap to the extent that she would not have a house, or that there would be X amount of dollars that would not have been available to her, seems to me to be an exercise that the judge has perhaps consciously chosen to dispense with because her mind had been made up, having considered the discretion would not be exercised, that it was a pointless task.

ELLEN FRANCE J:

How is it, though, that you know what it is you're exercising the discretion against?

MR McCLEARY:

Well Justice Fitzgerald found the gap. I mean she, the Court certainly recognised that there was going to be a gap between the positions, depending on whether the marriage continued or the marriage ended. It seems that the assessment was not arithmetic as far as the assessment of the discretion, or the matters that were considered under the discretion, but it seems that the High Court judge has considered other matters, other than arithmetic matters, persuaded her not to exercise a discretion.

WINKELMANN CJ:

Well it wasn't arithmetic, though, was it? She really didn't find anything more than a gap, did she, because she didn't say what B was and what C would be?

MR McCLEARY:

No.

WINKELMANN CJ:

So how could you say that she decided matters other than arithmetic matters carried against it?

MR McCLEARY:

What I'm saying is that I acknowledge that there wasn't an arithmetic assessment, but it would seem that the High Court has skipped that step on the basis that there was other more influential matters that meant that the exercise of the discretion wasn't going to provide a remedy.

ELLEN FRANCE J:

I suppose my query is more influential than what?

MR McCLEARY:

The matters that were considered?

ELLEN FRANCE J:

Well you said that the Court had skipped that step on the basis that there were other more influential matters, and my question is, I'm not sure how you say what – as against what?

MR McCLEARY:

Let's take, for example, the last matter that the High Court looked at, which was the length of the relationship. So if we were going to look at a hypothetical situation, and I've given such an example in my submissions, let's say a spouse moves into a trust-owned property, and for whatever reason it turns out to be a nuptial settlement, and the marriage falls over two weeks later. Now there's a dissolution two years after that. Is it really a necessary exercise to go through and see what the mathematical and financial implications of the delta is, when the fact that the marriage was so short, for example, that it would just seem like a nonsense exercise, and I think in this case the Court was so persuaded by the source of the – well, the seven matters that it took into account. The source, the fact that this trust was settled primarily for Mr Preston's children. The Court has gone as far as to

say that the importance of the length of the marriage was a key factor. Of course I can't get inside Justice Fitzgerald's head, but it would seem to me that that step may have been skipped because of what she considered was the overriding or the overwhelming importance of the matters that she did consider.

GLAZEBROOK J:

If you look at the *Clayton* stage 2 it says will there be a gap in expectation? Even if you're right doesn't the fact there's a gap in expectation have to be balanced at least against the other factors because Clayton says there's a gap in what would've happened. Now in a two week relationship there probably wouldn't be a gap in what happened, so I think we might of well just get rid of that. But in a longer relationship, and here, it's argued there is a gap in terms of expectation. At the very least, even if you don't quantify that, don't you have to say there's a gap in expectation, therefore, that says strongly that there should be something in terms of – or the discretion should be exercised in respect of this, but looking at these other factors to see how much that discretion should be? So there's not an assumption of 50/50, but there is at least an assumption if you find that discretion that there will be some measure of change in terms of that trust.

MR McCLEARY:

My answer to that, Justice Glazebrook, would be that, once again, if the decision has been made that there is going to be no exercise of the discretion whatsoever, then perhaps –

GLAZEBROOK J:

But how can you make that without saying, on the other side there are all these factors saying there should be, the discretion should be exercised, and the issue is how much. You have to balance those rather than just say, well, there are all these factors that are important and say it shouldn't be. Because it's not balanced against anything there, is it?

MR McCLEARY:

Well, it's balanced against a range of circumstances, but I accept that there has not been a quantification of that gap and I obviously can't get around that because that's in black and –

GLAZEBROOK J:

But even if you don't quantify it, surely you have to say, well, there is a gap that suggests there should be, the discretion should be exercised, and the issue is how much.

MR McCLEARY:

But it's the how much issue that has not been undertaken because we don't have the mathematics, but to Mrs Preston's credit, and of the judge's credit, she did recognise that there would be a gap that the trustees would not be exercising their discretion in her favour. But it's indisputable the fact that the judgment doesn't say how much.

GLAZEBROOK J:

How do you decide that? But isn't the whole point of 182 is, and the whole point of the ABC, is that if there is a discrepancy and normally you would make, you would exercise the discretion to do something about that, and then you have to have factors that countervail against that.

MR McCLEARY:

I can't answer that, your Honour. Perhaps that is a matter that the judge took into account but didn't record.

WINKELMANN J:

We've probably beat around this one enough. Yes.

MR McCLEARY:

Yes, thank you, your Honour.

WINKELMANN CJ:

I think your point is, you can't take the submission you've made any further.

MR McCLEARY:

No. So, if I am correct, or if your Honours agree with me ultimately that there was not an error of law and that this assessment of the B and C delta, then it is my submission that we are down to considering relevant factors versus irrelevant factors as per *May v May* (1982) 1 NZFLR 165 (CA), and in my submission there was no irrelevant matters that were applied and there were no relevant matters that were overlooked and perhaps in some ways that answers or alleviates, if there was an error in respect of the – not that I'm dangerously going back to this B and C delta again, but if there was a failure to assess mathematically or to quantify what that gap may have been, given the fact that there is no evidence of anything relevant that was overlooked in the appellant's favour, then –

WINKELMANN J:

Well, your difficulty with that, of course, is it the relevant thing that was overlooked was the delta between B and C?

GLAZEBROOK J:

Or the fact or on my analysis, just the fact there was that gap and, therefore, they're given a strong weight.

WINKELMANN J:

So we understand your point. You say that there wasn't that error. I just don't think you can have your cake and eat it too on that point.

MR McCLEARY:

I beg your pardon?

WINKELMANN CJ:

It's all right. It's okay.

ELLEN FRANCE J:

Sorry, in terms of relevant factors, do you say that contribution to the family unit, just putting it in that general sense, is irrelevant in this exercise?

MR McCLEARY:

No, I don't, your Honour. But I also say that the High Court did not overlook non-financial contributions. There was an enormous emphasis on contributions in respect of both the evidence that went before the High Court and the analysis that was made by the High Court, and it –

ELLEN FRANCE J:

But there's no reference to that in 167.

MR McCLEARY:

In respect of contributions, it does say that you – referring to the fifth reason: "For the reasons outlined at 76 to 95 above, I am also satisfied Mrs Preston made no material or substantial contribution to sustaining the trust assets." Yes, I accept that, but in the paragraphs 76 to 95 there's certainly an acknowledgement of non-financial contributions that the Judge has acknowledged. It acknowledges that the –

GLAZEBROOK J:

Do you want to take us to those passages?

MR McCLEARY:

76. So at paragraph 77 the Judge says: "I accept Mrs Preston assisted with some plantings at the back of the property, staining a fence and helping assemble a kit set garden shed."

WINKELMANN CJ:

There she's talking about a contribution to the asset though, isn't she?

MR McCLEARY:

Well, in the round because the argument that was put to the High Court was that there were specific contributions made to The Fairway and there were specific contributions to Eastern Bay Thrusting and that was Mrs Preston's case, and so the Court was entitled to answer those, but as part of that process there's also acknowledgement there in respect of Mrs Preston's other work. Later on in paragraph 77 on the other page, at 101.0074 is the page: "Once she resided at The Fairway from October 2009, she carried out most of the housework type duties (though accepted that of course others assisted from time to time), and engaged in various maintenance activities," such as washing the house, et cetera. So I mean "housework type duties", for example, is not something that improves the quality of an asset but it's clearly something that Justice Fitzgerald has turned her mind to.

WILLIAMS J:

Isn't there a danger there that you're applying a kind of *Lankow v Rose* analysis to section 182? Is the test really the constructive trust approach to these things?

MR McCLEARY:

Well, it's certainly one of the factors that the High Court looked at but in my submission it wasn't done in isolation. I mean it was – one of the –

WILLIAM YOUNG J:

Basically, the Judge says: "Your role as wife was a minor contribution and I can set it aside," at 78. Unless she had done the landscaping and added a bedroom, this wasn't going to carry much weight with her. That does seem to be generally inconsistent with the idea that spouses contribute equally to the family unless there's very good evidence to suggest that that wasn't the case.

MR McCLEARY:

Well, there probably wasn't a lot of evidence on it during the trial, your Honour, to – Mrs Preston's case, as I said, was very much focused on her contributions to The Fairway and to Eastern Bay Thrusting, and certainly this

case took a bit of an unusual turn because in the pleadings and leading up to the trial most of the emphasis was actually on a constructive trust claim.

WILLIAMS J:
So that was the way the case was put, you say?

MR McCLEARY:
It was and the 182 was sort of an add-on right at the end and granted it certainly had some emphasis at trial but in all pre-trial stages the case was very much about a constructive trust inquiry and, indeed, you would be able to note from the costs judgment, the first costs judgment of Justice Fitzgerald, there is detail there about settlement offers that were made by Mr Preston to Mrs Preston or from the trust to Mrs Preston and there was one offer of $60,000 in respect of The Fairway and $7000 in respect of Eastern Bay Thrusting, and I don't think the documents are in the bundle but the analysis behind that was very much based on constructive trust type principles.

So to answer your question, your Honour, was there a constructive trust type inquiry in respect of this section 182 assessment? Absolutely, I can't get away from that, but not on its own. I mean there were seven matters that the High Court considered and then another two tagged on by the Court of Appeal, so this was not just a constructive trust enquiry.

GLAZEBROOK J:
And I think you were going to take us to the rest of it to show other things were taken into account, were you? You referred to more than one paragraph?

MR McCLEARY:
In respect of the acknowledgements?

GLAZEBROOK J:
Yes.

O'REGAN J:

Contributions.

GLAZEBROOK J:

I'm not forcing you to, I just thought we perhaps interrupted you at The Fairway stage and you hadn't had a chance to get onto it.

MR McCLEARY:

Yes your Honour. The paragraphs go on from 80 right through to about 86, and they talk about, for example, reports that Mrs Preston did at Eastern Bay Thrusting that were reasonably over and above her role as an office administrator, and it also talks about the fact that she made cash contributions to Eastern Bay Thrusting that were later repaid. Amongst all this, and as the Court may have noted in earlier paragraphs though, I do submit that it was quite reasonable for the Court to become probably very sceptical of Mrs Preston's alleged contributions in her evidence, and what she had and had not done, because there was such an overwhelming finding that her evidence was exaggerated on so many different levels, and the Court went to great lengths at one point, over about eight paragraphs, to make observations about Mrs Preston's credibility and her propensity to exaggerate, and whether or not that influenced the Court at that point in time to be a little more conservative in respect of the assessment of her contributions, I don't know. There is other evidence there, which we can adopt perhaps on a de facto basis in respect of what Mrs Preston did and didn't do. I do note that she studied for the entire term of the marriage. It's not set out in black and white in the judgment, but perhaps that is a matter that is considered by either the trial court, or even this Court, as to perhaps how much Mrs Preston did do. There wasn't a lot of emphasis on non-financial *Rose v Rose*-type contributions, and indeed in my submission although I accept that *Clayton* does make reference to contributions being made in not necessarily financial ways. This was not a section 9A *Rose v Rose* case.

Does the Court wish me to take you through the detail in the seven matters that have been addressed by the High Court? I'm just conscious of time. They're set out in my submissions at pages 4 through to 8.

WINKELMANN CJ:
Well for my part I don't require it.

GLAZEBROOK J:
Is there something you want to draw our attention to in particular?

MR McCLEARY:
No there's nothing in particular further that I want to say other than, we've obviously had a very good discussion about contributions. The source of the assets, coming from Mr Preston's contracting business, which was acquired by him in 1990, we say is a highly relevant factor, and also the benefit which has been acknowledged by other courts. For example, in *Wylie v Wylie* the chemical engineer that was married to the vet, the Court acknowledged that Mr Wylie living in a house that was owned and funded by Mrs Wylie's trust, was a matter that was relevant, and the Court in this case, Justice Fitzgerald also noted that Mrs Preston had had substantial benefit. Well it's my submission that she had substantial benefit from trust assets in a relatively short timeframe. She studied –

WINKELMANN CJ:
It's interesting though, isn't it, because that tends to highlight the gap in the exercise of doing B and C because in fact that's being used against Mrs Preston, that you could say that it should've been something weighed in her favour that she was going to – that their life was built on this basis and it was going to be removed.

MR McCLEARY:
Well most of the advantage, your Honour, was in respect of study. So the answer to that comment is that the study had finished. So, yes, she was, she was very well supported as far as university studies were concerned during

the marriage, but her studies had largely finished by the time the marriage had finished.

WINKELMANN CJ:

But that doesn't really answer my point, which is it seems, it's being held against her whereas on the *Clayton v Clayton* analysis it would tend to be something that would frame the size of the gap.

MR McCLEARY:

I accept that there was no dispute that there was going to be a gap when this marriage ended between the trusts, I can't deny that, and it would be a submission that would take me nowhere. But the reality, in real terms, such a large part of the financial assistance that she did have, was why she was studying, and even non-financial. Mr Preston at one point gives evidence of the fact that he was looking after Mrs Preston's child while she was studying and it was hard on him having to manage the house and the business while she was away studying. So perhaps the level of benefit that she did have, that concentration over that five-year period while she was studying, would not have been as great at the end of the relationship.

WILLIAMS J:

Was she away, what, a day a week, two days a week?

MR McCLEARY:

I think it varied, your Honour. The first couple of years it was extramural and then it cranked up towards the end of the marriage. I think by the end of the marriage she was spending quite a bit of time in Palmerston North and Wellington.

WILLIAMS J:

I wonder whether the correct approach to this sort of issue is to take it as a given that emotional, economic, social and physical support, one partner to the other, is generally to be treated as equal rather than this nickel and diming stuff, because we all know that these relationships are much more than

"whether I paid for her study" and, you know, "whether I was allowed to go to work or not". Human life is much more complex than that and the law should try and reflect that as best it can, don't you think?

MR McCLEARY:
I appreciate the modern context in taking a –

WILLIAMS J:
I don't think it's a modern context.

WINKELMANN CJ:
It is a modern context.

WILLIAMS J:
It's just a human context.

MR McCLEARY:
Well, it's been submitted as a 21st century context.

WILLIAMS J:
Sure.

WINKELMANN CJ:
And the authorities have established as such.

GLAZEBROOK J:
It might be 21st century to actually recognise that specifically in financial terms.

WINKELMANN CJ:
And the authorities have recognised it.

GLAZEBROOK J:
But I don't think the reality was ever any different.

MR McCLEARY:

No, but the danger being is that there's so much concentration at the moment in this appeal on non-financial contributions is that it detracts from so many other relevant factors.

WILLIAMS J:

You see but that's the point because a proper balanced weighing requires those factors to be in the balance, and one of the potential problems is that in this case they weren't because of the utter focus on the dollars.

MR McCLEARY:

Well, not just the dollars, with respect, your Honour. I mean there was a focus on the fact that two of the – the two beneficiaries were and are, remain, Rhys and Kate Preston who are the –

WILLIAMS J:

Yes, right, absolutely.

MR McCLEARY:

So that's a non-financial one.

WILLIAMS J:

Yes, and I don't think anyone would want to argue that they need to be provided for out of that, out of the trust asset.

WINKELMANN CJ:

That they don't need to be.

WILLIAMS J:

They do need to.

WINKELMANN CJ:

Yes, they do need to be, yes.

MR McCLEARY:

And the source and the character of the assets, I mean that's not a strictly mathematical exercise.

WILLIAMS J:

No.

MR McCLEARY:

That's just in recognition of where those assets have come from.

GLAZEBROOK J:

The issue is whether they totally exclude the other factors which is what you're arguing and what the judge actually did.

MR McCLEARY:

This might be an appropriate time for me to look at the Court of Appeal judgment and the two extra factors that they added in that Justice Fitzgerald didn't seem to mention in her judgment was, firstly, the raison d'être, the existence for the trust being Rhys and Kate Preston, and, secondly, the issue of an injustice and, in my submission, I think the concept of a potential injustice is a much more useful safety check when assessing all of the matters that are taken into consideration in respect of the section 182 discretion. That very final question, has somebody had an absolute windfall at the expense of the other. It's a matter that the Court of Appeal looked at and I consider, in my submission, it's a very relevant matter to put before…

GLAZEBROOK J:

Well, of course, the argument against you would be there is an injustice because the contributions over the period and her expectations have not had any recognition at all. It comes back to the question I've been asking you all along and we probably can't say any more on that, but that that's what's against you because looking at this you say, well, there would be an injustice because it was set up for the children and it came from his money, and she made very minor contributions on the findings to those assets during the

marriage, therefore, it's unjust that she gets nothing and if she did get something, it would be a windfall because those contributions are so minor that they should not count at all.

MR McCLEARY:

But doesn't that then invite an imposition of relationship property regime against the section 182 assessment because if we start looking – it becomes maybe a section 9(a) analysis, where we're saying, is that an unjust windfall because these assets went up in value while Mrs Preston was there, taking, you know, for example, an approach in *Little*, these assets went up in value when she was in the relationship. But there's no injustice if there was no windfall to Mr Preston. It's not one of those sort of long-term relationships where we've got Mrs Preston is at home and raising children and supporting Mr Preston in his –

GLAZEBROOK J:

But now you are looking at relationship property because don't you actually just use the *Clayton* principle that says is there a difference between dissolution and otherwise? If there is one, then that would suggest that you provide something out of the trust on dissolution and the question is how much should that be and whether other factors outweigh it. Right, you have to put that into the pot and not on a relationship property because *Clayton* says no, you don't assume on relationship property principles.

MR McCLEARY:

Right, and of course I agree. But then we've circled back to the delta again –

WINKELMANN CJ:

Can I ask just one question before we take the luncheon adjournment, you say the purpose of the trust was Mr Preston's children and obviously that was the initial purpose, but when there was a resettlement with Mrs Preston, well, yes, Mrs Preston as a discretionary beneficiary, the purpose of the trust was clearly enlarged, I mean, it probably was always larger than just the children because it's not just the final beneficiaries, it's how the trust is being used

prior to the final dispersion, isn't it? So, the purpose of the trust encompassed supporting the Preston's.

MR McCLEARY:

Yes, certainly. But looking at, for example, the Court of Appeal decision in *Dyer v Gardiner*, where Mrs Gardiner had one son, called Kevin, and he was the primary beneficiary, and then the Court of Appeal were persuaded that Mr Dyer should not have a share of those trust assets and one of those reasons being that Kevin was always the primary beneficiary. Now, Mr Dyer certainly qualified as a beneficiary because of the marriage and, in fact, I think he was even a trustee at one stage. So those factual circumstances are no different, but –

WINKELMANN CJ:

Well, they are different because the nature of the needs of the final beneficiary.

MR McCLEARY:

Because Kevin had disadvantages.

WILLIAMS J:

I would have thought, what bugs me about this aspect of it is that for taxation, and probably vires reasons, Mrs Preston gets written in as a discretionary beneficiary to the trust, so that it's obvious that the young Prestons are the primary purpose, but now she's a purpose too, and she has been taking the advantage of the trust assets for, you know, for the entire duration of the relationship, certainly the marriage, and then she gets written out as irrelevant and that seems to me, if she's written in, you've got to take the good with the bad even if she's not primary, she's in there.

MR McCLEARY:

Yes, and look, there's not a lot of evidence on it but Mr Fisher gave evidence at the trial and he admitted, under cross-examination, that the idea of appointing Mrs Preston as a beneficiary was his idea.

WINKELMANN CJ:

I don't know –

MR McCLEARY:

Well, if you could let me, with your Honour's permission, if I can just take that a step further because there was a reason behind it, and he did give that reason, and it was because there were, Mrs Preston was having university fees paid by the trust.

GLAZEBROOK J:

Having what, sorry?

WILLIAMS J:

Exactly. She was already benefiting but probably shouldn't have been.

MR McCLEARY:

She was already benefiting but it wasn't formalised and so the reason for making her a discretionary beneficiary with the accountant's brain, of course, not necessarily the lawyer's brain, was to contra off the benefit with a tax break. So, in Mr Fisher's evidence, under cross-examination, he said that there was no cash that came back in the form of a tax refund, it was an accounting exercise to balance up the benefits that she was getting in the payment of her university fees.

WILLIAMS J:

Yes.

WINKELMANN CJ:

The fact that it was his idea doesn't really seem to take us very far, does it, because Mr Preston obviously wanted Mrs Preston to benefit from the trust.

MR McCLEARY:

It's just an explanation, particularly in respect of the tax because the submission and the idea that comes out that there was perhaps a windfall to

Mr Preston on the basis that he scored a tax benefit and was getting cash back, and that wasn't the case. The way Mr Fisher explained it in cross-examination is that it was an internal adjustment.

WILLIAMS J:
Yes, I took it to be that, in fact, those payments were unlawful because she wasn't a beneficiary of the trust and so that had to be regularised and there were accounting issues as well and that's obviously definitely correct, but once she's written in, you have your cake and eat it too.

MR McCLEARY:
No. There's not enough evidence on it, your Honour, to be able to answer that properly. It seems that the drawings were being taken by Mr Preston and being used to pay university fees, and then that was the correction so that the university fees could be paid by the trust and then there could be a tax credit.

WILLIAMS J:
Right, I see.

WINKELMANN CJ:
We will take the luncheon adjournment, I think.

COURT ADJOURNS: 1.06 PM

COURT RESUMES: 2.16 PM

MR McCLEARY:
Your Honours, firstly just on the issue of the mathematics that we spoke about in relation to the calculations presented to the Court by my friend Mr Hutcheson, Mr Preston and Fisher Partners will agree to the ratio, which probably solves just about all of our problems in respect of the funds that are held in Robinson Law's trust account. So looking at the second table on that sheet where it talks about a ratio of .53 of the funds belonging to the Grant Preston Family Trust, and .47 belonging to Huntbos, that's agreed.

So if the Court does end up dealing with those funds as part of its judgment, then I think it's fair to say that the appellant and the respondent are agreed on that ratio.

WINKELMANN CJ:
So as the funds stand at the moment?

MR McCLEARY:
Well they're not separated, they're all just in one pot.

WINKELMANN CJ:
So as the funds stand?

MR McCLEARY:
Yes, as the funds stand at the moment, precisely.

O'REGAN J:
Well that's the 53/47?

MR McCLEARY:
Yes, .53 versus .47.

O'REGAN J:
Thank you.

MR McCLEARY:
Now somewhat dangerously I'm going to do a very brief circle back to the B and C delta and just add in one further point that I would like your Honours to consider. Having looked at the various authorities it seems, and I responsibly concede that there has been a thorough analysis of the B and C delta, in respect of all decisions where an award has been made and where the discretion has been exercised, and I do submit whether this supports my submission that the lower courts have perhaps taken the view that an analysis of that calculation is only necessary when an award is being made. Now I accept the position of this court is different to that, and maybe that –

WILLIAMS J:
Well there's another thesis available on that.

WINKELMANN CJ:
Yes there is, which is that when they don't do it, it leads them into error.

MR McCLEARY:
Well I don't consider that any of the decisions that have come out that have certainly been referred to in this appeal are questionably unfair. Certainly one of the decisions I'm looking at is again, and I've mentioned it before, is *Dyer v Gardiner* where there was only a very brief paragraph, again, on the B and C delta, and then relief was declined.

I'm now going to turn to page 14 of my written submissions starting at paragraph 52, just as a point of reference, and I just want to consider some of the appellant's specific arguments that they have raised. The first is the allegations that there was a disregard of the trust structure, and that essentially Mr Preston treated the trust as if it was his own, and there's a reference to *Official Assignee* and perhaps insinuations of alter ego. This was neve pursued at trial, and there was no finding of fact made by the High Court as to, firstly, whether the second defendant, being Fisher, actually abjured from its duties, and in fairness that was pleaded in the statement of claim, although there was very little argument on it at trial. But more significantly there was no finding of fact as to whether Mr Preston completely or largely treated trust property as to his own, or to control as he saw fit, and so the allegation accordingly at this appeal level is unfair. In fact –

GLAZEBROOK J:
I gave a different characterisation, would you agree with this, that effectively they were using the trust assets for the use of the beneficiaries?

MR McCLEARY:
Who's "they", Justice Glazebrook?

GLAZEBROOK J:
Well, the trustees were presumably allowing the family as beneficiaries to use those trust assets.

MR McCLEARY:
Yes.

GLAZEBROOK J:
In a perfectly proper manner.

MR McCLEARY:
Yes, not in an unacceptable way, other than perhaps the…

GLAZEBROOK J:
Well, the difficulty with Mrs Preston, the issue that arose there, but aside from that it was a perfectly normal use of trust property.

MR McCLEARY:
Yes, but there's two comments that flow from that that come to mind. Firstly is that a lot of the financial benefit that this couple utilised was not directly from the trust. Granted the trust owned Eastern Bay Thrusting but, you know, there is another legal entity there between these parties and the trust, being the company Eastern Bay Thrusting, and so the trust itself actually did very little. I mean it was a passive holder of those two major assets, being the home and the shares in that company. So the actual extraction of money was all coming through Eastern Bays Thrusting, either in the form of wages to, well, salary to Mr Preston and drawings, and there has been criticism in respect of Mr Preston taking drawings that were out of kilter with his shareholding but as identified by Jay Shaw, who was the forensic accountant called by Mr Preston at trial, the constitution permits a shareholder to waive its rights to two dividends. So what was happening in respect of Mr Preston taking drawings that were out of proportion to his shareholdings was not illegal or –

WINKELMANN CJ:

No, but who were the shareholders who were waiving their entitlement?

MR McCLEARY:

The trust, because the trust owned 99 shares and Mr Preston only had one share, but that was a –

WINKELMANN CJ:

So the trust was waiving its rights to dividends in favour of Mr Preston?

MR McCLEARY:

Yes. Well, that must have been the case because the reality was Mr Preston was taking drawings in his own name that were far greater than the trust was taking, and we do not – there's no evidence as to why that was occurring. Presumably there was an accounting reason for it, a taxation structure. We just simply don't know.

WILLIAMS J:

Those drawings are relationship property, aren't they, once they're in his pocket?

MR McCLEARY:

Yes, they would be, but they were spent.

WILLIAMS J:

Does it matter?

MR McCLEARY:

They're gone.

WILLIAMS J:

Of course, but they were relationship property as a matter of law and probably as a matter of social and economic fact in that he spent his money, presumably any spare cash, on maintaining his family.

MR McCLEARY:

Yes, but with respect, your Honour, the point I'm making in the submission is not in relation to necessarily the status of those funds.

WILLIAMS J:

No, no, that's not – I agree. That wasn't…

MR McCLEARY:

It's just the attachment as to is Mr Preston running this show all on his own or is he pretending, is he running the trust as if it's his own asset but remembering he was a director, the director of Eastern Bay Thrusting, so he was entitled to make decisions in relation to that company and he was entitled to take drawings. So the submission that he was running this trust on his own as if it was his own without any reference to the professional trustee, to the other trustee, is rejected for that reason.

GLAZEBROOK J:

And do we have trust resolutions waiving the entitlement to dividends?

MR McCLEARY:

No. There was actually – there was no trust resolutions at all discovered but what we do have to demonstrate that Fishers were an active player in the management of the trust to the extent that any management was required because, as I have said, it was a relatively passive role that it took in respect of simply holding shares and owning a house, but I'm happy to refer the Court to evidence that Fisher gave in respect of yes, he did give advice. Would you like me to take you to the passages in the cross-examination?

O'REGAN J:

I don't think we need to.

MR McCLEARY:

The points that come out of it, they're in the cross-examination of John Fisher. He deposed that, well he gave evidence to say that he did discuss and advise

on all trust transactions. He admits that it was his idea to appoint Mrs Preston as a discretionary beneficiary, and this is a separate point I'm making in respect of the last time this fact was raised, because what I'm demonstrating to the Court is that there was active involvement by Fishers, this was not just a one man Mr Preston show, and it was –

WINKELMANN CJ:
Well it sounds like Mr Fisher is saying he's advising on it.

MR McCLEARY:
Yes, the flavour that comes out of his evidence is that he was actively involved in the running of that trust, and there's certainly nothing in either the evidence other than what I would respectfully call the cherry pick of the appellant's reference to Mr Preston saying in cross-examination, talking about his assets and his life with Mrs Preston, but putting that in context where he's having a conversation with his wife, when you dig a little bit deeper there's actually no evidence that he was running the show on his own.

WINKELMANN CJ:
So there were no trust records disclosed, were they not sought?

MR McCLEARY:
They weren't sought. The next issue is in respect of this concept of a family unit, and this joint enterprise. The picture has certainly been painted of a blended family unit but in my submission there are characteristics of this relationship which indicated that these parties were in many ways very independent from each other. The first and most obvious one is the fact that Mrs Preston herself settled a trust. She settled the Huntbos Trust to hold her assets, and if I can refer the Court to a letter from Mrs Preston's father, in his capacity as solicitor, to the ANZ, and that document is 301.0063. it's very clear in the second paragraph: "Mr and Mrs Preston wish to transfer a half share of the property to – "

GLAZEBROOK J:

Can you just pause please while we find it. Sorry, 301?

MR McCLEARY:

Sorry, 301.0063.

WILLIAMS J:

Is this the one you quote in your submissions? At 56?

MR McCLEARY:

Yes. At paragraph 56? No it's not. That's a summary that the High Court has arrived out in considering of the same documents.

WILLIAMS J:

I see.

MR McCLEARY:

So that passage there is actually from the High Court. So this one here is actually the source document, if you like, well one of two. So the second paragraph of that letter says: "The Huntbos Family Trust which has been created for the benefit of her family." So the point I make there is, if this is a truly a joint enterprise, why would Mrs Preston seek to settle a trust to specifically hold assets for the benefit of her family. Now in her family there is no suggestion at any time that Mr Preston or his children were beneficiaries of her trust. So there's a deliberate attempt to have a firewall there between Mrs Preston's assets and Mr Preston's assets.

WINKELMANN CJ:

That submission is undermined somewhat, isn't it, by the fact she then used her assets to help fund the business.

MR McCLEARY:

Only in the form of the loans though, your Honour.

WINKELMANN CJ:

In the world I come from small businesses having access to ready finance is pretty important. Ready working capital finance is pretty important.

MR McCLEARY:

No there was very specific evidence on that point, your Honour, given by Frans van der Merwe from the ANZ Bank who said to the Court there was no, at no time was his business under pressure and we were regularly in the business of extending overdraft facilities in situations where there was not enough money to pay some wages or pay some tax so, and the High Court agreed that the loans that Mrs Preston did make were not critical. So maybe typical in a small business environment but it would seem that, based on what the bank has said, and the conclusions that the High Court arrived at having heard all the evidence, is that these were not critical loans at all.

WINKELMANN CJ:

But that doesn't matter. Why does it matter if they're critical. They chose to fund the business in this way. It was interest free and they choose to use it as a floating facility. That's the significance.

MR McCLEARY:

In my submission it would be a convenience.

WINKELMANN CJ:

Yes, it was very convenient.

MR McCLEARY:

The next document which is also significant in respect of the ring-fencing is two pages on, so that's 301.0065. So this is an email from David McKay who is an employee at Fishers which is the professional trustee to Kristina Couch who is a legal executive at Graeme Jespersen's law firm, and this is setting out what is wanted and what isn't wanted in respect of the financial arrangement between these two parties in respect of Pauanui, and so at point 4 it's clear that the ownership of the property is going to be 50/50 as

tenants in common and I say to that that is not consistent with parties that are building a joint enterprise, that are financially blended at the hip. Then somewhat interestingly, and there's no evidence to say whether this materialised or not –

GLAZEBROOK J:
Why do to you say that?

MR McCLEARY:
I beg your pardon, your Honour?

GLAZEBROOK J:
Well, you made a point about paragraph 4.

MR McCLEARY:
It was just the fact that the property was going to be held as 50/50 tenants in common as opposed, for example, a joint tenancy. It's the starting point of what ultimately ended up being ring-fenced assets and financial separation. So if this was a truly traditional blended, joint enterprise and blended family, everything's in the same pot, contributions financial and non-financial, then why would these parties even consider owning properties in 50/50 shares? Why would they not just – why did they not just go and buy a bach at –

GLAZEBROOK J:
Well, when there are other children involved, it'd be fairly common with blended families, wouldn't it?

MR McCLEARY:
Well, precisely, and that –

GLAZEBROOK J:
But even otherwise people often try and keep their affairs separate. You often have mirror trust, for instance. That's a very common structure.

MR McCLEARY:

Yes, but, your Honour, that almost – well, I take that as in support of what I'm trying to submit to the Court in that this is evidence of these parties –

GLAZEBROOK J:

Well, oddly I don't see it but you can perhaps explain to me why you do.

MR McCLEARY:

I'm not feeling it but I've said – this is a situation where yes, there were children from other relationships, and consequently these parties took very deliberate steps to ensure that their interests were kept separate. So flicking back to the letter from Graeme Jespersen to the ANZ he's saying: "This is a trust for my daughter and her family." Then we've got a property which is purchased and it's purchased 50/50. So it's not necessarily just a little bit of asset protection on the side to ensure that the kids from the first marriage are protected. This is quite consistent all the way through.

GLAZEBROOK J:

Well, what do you say about mirror trusts then which are exceedingly common, or at least they used to be?

MR McCLEARY:

I'm too young to have had much commercial experience in mirror trusts, your Honour.

GLAZEBROOK J:

Well, each party sets up their own trust.

MR McCLEARY:

Yes.

GLAZEBROOK J:

And it's still common.

MR McCLEARY:

Yes, but these were not mirror trusts.

GLAZEBROOK J:

They may not have been but I don't know why the fact they've got separate trusts when you have a very common structure of mirror trusts in any sort of joint enterprise…

MR McCLEARY:

Because in my understanding as a mirror trust you have, let's say, the husband settles a trust which is ultimately for the benefit of the wife and her children and the wife has the…

GLAZEBROOK J:

Not necessarily. They might each have their separate trust but they basically split the asset between the two trusts.

MR McCLEARY:

But there's nothing to indicate that Mrs Preston's –

GLAZEBROOK J:

I'm not suggesting there is but you're saying the fact they had different trusts means it's not a joint enterprise. I'm just challenging that.

MR McCLEARY:

Yes. With respect, your Honour, I don't think that – the submission doesn't start and finish there. That is the starting point. I mean it's been no secret that Mrs Preston has had a trust but the fact that there are, for example, there's no suggestion that Mr Preston or his children are included in that trust, and then we've got Mr Preston's trust sitting out to the side, and yes, there was the 2010 variation which caused Mrs Preston to become a discretionary beneficiary but her children are not beneficiaries of his trust, so while the analogy is accepted, there's no similarities in respect of this structure. It's quite separate. There's no cross-pollination, if you like, of beneficiaries.

WILLIAMS J:

I guess the point is really the way you're pitching your case, unless there is assimilation into a unity, there is no access to section 182 relief. Whereas, I think maybe the better way to put it is that it's going to be a question of degree. And that what you're talking about, that degree of separation, maybe a relevant factor, but it's not ever going to be decisive, is it?

MR McCLEARY:

Well, I would like to think that no one factor is ever going to be decisive –

WILLIAMS J:

Right. But do you agree that it's not going to be disqualifying?

MR McCLEARY:

I do.

WILLIAMS J:

Or do you say it's going to be –

MR McCLEARY:

I don't suggest that it's decisive, but I would suggest that it rebuts the contention that a powerful relevant matter is the submission that these parties were a joint enterprise, and therefore, it should sort of all be in one pot and there should be something that comes out at the end for Mrs Preston.

WINKELMANN J:

You're pointing at little bits and pieces that shows that they're keeping assets separately, there are other bits and pieces that can be pointed out where they're behaving just like married couples do when they're doing things in a joint way, so I don't know, I think you made the points that you need to make about that. Is there anything else you want to point to in terms of that?

MR McCLEARY:

In respect of this document there is because, with respect, is their day-to-day life I think was probably just in everyday spending but as far as the actual substructure of their assets were concerned, I don't think there is any evidence of them being blended or being like a normal family.

WINKELMANN J:

The email from Kristina Couch.

MR MCCLEARY:

Well, it's just another point. In paragraphs 12 and 11 from Kristina Couch there's also a reference there to life policies, and the idea that there will be a life policy over the life over the other so that the surviving party isn't forced to have to buy out the shares of the deceased. That in itself again demonstrates a very deliberate attempt to make sure that finances are kept separate.

GLAZEBROOK J:

Which paragraph are you looking at?

MR McCLEARY:

Paragraphs 12 and 13, they're mirror clauses in respect of life insurance policies.

WINKELMANN J:

This is about just simply about the Pauanui property, is it?

MR McCLEARY:

It is.

WINKELMANN J:

Yes, right. I think we have your point about the Pauanui property.

MR McCLEARY:

But it's just not about the Pauanui property, there were no joint bank accounts. There were no wills that addressed each other. There's no evidence of any memorandum of wishes either from Mrs Preston's trust or Mr Preston's trust that suggested that there was going to be any kind of asset planning consistent with a joint financial life. That's just completely absent.

WINKELMANN J:

Nevertheless, they were married.

MR MCCLEARY:

Yes, nevertheless, they were married but if we were going to look at the position of, and this is moving into the countenance argument that my friend makes, and saying, well, what the High Court and the Court of Appeal have done is they've provided essentially asset protection in the absence of a section 21 agreement. But we have to remember that these parties, their marriage was all pre-*Clayton*. It's quite possible that if these parties did seek legal advice the advice that they would've had would've been, well, you've got a trust and you can rely on that for asset protection and Mrs Preston, why don't you go and set up a trust and you can have asset protection within your trust as well. *Clayton* certainly shook up the world as far as that was concerned and consequently there's been, you know, I expect a massive growth in section 21 agreements since that time. But that was all – these parties had separated in 2015, *Clayton* come out in March 2016. So, they were operating within a legal environment that they undoubtedly thought that they could rely on at the time.

WINKELMANN J:

Does that take us on to contributions to the marriage?

MR McCLEARY:

Well, I think we've covered that fairly thoroughly, so I don't intend to address that again. And likewise, the constructive trust inquiry, I think that's something

that we have talked about. I don't intend to make any further submissions in that regard.

Economic disparity and necessitous circumstances. In my submission, your Honour, much of the circumstances that Mrs Preston finds herself in now, in relation to her debt, have actually been as a result of the litigation and that goes both ways. Both parties have incurred significant debt. It's obviously a tragedy both ways, but at the end of the relationship, Mrs Preston's circumstances wouldn't have been anything like what they are now.

I'll now talk about the countenanced protection of trust property without a section 21 agreement, which I just touched on before, and a point that I want to make to the Court is in respect of *Ward* where this Court said that: "The Courts task is not to produce an outcome that would have applied if relationship property had not gone into the trust." But I'm sensing that this is an argument that the Court maybe willing to embrace now, which would be quite a shift from *Ward* when there has been, which was affirmed by *Clayton*, to ensure that there was not a blending of principles between section 182 and the PRA.

WILLIAMS J:

Ms Bruton said about that, that in your common or garden, rather less common and less garden these days, but in the old days anyway, when *The Andy Griffith Show* was still on, relationship, we don't get these fights anymore because *Ward v Ward* and *Clayton* have produced enough clarity for parties just to make the arrangements they need to make because they know they're going to be exposed to awards in those particular circumstances. So there doesn't seem to be, if she is to be believed, there is no problem there. The question is only about the new form of marriage relationships that are much more common these days and need to be provided for. Is it really as bad a problem as you suggest? Because I got the impression from Ms Bruton that in the common or garden long-term children of the relationship, you're going to get pretty close to a PRA result anyway.

MR McCLEARY:

When you say it's not as bad as what I'm alluding to, I'm sorry, what is the bad part that I'm suggesting?

WILLIAMS J:

So you said, your suggestion is that basically you're infecting the FPA with new-fangled PRA thinking about equality et cetera, et cetera. Now the impression I got from Ms Bruton, I don't have any reason to disbelieve her, is that at least with the common or garden marriages, that's actually been the result, without too much, without the world turning upside down, and we're having to address now the increasingly more common blended family situations where people walk into the relationship with their own assets, a little gun-shy, and work out things in a way that isn't as completely assimilated as they are in the standard model, and that's the only area where there is going to be uncertainty because in fact the PRA has infected the standard relationships already. Or at least the thinking underlying the PRA has, whatever *Ward v Ward* said.

MR McCLEARY:

I don't disagree with that your Honour, to the extent that it's definitely more complicated as move away from the traditional 25 year, three kid marriage. I accept that. But in my submission the discretion is deliberately wide and I guess we have to have faith in judge's expertise and experience to be able to find a just result in respect of the circumstances of each particular case.

WILLIAMS J:

You'd think so, you'd like to think so.

MR McCLEARY:

What Ms Bruton has submitted to the Court is that there should be a list that we should be able to go through that will assist courts in being able to make decisions easier. My submission in response to that is we have *Ward* and *Clayton* specifically saying there should be no list, and perhaps the Court is considering a turnaround in respect of that, in that regard.

WINKELMANN CJ:

Well, we're always considering everything, so you needn't feel too defeated about that. I sense you thought we had a particular attitude, and we're just hearing argument. But on that it would be helpful if you could tell us what you do think, and I don't know if you're coming to this in your submissions, about this suggested criteria that Ms Bruton took us to in her second table, I think, she handed up today. At some point, not necessarily now. So her paragraph four relevant factors.

MR McCLEARY:

Yes, I will, your Honour, but before I do so I just want to finish off in respect of the position between the countenanced protection and the de facto protection of trust property without a section 21 agreement, because we don't know what these parties would have done. It's a completely hypothetical situation. If Mr Preston realised that his trust was not going to be a useful asset protection device to protect his assets for his two children he may have done things differently, but we just don't know, and he was entitled to rely and have confidence to protect those assets for his children at that time because, as I've submitted, it was all pre-*Clayton*. Yes, that's my point on that. I've nothing further.

Before we move on to the issue of further guidance on section 182, just so I can keep some order in respect of my submissions, I just want to talk to the Court about this concept of providing a freehold home which has been stressed as being very importantly by my friend, Ms Bruton. Look, in an ideal world that would obviously be a great outcome if there are sufficient resources to be able to provide a freehold home and the circumstances justify it, and in the cases such as *Bethell* and *Oldfield* there was significant wealth and there were circumstances that justified it. Mr and Mrs Oldfield were together for some 47 years and that really was just a case about implementing how that was going to happen. There was the first 2019 *Oldfield* decision where an application was made to strike out a trustee and then buy a house and that happened and, in my submission, entirely appropriate, and then likewise in the – if I said *Bethell* I meant *Oldfield* – and then in *Bethell* in the farming case

in the South Island, those parties lived in that homestead for 14 years together and raised two children there and, arguably, Diana Bethell was in a position where life may have passed her by as far as having her own financial independence was concerned and so being able to provide a home for her and the two children was a reasonable conclusion to reach at that time, but in these circumstances what the appellant is asking for is a freehold home in Pauanui.

WINKELMANN CJ:
A freehold piece of land with some caravans on it.

MR McCLEARY:
Well, as Justice Williams noted, it is Pauanui.

WINKELMANN CJ:
Well, we know what the value is though. It's not excessive. It's four hundred and something thousand, so…

MR McCLEARY:
That's a 2017 value. We don't have up-to-date valuations on it.

WINKELMANN CJ:
But she's not seeking a freehold home. You can quip back at me, but she's seeking to have this piece of property with two caravans on it.

MR McCLEARY:
Okay, well –

WILLIAMS J:
I guess you would say the principle is a home. That was the way the case was pitched.

MR McCLEARY:
A home of some description. That piece of land with caravans on it will be freehold under the appellant's submission to Mrs Preston whereby Mr Preston

will end up with a home which has $800,000 worth of debt on it. So the latest valuation we have on The Fairway is $715,000 which, granted, it also old but we do have up-to-date debt figures and we've got $800,000 worth of debt. Now some of that is business debt but it's still debt and it's still all with ANZ which is all secured against The Fairway. So it would be quite an unfair outcome for Mrs Preston to walk away with a freehold piece of land with caravans on it in Pauanui and Mr Preston to not be freehold. That seems like an unfair outcome. So the potential answer to that is, well, Mr Preston can sell his business and pay all his –

WINKELMANN CJ:
Can I just ask is the debt that's secured on his home, is some of it business debt?

MR McCLEARY:
Yes.

WINKELMANN CJ:
All right. So apart from the money paid to lawyers it's all business debt?

MR McCLEARY:
Not all business debt. There's a mix. There's a mix of personal debt and business debt, and so to extinguish that business debt he could sell his business.

WINKELMANN CJ:
We don't know what proportion is business debt?

MR McCLEARY:
Yes, there is some detail on that, on the last page of – it's on document 305.0847. So you'll see down the bottom of that page there's the –

WINKELMANN CJ:
Is it the last page?

MR McCleary:
No, it's about the third, fourth to last page, 305.0847. So anything that's got ANZ next to it is secured against the house. So there's business overdrafts, business Visas, there's home loans but they are in the name of Eastern Bays Thrusting. So that first bunch of loans, which included, admittedly, non-ANZ debt as well, comes to $829,000 but the $800,000 that my friend referred to in her submissions is, in fact, ANZ debt, is my understanding.

WINKELMANN CJ:
So when you say those home loans, they're in the name of Eastern Bays Thrusting, right.

MR McCLEARY:
Yes, I expect that the, I think the usual arrangement is that if the debt is secured against a residential property then you get a residential lending rate. So, the trust is obviously taking advantage of the fact that it owns a house and borrowing money for the company and, well, securing company debt, with the residential property to ensure it doesn't have to pay a business rate.

Then you've got Grant Preston's loans. There's a legal fee loan of 164 and then a Visa of 37,000. And then you've got the last two loans under the family trust, one's for 90 and one's for 146, but the loan for 146 was the joint loan in respect of Pauanui which is, that's gone because Pauanui has now been purchased by Mrs Preston.

GLAZEBROOK J:
I'm having trouble seeing where the personal side of the 800,000 is.

MR McCLEARY:
No, I don't think there's a personal side to 800,000.

GLAZEBROOK J:
Well then, it looks like business debt.

MR McCLEARY:
It's the ANZ debt, there's $735,000 worth of trust secured ANZ debt. So if you've got a property of –

WINKELMANN CJ:
Can we just go back and make this simple? I asked you whether all the money secured over The Fairway home was business debt and you said it's a mix of personal and business debt.

MR McCLEARY:
Yes, insofar as that document at 0847 shows, so there's the –

GLAZEBROOK J:
It doesn't show it to me is what –

ELLEN FRANCE J:
I was going to say, I don't understand –

WILLIAMS J:
There's the Visa Gold –

WINKELMANN CJ:
We'll just ask you to tell us what's the personal debt you said, it's a simple question, I think.

MR McCLEARY:
The ANZ debt which is secured against the home is, on my maths, and this is just going up and tallying up all the debt that has ANZ beside it, is 735,000.

WINKELMANN CJ:
Yes, but it's all lent to Eastern Bays Thrusting Limited apart from –

MR McCLEARY:

Not all of it, but a lot of it –

WINKELMANN CJ:

Is the personal stuff the home loan legal fees and the Visa Gold?

MR McCLEARY:

Yes. And then there's the trust debt of $90,000. So excluding Eastern Bays Thrusting debt there is $290,000 worth of ANZ debt.

GLAZEBROOK J:

Yes, what I'm asking is where that comes from out of the 800,000? The 800,000 to me looks as though it's business debt.

MR McCLEARY:

That was trust equity. So that was looking at the actual equity of the trust assets which includes both the, sorry, trust debt which includes debt in relation to both The Fairway and in respect of the trust shareholding in Eastern Bays Thrusting. So my friend correctly, in my submission, has grouped together Fairway debt and Eastern Bays Thrusting debt as affecting the overall equity of the trust.

ELLEN FRANCE J:

Well, as I read that, the only aspect of the 829 that's personal is the legal fees.

MR McCLEARY:

In respect of that top group of debt, yes, I agree. So just so we're clear on the different classifications of debt, the submission that the appellant has made to say that the trust equity is 1.57 million based on overall trust debt, whether it be as a result of Easter –

GLAZEBROOK J:

What he's done, he's split up the mortgage of Fairway at 90,000 and then he's got EBTL debt at 800,000. You said to us the 800,000 is partly personal. And then you showed us this which would suggest to me, it's not at all.

MR McCLEARY:
No, well, in that case that's an error. The debt overall is in excess of a million dollars.

GLAZEBROOK J:
What he's got here is a mortgage of Fairway at 90,000 which I'm assuming he's accepting is related to the purchase of Fairway so it's personal –

WINKELMANN CJ:
That's Mr Hutcheson's chart.

GLAZEBROOK J:
And 800,000 that's actually business debt. I don't know –

WINKELMANN CJ:
So can you look at Mr Hutcheson's chart? It might help us if we look, if you look at Mr Hutcheson's chart and tell us what you say about that.

MR McCLEARY:
On Mr Hutcheson's data he's got GPF debts and he's got mortgage of –

GLAZEBROOK J:
I think he's taken the 800,000 being the 829,000 that's on that sheet.

MR McCLEARY:
And rounded it down.

GLAZEBROOK J:
Well, he may have taken off the 10,000, I think he said he was being conservative.

MR McCLEARY:

Yes. Yes, I accept that. I accept that's correct.

GLAZEBROOK J:

So, it is business debt and it isn't personal debt?

MR McCLEARY:

No. Correct.

GLAZEBROOK J:

Right. Okay, well that's all right, sorted that.

MR McCLEARY:

But in respect of, coming back to the issue of the freehold home, there is 730 –

GLAZEBROOK J:

But he has the business and the business need debt in order to keep going.

MR McCLEARY:

I'm sure the business doesn't need debt, I'm sure –

GLAZEBROOK J:

Well, it must do because, well, I'd be very surprised, most businesses need debt.

MR McCLEARY:

I'm not sure if "needs" is word I would use, your Honour. But the business certainly has debt and the only way to get rid of that debt, if Mr Preston was going to be put in the same position as Mrs Preston, and have a freehold home, then that debt would have to be repaid. So, something would have to be sold. He'd have to either sell the house or he'd have to sell the business. If he sells the house, he's got no house, but I guess at least the debt's repaid.

That becomes a personal decision for him as a trustee as to whether they want to lose their income stream or they want to lose the house.

O'REGAN J:
Isn't it a bit irrelevant, I mean, if he's got a very valuable business, what's the big deal about him not having a freehold home?

WINKELMANN CJ:
You're addressing it to an absurdity.

O'REGAN J:
I mean, if all the debt on the home is the business debt, and the business is a very valuable business, what's the problem?

MR McCLEARY:
Well, it's that Mrs Preston gets a freehold home and he doesn't.

O'REGAN J:
Yes, but she doesn't have a million dollar business.

MR McCLEARY:
No, she doesn't, your Honour. But something we can take from this loan structure is that there's not much room for borrowing extra funds. If we've got a value on the home of $715,000 and we've got ANZ debt of $735,000, then it looks like the chances of going to the ANZ to raise money are pretty low.

O'REGAN J:
Does the company have no assets at all?

MR McCLEARY:
Well, I'm sure the company has assets, but banks don't –

O'REGAN J:

Well, does it have the ability – what you said before is the only reason it borrows money secured over the house is because it's a cheaper interest rate. Presumably it could have given a general security agreement over its assets and paid a slightly higher interest rate and he would've had a freehold home? That's his choice, isn't it?

MR McCLEARY:

If you look at the assets that are attached, sorry, look at the debts on that document at 305.0847, it looks at a glance like the big value assets have debt on them. For example, I think the, this is a directional drilling company, so the directional drill has got a UDC debt on it of $215,000. I can't answer your question, your Honour. Perhaps an examination of the financial accounts to see whether there are surplus assets that could be borrowed against.

WINKELMANN CJ:

What is 107 Vista Pakuranga?

MR McCLEARY:

That's Pauanui.

WINKELMANN CJ:

Pauanui, it says Paku, but it's –

MR McCLEARY:

No, that's the name of the street.

WINKELMANN CJ:

Paku. Okay.

MR McCLEARY:

And that debt has gone, that 146 has been repaid, because that was part of the settlement with Mrs Preston in respect of… Is there anything else I can assist in respect of the debt?

WINKELMANN CJ:

No, you've left us suitably confused. No, we understand.

O'REGAN J:

Well, no, I think if you accept the 800 figure in the schedule, that's probably all we need to know for the purposes of what we're looking at.

WINKELMANN CJ:

We have that.

MR McCLEARY:

So the last part of my submission is in respect of this further guidance for section 182 and, as I have already touched upon, section 182(1) does make the discretion wide and the legislation, in my submission, is deliberately wide, evidenced by the language that's used. The Court may take into account any other matters which the Court considers relevant, and I must submit my concern at how much concentration has been put on the non-financial contributions of a spouse as a relevant matter when there are such a wide variety of matters that could be considered in respect of a claim under section 182 and, as the cases have shown, in *Bethell* Justice Nation went through 16 different matters when considering whether or not to exercise a discretion, then subsequently in *Wylie* the same judge considered just two and they were entirely different.

So in my submission that flexibility needs to remain so that judges do have the ability to be able to consider all aspects, particularly in circumstances where we're faced with non-traditional family units, such as blended families, second marriages, children from prior – if we put a list together and give it to judges, how are we ever going to catch everything?

WINKELMANN CJ:

But having said that, the Court does mention some considerations in *Clayton*. Can I just ask you two things? Firstly, what do you say about the approach

that Ms Bruton has suggested that the Court puts itself in the mindset of a trustee who's looking after the interests of this person as a beneficiary?

MR McCLEARY:

I think that that's a responsibility that a trustee would have to take and I accept that that's a fair submission but, again, it has to be balanced against the circumstances. So a discretionary beneficiary who has perhaps only been in the marriage or on the scene for a short amount of time or for whatever other great number of factors is a matter that the trustee is going to have to take into account. At that point in time, it would be the trustee, I guess, sitting in the position of the decision-maker rather than the Court in exercising his or her –

WINKELMANN CJ:

No, no, but Ms Bruton's suggestion is that a useful guide for the Courts might be to create an intellectual kind of a framework as if they were the trustee exercising this because we know the trustee won't be exercising discretion.

MR McCLEARY:

Yes. Yes, I accept that, but I don't see any harm in that approach, but, once again, it's one factor.

WILLIAMS J:

What do you mean "it's one factor"?

WINKELMANN CJ:

Well, no, because I'm suggesting there's a guiding framework. That's what – I'm not suggesting –

MR McCLEARY:

As opposed to an independent relevant factor?

WINKELMANN CJ:

Yes. I'm not suggesting there's a guiding framework. Ms Bruton is suggesting it as a guiding framework.

MR McCLEARY:

Yes, I don't oppose that submission. I consider that if the Court were to consider what the trustee would do then that's not wildly different to what the Court is probably going to do anyway in exercising its discretion, taking into account a range of matters, considering needs, considering circumstances, where the assets came from, et cetera. Presumably they are all considerations that a trustee would make when they're assessing whether or not to make a payment to a beneficiary, so it's swapping out one decision-maker for another.

WILLIAMS J:

Yes, you wouldn't be a very wise trustee if you didn't take into account a marriage of short duration.

MR McCLEARY:

Absolutely.

WILLIAMS J:

Or the needs of children from the prior marriage and so on and so forth. Just one way of thinking about it, I suppose, to –

WINKELMANN CJ:

Can I ask you my second question? Second question was, and this is just taking you back, I said to you that in *Clayton v Clayton* the Court did give indication about relevant considerations and Ms Bruton has had another go at that in her paragraph 4, relevant factors, so just inviting you to comment on those.

MR McCLEARY:

In respect of the indicators that were given in *Clayton*?

WINKELMANN CJ:

These are in her chart which is…

O'REGAN J:

It's also in paragraph 38 of the submissions.

WINKELMANN CJ:

I think it's a different…

O'REGAN J:

No, it's the same –

WILLIAMS J:

Same list, yes.

WINKELMANN CJ:

Is it? Okay. I thought it was slightly different but – anyway, the list which I'm working from in paragraph 4 but is it the same as in the submissions?

MR McCLEARY:

Are you referring to the suggested list of relevant factors?

WINKELMANN CJ:

Yes. They do look exactly the same so – I'm not sure they are exactly the same because I haven't done a word check. Scanning, they look exactly the same. So it's paragraph 38 so it's not new to you.

MR McCLEARY:

Yes, so your question is what do I say in respect of the –

WINKELMANN CJ:

As to their relevance. I know you oppose the notion of a checklist and certainly the Court in *Clayton* said yes, the checklist is not a good idea because so many factors won't be relevant in some cases, et cetera, and, as you say, Justice Nation's approach in those two cases rather makes the point,

but I just wondered if you had any comments about these relevant factors as to whether you say they're relevant or irrelevant and whether you'd add others as possibly relevant in a non-checklist way.

MR McCLEARY:

Look, I certainly don't consider that any of the suggestions that are made by Ms Bruton in this list are irrelevant, so I think it's responsible to acknowledge that they are all potentially relevant factors, but I couldn't add to them or subtract to them on the spot, your Honour, because it would depend on the facts of the case. I'm not sure what circumstances may arise before the Court in the next one year, two years, 10 years, as to whether this list will need to be extended.

WINKELMANN CJ:

But for the facts of this case?

MR McCLEARY:

Yes, I think that's fair.

WILLIAMS J:

You would've – no, you've got source and character of the assets. Well, I'm not sure that in that list there's the, at least not obviously, your point that in fact you say these people lived financially separate lives.

MR McCLEARY:

Correct, thank you, your Honour.

WILLIAMS J:

I don't think that's in the list.

MR McCLEARY:

Yes, that's a point I would add.

WINKELMANN CJ:

And how do you say that's relevant to the exercise of the discretion as against the simple delta between B and C?

MR McCLEARY:

Not necessarily. It's just it's necessarily about B and C but if – in respect of 182(3), other matters, I would consider it would be a matter that would be relevant. I mean this is a, to use that expression that I think has already been thrown around today, having your cake and eating it too. If there was a deliberate and structured effort to keep your financial interests separate and compartmentalised and then at the end of the relationship there is – and that structure is entered into consciously, it's not a matter of asset protection by stealth or someone being blindsided, if that's what everyone believed, that assets were protected or structured in a certain way and then the relationship then ends, the marriage is dissolved and then one party seeks relief under section 182, then I think that's most certainly a relevant factor.

WINKELMANN CJ:

So is that –

GLAZEBROOK J:

Wouldn't that usually be that you wouldn't have a disparity between B and C because they've kept everything so separate that there wouldn't have been a disparity between B and C because they've kept it separate and B went to – one trust went to one side of the family and the other trust went to the other and everything was kept separate? I would've thought that if they'd done that then effectively you wouldn't have a disparity between B and C.

MR McCLEARY:

I'm not sure whether that would necessarily be the case. If…

GLAZEBROOK J:

Well, how can you keep something separate when you don't keep it separate?

MR McCLEARY:

Well, I guess this is where the difficulty arises where there is a fudging of the beneficial interests in respect of parties living in houses and living on farms. So if, for example, Sam Bethell had purchased his – settled the Stumpy Trust prior to meeting his wife, Diana, and hadn't settled the Timpendean Farm on that trust because it was already there, so let's say there was no nuptial settlements, in reality is someone like Diana Bethell still going to live on that farm and graze her ponies and have a life in that homestead. There's no nuptial settlement and perhaps no expectation. She may have her own trust. I think that if parties have compartmentalised financial arrangements, there is still a likelihood that there is going to be some blending of their lives in sharing each other's assets whether or not –

WINKELMANN CJ:

Yes, so I don't know if it adds anything to the B and C delta, but you think – why would it add anything to it?

MR McCLEARY:

I'm not sure if it necessarily does add anything to it, and I'm not addressing the Court on the B and C delta, I'm considering this more as in a section 182(3) other matters.

WINKELMANN CJ:

I know, in terms of the exercise of the discretion, that's what I'm asking you because I'm just trying to think, I'm not arguing with you. I'm trying to conceptualise how it's relevant. I'm seeing if you can help me with that.

MR McCLEARY:

In respect of parties being financially separate?

WINKELMANN CJ:

Yes, why does it bear on the exercise of discretion?

MR McCLEARY:

It was just off the back of Justice Glazebrook's comment about, surely if parties are going to be that financially separate, then there will not be a delta.

WINKELMANN CJ:

Yes.

MR McCLEARY:

My point is that I think there still could possibly be a delta of expectations, even if they are financially separate because of the mere fact that there is a wife or there is a husband or there is a shared house.

WILLIAMS J:

Well, you know, these days you could have situations where blended families and second marriages living in separate households and just sort of visiting. That's not unheard of.

MR McCLEARY:

No, that's not unheard of.

WILLIAMS J:

And would probably not create your delta and it's going to be a question of degree as to how much separation indicates there's no expectation of continued reliance on the other if the relationship fails. It's just a common sense approach to facts, isn't it?

MR McCLEARY:

Yes, but it invites a dangerous territory in my submission, your Honour, because at that point in time what protection does a trust structure offer the beneficiaries of that trust? I mean, if the trust –

WILLIAMS J:

Well, that depends on the facts. In some cases, none.

MR McCLEARY:

Absolutely, it does.

WILLIAMS J:

In some cases none and in many cases, lots.

MR McCLEARY:

Yes.

WILLIAMS J:

That's what section 182 seems to require.

MR McCLEARY:

And to answer your question, the addition on the list, difficult to get my head around how much that may or may not affect the B and C delta –

WINKELMANN J:

Yes, it's hard to see anything above the significance of the B and C delta of the separate lives but you're just saying there maybe something?

MR McCLEARY:

There may be something in respect of it being another matter.

WINKELMANN CJ:

Separate ring-fencing.

MR McCLEARY:

And this is where I think, you know, there has potentially been a misunderstanding with the likes of the lower Courts in respect of the need to try and establish that B and C delta gap and certainly it is my position and my interpretation of *Clayton*, a difficult to argument to run against the decision-makers of that decision, but that step 1 was a nuptial settlement, step 2, is there a delta, is there a gap? Step 3, what are the relevant matters? If Justice Fitzgerald did make a mistake, which I say that she didn't because

her interpretation of that analysis of the B and C delta is the same as mine, but perhaps that is where it is out of step and that there is a misunderstanding as to the importance of that B and C delta.

WILLIAMS J:
And you would say, wouldn't you, that looking at the countervailing factors even if that step was skipped it's not going to make any difference in the end?

MR McCLEARY:
That is absolutely my argument, your Honour, and I think that's what has transpired in the judgments. All of the authorities cited by, with the exception of *Little*, all of the authorities cited by the appellant have been successful cases and, you know, in the like of *Bethell* there was an incredibly in-depth analysis. It was very arithmetic and the Judge in that case clearly wanted to make sure that there was money sitting on the right side of the ledger in respect of each party which is why that analysis was so detailed, and I submit that it is quite possible, as was maybe evidenced in *Wylie*, that where there is no remedy then that analysis is not necessary, but I am anxious not to get back into that argument which I think that we have traversed very thoroughly.

WINKELMANN CJ:
Does that take you through everything, apart from relief?

MR McCLEARY:
Yes, it does, your Honour. My last comment in respect of this case is that this might be a situation that this Court commented on in *Ward* at paragraph 59. It might be a situation that even though the Family Court and the Court of Appeal may not have articulated the principles in the same way in which this Court would have articulated them, when standing back and looking at a *May v May* analysis would the decision be any different even if the approach was not the same?

I have nothing further unless there are any questions.

GLAZEBROOK J:

Can I just check with you, if we're not with you on this, did you have anything to say about quantum or is what you accept in relation to the 192,000, does that mean that you would, if we were inclined to make an order, you would accept the order that they're seeking? I have to say for myself I don't see that an order would actually be related to any of the things set out in paragraph 99 because we're actually looking at a 182 analysis rather than anything to do with that, and I'm not saying whether we're decided one way or the other, it's just that if we are making an order do you have anything to say on quantum? I suppose I should have put that better that way.

MR McCLEARY:

There is a gap in the quantum to the extent that my instructions are that there is an acceptance of an equity value of 1.5 million and there was attempts to try and get agreement on that pre-appeal, but in any event we're not miles apart so Mr Preston and Fishers say the equity is 1.5 and the appellants say that it's 1.57, so we are certainly within range as far as that's concerned and I can't take that point any further. In respect –

GLAZEBROOK J:

So a difference between 1.5 and 1.57, is that what you're saying?

WINKELMANN CJ:

Is it 1.57?

MR McCLEARY:

Yes, so a $70,000 point of difference in that regard and, look, it's going to be –

GLAZEBROOK J:

And you also accept the ratio?

MR McCLEARY:

It would've been an possible, well, it would be an impossible task for the Court to try and revalue this without having to send it to a lower Court which is why we are all in agreement that we want this settled now because otherwise we're going to have to go back and get Pauanui valued and The Fairway valued.

GLAZEBROOK J:

No, no, that's what I was trying to just get an idea. So you accept the ratio. The accept the equity value.

MR McCLEARY:

Yes, we do. Well, we are close to accepting equity value.

WILLIAMS J:

Within 70K.

O'REGAN J:

Yes.

MR McCLEARY:

Beg your pardon, Sir?

GLAZEBROOK J:

Do you have anything to say about the quantum that they are seeking, and as I said, not necessarily the basis upon which they are seeking that but…

MR McCLEARY:

Well, no, we don't have any issue with the quantum because that's a matter of fact. The reality is there is $192,000 sitting in a trust account and we agree that 101,000 belongs to the Grant Preston Family Trust as of now and we agree that 90,000 belongs to Huntbos right now. So no, those values are agreed.

WINKELMANN CJ:

No, but then they ask for relief –

GLAZEBROOK J:

So they're basically asking for 131 and 102.

WINKELMANN CJ:

Yes.

MR McCLEARY:

Well, that's just the way that the relief is structured and we obviously, you know, we reject that. Our position is that there should not be any relief granted.

GLAZEBROOK J:

Well, I understand that but say you lose, say we're saying that some amount should go under section 182.

WINKELMANN CJ:

In other words, do you have an alternative model of relief? Do you think there's some other – say the Court reached the point where it was satisfied the discretion was enlivened so there was a delta and it looked at it and thought there were factors justifying relief, do you have an alternative scenario on relief to that which has been put forward which is 141,000 plus 102,000 which is 243?

MR McCLEARY:

No, I don't, your Honour. I mean the short answer to that is no order, is zero.

WINKELMANN CJ:

Zero. Okay.

GLAZEBROOK J:

But say zero is not an option.

WINKELMANN CJ:

I think we'll give it a –

GLAZEBROOK J:

Do you say it should be 243 or some other figure, and if so, why? And I'm not making any comment on whether zero's an option or not.

MR McCLEARY:

Well, no, no, I appreciate that. Look, something that we are very mindful of in respect of any award that is made is costs because the costs have been enormous.

WINKELMANN CJ:

I was going to take you to costs next because you've made submissions on the basis that you're successful. What do you say about costs if you're unsuccessful at this level?

MR McCLEARY:

At this level, if we are unsuccessful?

WINKELMANN CJ:

Yes.

MR McCLEARY:

Well, given so much of this argument in this appeal has been centred around further guidance on section 182, then if we were unsuccessful then I think it would be very unkind to Mr Preston to have to wear a costs award in respect of an argument which, as I put in my written submissions, was not really his.

WINKELMANN CJ:

Most cases taken at this level are in that form.

MR McCLEARY:

He was making decisions in relation to settling with Mrs Preston pre this hearing and in reliance on *Clayton*. Justice Fitzgerald obviously applied what she considered were the correct principles in respect of *Clayton*. I'll just repeat the submission, your Honour, it would be – this has become an argument of public interest and potentially reshaping the ways the courts approach section 182 and I think it would be very unfair for Mr Preston to become collateral damage.

WINKELMANN CJ:

Why I asked you is post Ms Bruton, but I'm going to ask her shortly as because, of course, costs are very straightforward if Ms Bruton's client loses but less straightforward if your client loses because he's got the benefit of costs at the two lower levels. So in terms of those two lower levels, you would, what, just say we remit them for reconsideration at those levels?

MR McCLEARY:

Well, we will have to go through and analyse those costs because those costs were – the original cost order was about $147,000 against Mrs Preston inclusive of disbursements. That's been upset recently by the Court of Appeal finding that Mrs Preston was entitled to buy Pauanui at the cheaper, earlier valuation back in 2014. So they will need to be put – and Justice Fitzgerald has already ruled on those. So, there's a realignment as far as those are concerned. Then, unfortunately, we are going to have to go through and dissect the costs. If we were unsuccessful today, then there would have to be a dissection of the costs that were awarded in the High Court because some of those costs relate to a wide range of cause of actions that were brought by Mrs Preston. I mean, there were 10 distinct points in the Court of Appeal.

WINKELMANN CJ:

Yes.

MR McCLEARY:

And you're obviously aware of the wide breadth of actions that were brought in the High Court.

O'REGAN J:

So would those courts need to reconsider?

MR McCLEARY:

I hope not. Justice Fitzgerald set out a schedule. So there is possibly going to be some argy-bargy in respect of some overlap in regards to the, you know, the different parallel proceedings, but I would be hopeful that we would be able to sort that out. I'm even more hopeful that we won't even have to have that conversation.

O'REGAN J:

Of course.

WINKELMANN CJ:

Yes, we know you are, yes. So just be clear, the reason I asked you this question is because of the – it's much more straightforward if Ms Bruton's client loses but I will ask her when she replies.

MR McCLEARY:

If I can just take that issue of costs back to your enquiry, Justice Glazebrook, as in, well, what number do I have in mind. What number does my client have in mind, I'm not prepared to put that to the Court, but what I would perhaps invite the Court to look at is the respondent's settlement offer in August 2018. It's set out in the High Court judgment. There was an offer of $60,000 in respect of The Fairway. And it may be of some interest to the Court to know that the rationale at that time was actually not in respect of section 182, it was in respect of potentially a constructive trust success against The Fairway. And the second part was $7,000 in respect of Eastern Bays Thrusting, so Mr Preston made an offer of $67,000 which was rejected. Justice Fitzgerald said it was a reasonable offer and it should have been taken.

The consequences of any award over and above $67,000 is going to be a double punishment against Mr Preston because if he does not succeed in this appeal and an award is made that is greater than $67,000, then his Calderbank status of that offer back in 2018 is lost. That is as far as I can – I certainly don't have instructions –

WINKELMANN CJ:
Yes. We don't normally have Calderbank offer shaping the Court's relief though. Not as the principal relief, only as to costs. All right. Thank you.

MR McCLEARY:
Thank you, your Honour.

MS BRUTON QC:
Your Honours, I don't really have anything to reply on unless I can assist the Court on costs, if you want me to, and also on the numbers in the form of relief that we're thinking. I think you've understood what we're thinking, but at one point one of your Honours said: "We're not looking at orders in terms of paragraph 99." So I just wanted to clarify that, in fact, we are and my friend's schedule is tied to paragraph 99. So the relief sought basically is all the money in the solicitor's trust account from the sale of Pauanui, the 192,000 goes over to Mrs Preston and –

WINKELMANN CJ:
And of that 102,000 is Mr Preston's.

MS BRUTON QC:
Yes, yes, and then in addition there's a payment to her, or Huntbos, however, it's framed of 141,000 which will give her, or Huntbos, 337,500 which will enable Huntbos to hold Pauanui debt-free. So the effect on that on Mr Preston and his interests, if you look at the –

O'REGAN J:
You need to stay near the microphone or the transcriber will lose you.

MS BRUTON QC:

Sorry, if you look at his numbers on 305.0847, somehow he'd have to borrow the 141,000, but, look, I accept it's all a bit of a guess. But everyone's keen to get this finally resolved. So when you look at these numbers, they obviously don't have up-to-date valuations of The Fairway or up-to-date valuations of the business, so in my submission finding one of them 141,000 against this level of borrowings and the asset pool of that value is not going to cause Mr Preston significant hardship, particularly bearing in mind that passage I took you to from his evidence-in-chief at the start where he said: "The business is healthy, we're running two drilling crews now and things have improved since the split occurred." So, can I provide your Honours with any further assistance on that aspect?

WINKELMANN CJ:

Relief? No, not of me. Costs, did you have anything to say about that?

MS BRUTON QC:

Well, what I've submitted at paragraph 99 is Mrs Preston is to receive costs in relation to the section 182 proceedings in the court below, so that is the current position. Frankly, I can take instructions, I mean, if she's successful in this court she should certainly get costs in this court in my submission because –

WINKELMANN CJ:

Yes, but the point is, the lower courts just to remit it for reconsideration.

MS BRUTON QC:

Yes, well, I, look, I'll need instructions on this. So I might need to put in a memo, but frankly, I mean, my friend's right. It's been a tragedy on all sides. I mean, it does make me raise my eyebrows to hear the submission about kindness and it would be unkind of this Court, but if there had been a bit of kindness at the start of this thing, we wouldn't be here. But we are, so frankly, and as I say, I don't have instructions so I might need to file a memorandum, but I actually think the way through this is if the Court were to grant the relief

that Mrs Preston is seeking in terms of the 243,000 that should wrap up costs in the court below as well, then they both get a clean outcome, we don't have any more argument. Mr Preston in his interest have got to raise a 141,000 and they both can finally get on with life. But that may not be satisfactory from your point of view because I'm not suggesting that if she gets less than the 243,000, but in my submission that's a sensible way through it.

WINKELMANN CJ:

So, leave the costs where they fall? You'll need to file a memorandum on it or else you could just leave the costs on the basis it's remitted to the lower court and you can deal with that because it's always open to you to waive reconsideration.

MS BRUTON QC:

Yes, that may be more sensible. Finally, maybe we can sort something out between us. But when you look at that kind of result in the overall scheme of things, Mr Preston's got a nice house in Whakatane, yes it has some debt on it. He's also got, through his interest, a valuable business which by all accounts is doing well. Mrs Preston, through her trust, got a bit of, some land in Pauanui, some financial security and on the numbers that we've got, that works out, including Pauanui and the pot, in terms of the question you asked my friend, Mr Hutcheson, Justice O'Regan, that gives Mrs Preston and her interest 22% of the pool, so it's nothing like 50, it's not a grand march, but it recognises that she was a beneficiary of the this trust, they combined their lives for six or seven years and they both end up with some property and also provides some guidance for other cases.

O'REGAN J:

That's including the business?

MS BRUTON QC:

Yes.

O'REGAN J:

You're including the whole business, not just the accretion in value of the business –

MS BRUTON QC:

Correct, that's the whole business. So unless I can assist the Court further, those are my submissions in reply.

WINKELMANN CJ:

Thank you, Ms Bruton. Well, thank you counsel for your very helpful submissions. We'll take some time to consider the issues. We will now retire.

COURT ADJOURNS: 15:32 PM