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IN THE SUPREME COURT OF NEW ZEALAND SC 65/2024

I TE KŌTI MANA NUI O AOTEAROA [2025] NZSC Trans 2

BETWEEN **BARTHOLOMAEUS ROLAND LASSNIG**

Appellant

AND **QIAN ZHOU**

First Respondent

AND **QIAN ZHOU AND BARTHOLOMAEUS ROLAND LASSNIG AS TRUSTEES OF THE LASSNIG FAMILY TRUST**

Second Respondent

Hearing: 04 March 2025

Court: Glazebrook J
Ellen France J
Williams J
Kós J
Miller J

Counsel: D Zhang and E Tie for the Appellant

V A Crawshaw KC, L L La Mantia and
T M McGoldrick for the First Respondent

CIVIL APPEAL

MR ZHANG:
Ma'am, I am here with my junior, Mr Tie. We appear for the appellant.

GLAZEBROOK J:
Thank you.

MS CRAWSHAW KC:
E ngā Kaiwhakawā, tēnā koutou, ko Ms Crawshaw tōku ingoa, kei kōnei māua ko Ms La Mantia, rāua ko Ms McGoldrick, mō te kaiwhakahē Ms Zhou.

GLAZEBROOK J:
Tēnā koutou. Now before we start, the Court would like you to concentrate on three particular questions: so what the parties' position would have been in a continuing marriage, how, in this case, should the failure of the premise, that is a continuing marriage, be factored in, and, third, what, if anything, and I realise that will depend on who's talking, did the High Court and the Court of Appeal get wrong in the exercise of the discretion, and just to note that we've read the submissions and so what we want you to do is to concentrate on matters of principle and high level rather than getting bogged down in the detail, and we obviously have your written submissions for that detail, and we would expect if we do that, that this shouldn't take the whole day so we want the matters of principle and high level submission rather than detail. So, did you get all of those? I tried to go slowly enough to allow you to. So just to repeat, it's what the parties' position would have been in a continuing marriage first, however, in this case should the failure of that premise, ie, continuing marriage be factored in and then what did either the High Court, depending on which side we're

looking at, or the Court of Appeal get wrong in the exercise of the discretion. So thank you, the appellant.

1005

MR ZHANG:

May it please the Court. Based on Justice Glazebrook's comment just now, I take it, it's not necessary for me to go through every aspect of my submissions. I will begin addressing these three questions and in the mix I'll probably be addressing some aspect of what we explain in our submissions.

In terms of the first question, the parties' position, if this was a continuing marriage, we say that given the way the parties had explained how they got into the Trust in the first place and given the wording of the Family Trust itself, where both parties are primary beneficiaries, this was intended to be a vehicle the parties establish wealth and life together. They obviously begin by speculating on property. Within the span of a year or so they purchased three properties. Now, they are not individuals with a high level of salary income. So it follows that it will be relatively flexible whether they will eventually or at any point in time sell some properties, develop other properties, moving money around, like many property investors do. Should the marriage continue, they will simply do that and reap the benefit, the profit, of such an exercise.

Where we strongly disagree with the Court of Appeal on this point is that we say there's nothing in this case that indicates that the parties would only reap the profit at retirement age. That's something the Court of Appeal was fairly firm on. They say they find the parties' intention was such that they would simply continue to service mortgages of the three properties and not get anything back until eventually they retire at some long distant future and they say in the short-term and medium-term there's no prospect or likelihood of them getting anything back from the Trust had the marriage continued on. We say there's really just no basis to say that. There is no real evidence to support that notion and that's just not how people in their shoes speculating properties, develop properties do.

During the years of the parties' marriage and subsequent few years, the property market didn't really see any short-term, sorry, any medium-term or long-term downturn that we may be seeing one now following 2022 but the point is that property speculators do what they do as the market changes. It is always flexible. I wonder if that answers your Honour's first question.

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GLAZEBROOK J:

If there were a basis for saying that you only shared the profit at retirement age, do you accept or not that that might have made a difference?

MR ZHANG:

It would probably depend on what is that basis and how strong it is. Let's say, for argument's sake, at some point in time they had a discussion and they said: "Wouldn't it be nice if we sell this when we retire. We'll have a large pile of cash then." So that may be taken as a basis to say so but there would still just be a relatively flexible view one would take on this life change and parties would move as is around. If there was some sort of otherwise very powerful binding agreement in place, that would potentially change things, but that would be very much against the nature of a discretionary family trust.

WILLIAMS J:

What if it was called the Lassnig Retirement Trust?

MR ZHANG:

That would be, as Justice Glazebrook said, something indicated there as a basis to say so but then again we've got to look at it in terms of the Trust. Does the term of Trust limit the trustees' ability of these current trustees from move trust properties around before retirement age. What we have here is a very standard family trust. Trustees have absolute discretion, the two parties are primary beneficiaries, they are meant to enjoy the benefits and profits of the Trust at any time should they please.

We may move back to this topic as the argument develops. So now quickly moving on to the second question, should the failure of the premise be factored in? That is a point that Ms Zhou drives very heavily throughout the course of these proceedings. She says: "I got into the Trust with the expectation of a continuing and loving marriage. I didn't get that. That's a failing premise so something should happen in my favour." That's essentially the argument. That can really be said about every single marriage breakdown. We only involve 182 if there's a divorce so in what every single 182 cases people marry in the first place. We can't simply assume that everybody, every person that enters into marriage, have this hope of having a long-lasting and loving relationship and it has to break down in order for there to be a dissolution of marriage, in order for there to be a 182 application in the first place. So, if this is a valid argument, if it is something to be taken into account, it has to be taken into every single 182 cases, then if the same thing is taken into account in every 182 cases, then essentially it's not to be taken into account because it's not really a factor that differentiates any case to another.

GLAZEBROOK J:

But perhaps if I – we tried to phrase it neutrally but perhaps if we can say, if the first question is answered that there was an expectation of a 50/50 split, for example, what factors would be taken into account to mean that that wasn't appropriate and in this case the main factor, and a factor that wasn't taken into account by the Family Court, was the short-term nature of the marriage. So, that was what we were getting at in that second question. We didn't want to put it quite in those terms because we don't want to prejudge anything in respect of it and use terminology that we wouldn't use in the judgment that that might just help clarify for now.

MR ZHANG:

Thank you, your Honour, that's very helpful and that's understandable. We actually made this very argument in the High Court. We didn't make this argument in the Court of Appeal because by then we – the landscape of our argument changed slightly so, in fact, right before this hearing I looked at my argument on this very point in the High Court. Now I haven't yet given enough

thought about how short duration should apply to 182 cases generally. We're only focusing on this case.

1015

There is a very unusual feature about this case that the Court of Appeal didn't pick up. That is, now, in the normal run of short duration cases when it's time for parties to split the Trust assets, or quite often in relationship property, you know, in cases, the argument against equal sharing is that the party who brought less into the relationship is essentially asking a share of the wealth that was accumulated by the other party before the marriage. So one would often say in these cases, well, there hasn't been enough time lapsed for no financial contribution to catch up to the monetary contribution, therefore you shouldn't get half.

The interest in one of the cases that's been cited in this case happened that way. That is the *TN v AK* [2019] NZHC 2466 case. So we settled the High Court part. What happened in the Family Court was that same facts, parents contributed $350,000 to the son to buy a property, son bought the property with girlfriend, girlfriend then split from the son arguing to have a share. So because it was a relationship of short duration, clearly the girlfriend didn't contribute sufficiently financially and what she's really asking is a cut of the money that really originally came from the parents, and the Family Court does the orthodox thing. Well, the Family Court first didn't find that the parents had an interest in the property, it wasn't a loan and wasn't a resulting trust interest which was overturned on appeal. So the Family Court considered this entire contribution to be the son's and they say, well, the son contributed a lot more than the girlfriend financially but he didn't contribute as much in the non-financial contributions, but because there's a shorter duration the non-financial contribution aspect must weigh less, so the Family Court's decision was something like either 70/30 or 75/30.

I explain this only to illustrate why in the normal run of cases short duration should mean less sharing because it's the party who didn't make the financial contribution asking a cut of money accumulated by the other party, and this is

with, unusually about this case, in this case both parties' financial contributions were meant to be clawed back. Ms Zhou, in her personal capacity, is a lender, is a creditor of the Family Trust. By the time of trial we have about 1.2 million on the ledger, and Mr Lassnig, in his personal capacity, is also a creditor to the Trust, so his ledger was about $280,000.

So what the parties are really fighting over in this case is not clawing back what they put in but the residual value. The residual value, how did that come from? That comes from inflation, purely lapse of time. They bought these properties in 2013 and 2014 and now we're in 2025. The value of the property has gone up a lot, and that chunk is what they're really fighting over.

So the normal rationale against equal sharing in short duration not only doesn't apply here because they're not really fighting over one party's contribution, one party's money pre-marriage, in fact we're only fighting because sufficient amount of time had lapsed, inflation has taken effect, the property values had gone up. We made this point in the High Court. What if the parties split the day after they purchased Young Access and what if Justice's decision was swift, we're able to get a judgment the next day? Nobody would be fighting over "should you get 20% or should you get 50%" because there's no value to fight over. They would literally just sell the properties, pay back the bank, claw back the money that they just put in. There would be nothing to share. If we're talking about a month after Young Access was purchased, inflation may have had a tiny amount of effect. We may be fighting over $2,000, $5,000, and nobody would really argue over "should you get 80%, should you get 20, 50%". We're really only arguing because with the lapse of time that extra chunk has grown from well nothing into I think last we counted about $4 million and, in fact, as of 2022 when they had this Family Court hearing, it had already gone up significantly. So that is why we say in this case short duration normally shouldn't count against Lassnig. One must recognise that Ms Zhou is only fighting because the length of time that had lapsed that created this extra value that's worth fighting for.

1020

GLAZEBROOK J:

Neither party has sought interest. Do you have a comment on that in respect of what you've just said about loans? I mean, obviously they weren't loans, interesting bearing loans –

MR ZHANG:

No.

GLAZEBROOK J:

– one assumes for tax reasons?

MR ZHANG:

Yes. Right. We –

GLAZEBROOK J:

I mean I don't know whether that's the case but they weren't interest bearing.

MR ZHANG:

Well, they didn't. I think they just agreed that the loans, Ms Zhou's 1.2 million and Mr Lassnig's 280,000, didn't attract interest. I think your Honour's question is to what extent should any weight be given to that. Do I understand your question correctly?

GLAZEBROOK J:

I just asked whether you had a comment on – we know they're not seeking interest but did you have a comment on it?

MR ZHANG:

Whether that should be factored into the exercise. I suppose there are two views about this. It really comes down to value judgement of each judge. Parties go into relationship/marriage, as in a family trust, certainly with a notion of romance and hope and it is entirely understandable when parties say: "You know what, I want to make this marriage work and for that I'm willing to forego interest claim. I wish to lend some money and I'll be able to get it back but I

don’t really want to make an interest claim because that just makes us feel like strangers.”

This arrangement of interest-free loan which often pop up in family cases in the form of parents loan to children, I personally have done many cases on that front. I don’t think it's ever questioned why parents would lend to children interest-free loan. It's obvious. You’ve got children, you help, you want to make them succeed in life, you want to give them a head start. And I don’t recall in any case somebody, when somebody says: “Well that wouldn’t mean the family,” sorry, “the parents should by virtue of foregoing the interest now have an interest in the property itself, some form of resulting trust arising from foregoing the interest on time, value or money.” So I'm saying if one accepts this notion that people are willing to sacrifice something when they get into a relationship, it's simply a willing sacrifice. It really should not factor into the 182 exercise because that’s basically you want to work, you give it a try, if it don’t work, that's that.

I've said there's two views to this because one could also say in response that well there is some value, you know, which we recognise in our submissions. It is of some value. It probably is wrong to say well that amounts to no contribution whatsoever, and if it is a contribution of some sort then under the authorities we’re working with, such as *Preston v Preston* [2021] NZSC 154 and *Clayton v Clayton* [2016] NZSC 30, that contribution is a factor for the Court to consider in the stage 3 access of discretion part. But we would still say in the grand scheme of things the foregone interest is relatively small, something not to the extent the Court of Appeal assigned the weight to. The Court of Appeal is essentially really saying because Ms Zhou forego her interest she should get 78.5%.

KÓS J:

Well, at paragraph 94 of your submissions you suggest there should be some recognition of foregone interest and the margin between the contributions, the loans, the two, is about a million dollars and the period we’re dealing with is

about seven years and the average deposit rate during that period was 3.7%. That's worth about $275,000.

1025

MR ZHANG:

Yes. We would accept if the Court was to treat it as a contribution, give some weight, that's the right way to go, not 78.5% was this – sorry, other way round – 81.5% was this, 18.5%.

I wonder if that answered the second question?

KÓS J:

Well, I think it sort of has in answer to the second question that Justice Glazebrook asked. You have raised two points. First, that short duration here shouldn't count against your client and, secondly, that perhaps there is a contribution in relation to foregone interest has should count. Is there anything else you want to say in relation to the second question?

MR ZHANG:

No, I don't have any. I will move on to the third question.

WILLIAMS J:

Your starting premise, just on the second question, your starting premise though is that interest ought not to be included in the calculation? You said that's just the way it goes?

MR ZHANG:

Yes.

WILLIAMS J:

And what's your basis for saying that? A romantic relationship shouldn't attract interest?

MR ZHANG:

Well, if parties were willing to make that sacrifice at the start and say: "I'm happy to forego this to make this work," then one should be to some extent bound to the promise or the premise they entered into. I draw analogy to that with what I explain about parents often lend interest-free money to children.

WILLIAMS J:

Sure, yes. Hard to divorce your children, I've found.

GLAZEBROOK J:

Well, you just say if they didn't put interest in in the first place there's no need for it to go in when you're looking at the differential contributions, is that the argument?

MR ZHANG:

Yes, so –

GLAZEBROOK J:

But it is – that may be relevant to the discretion?

MR ZHANG:

Yes, I say it's – whether they should be taken into account, given the factual basis of how this panned out, it really is your Honours' value judgement. If your Honour is of the view that adults should be bound by the promise they made, well, then it shouldn't count. If your Honours' view is, well, notwithstanding they made the promise, it didn't work out, we want to do some justice between the parties, then it should count for something.

GLAZEBROOK J:

But at the discretion stage I think is what you're saying, at that third stage?

MR ZHANG:

Yes.

ELLEN FRANCE J:

And the more minimal amount rather than the amount the Court of Appeal would have attributed to it.

WILLIAMS J:

So you start with an equity position of 50/50 and then you apply your discretion, you say?

MR ZHANG:

In the context of this case you do because the way the parties set up the Trust in the first place was on the Trust deed, so unlike cases, for example, *Preston*, where Lady Preston was only just ever added as a discretionary beneficiary half way through, here the parties jointly made the Trust together and put money up front and agreed they would claw back what they put in. This is a very strong feature in our argument that we say that the Family Court and High Court correctly recognised. By being able to claw back their contribution, it really equalises their contribution. I accept the Court of Appeal disagreed with us and that's why we're here.

KÓS J:

Well, it equalises apart from the interest element.

MR ZHANG:

Yes.

WILLIAMS J:

If it has to. Your starting position is it doesn't have to but if it has to then you'll live with that?

1030

MR ZHANG:

Yes.

If we now move to the third question, what did the Court of Appeal get wrong in the exercise of discretion. As we explain in our submission the promise had been bigger than that because they got stage 2 wrong. This is how the Court of Appeal –

GLAZEBROOK J:
Sorry, the Court of Appeal got stage 2 wrong is it or both of them?

MR ZHANG:
Well they got both of them wrong.

GLAZEBROOK J:
Okay.

MR ZHANG:
But because they got stage 2 wrong –

GLAZEBROOK J:
No, sorry, I just didn't catch whether you were talking about the High Court or the Court of Appeal.

MR ZHANG:
The Court of Appeal.

GLAZEBROOK J:
Starting with the Court of Appeal, thank you.

MR ZHANG:
Because they got stage 2 wrong it shifted the, I suppose, landscape, if that's the wrong word for it, by the time they did stage 3. We say the right way to look at stage 2 is had this been a continuing relationship Mr Lassnig would get it, enjoy all aspects from the Trust, all its profits, all its assets. It doesn't have to be retirement age, can be any time in between, so effectively half. The Court of Appeal's analysis of stage 2 is his expectation can only be getting back the loan that he's paid and a pro rata share of the profit and therefore they say, by

the time we look at stage 3, well not only we're not going to give him any less than that, we are going to give him a little bit more, bumping him up from 18.5 to 20%.

KÓS J:

This is the analysis that's repeated in the Court of Appeal's decision describing the difference between B and C as being negligible?

MR ZHANG:

Yes.

KÓS J:

Which is an analysis, I have to say, I have some trouble with and I see this question 3 is one actually it's more directed to Ms Crawshaw. I say that because the question for me is what the High Court did wrong. We know the Family Court went wrong because it didn't take account of short duration, although you may say actually the Family Court did land on the right position there, but then its exercise of discretion was modified by the High Court –

MR ZHANG:

Yes.

KÓS J:

– and the question for me, which is really not for you but for Ms Crawshaw, is what the High Court did wrong in the exercise of its discretion because to interfere with that exercise of discretion the Court of Appeal had to identify an error of law.

MR ZHANG:

Yes.

KÓS J:

And you I think rather liked Justice Venning's judgment and I don't think you're identifying any errors of law with his judgment are you?

MR ZHANG:

To be fair we were the cross-appellant.

KÓS J:

True, all right. You didn't get very far with that, did you?

MR ZHANG:

No, no.

WILLIAMS J:

You liked it more than the Court of Appeal decision?

MR ZHANG:

Way more, yes. We wouldn't have appealed if there was no appeal. We do stand by our position in the Court of Appeal that Justice Venning didn't need to tamper with the Family Court's judgment. We don't accept the Family Court actually made an error anywhere but, be that as it may, we would have lived with the High Court outcome but given that there was an appeal we may as well just take (**inaudible** 10:33:41) unsuccessfully, as it turns out.

GLAZEBROOK J:

All right, so I think you have said they got stage 2 wrong and that meant they got stage 3 wrong and I suppose what you'd say is if anything, because they got stage 2 wrong and it should have been 50/50, by stage 3 the only things they could take into account are discounting factors, if you like, and you say in fact they shouldn't have taken into account the short-term nature of the marriage but you're willing to live with the High Court which did take that into account, is that…

MR ZHANG:

Yes, that's an accurate summary of our position generally.

1035

GLAZEBROOK J:

Now I know we said to do it at high level but if there's anything in particular in the detail that you want to draw our attention to then obviously feel free to do that because we don't want to make you feel or client feel as though you didn't get a full go at everything.

MR ZHANG:

Yes, your Honour.

KÓS J:

It's been very helpful there, Mr Zhang.

MR ZHANG:

Thank you, your Honour.

GLAZEBROOK J:

Yes, and thank you for being so succinct in addressing the questions.

MR ZHANG:

Thank you, your Honour, for the kind words.

GLAZEBROOK J:

Would you like us to take a short break so that you can decide what you might want to deal with in more detail or are you happy to carry on?

MR ZHANG:

I am happy to carry on, your Honour.

GLAZEBROOK J:

Okay.

MR ZHANG:

Your Honour, I am of the view that we have drafted our submissions as clear as we can, so if I can ask do your Honours have any questions about any aspect of our written submission? I'm happy to address it. It's always difficult to try to

figure out what five judges may not agree with me on my written submission pre-emptively.

KÓS J:

Unfortunately, it doesn't quite work that way.

MR ZHANG:

No, no.

KÓS J:

As the old line goes, we ask the questions.

MR ZHANG:

Yes, yes.

GLAZEBROOK J:

Well, I think sometimes we do, to be fair, sometimes we do have questions on written submissions, but I think probably in this case if there are matters of detail that you think are vital to back up what you've said, because I think, for instance, you say the 50/50 expectation comes clearly from the Trust deed and from I think statements in terms of what this Trust was for as well. So up to you if there are matters of detail you think are vital for us to take into account then please do let us know.

MR ZHANG:

Sure, your Honour. I am going to proceed on the premise that our written submission was okay. So what I will do now is I will address the rebuttals from my learned friend in their written submissions. That's, I suppose, a good use of our time.

I thank my learned friend for responsibly drafting their submission answering our submission. This always makes things easier for everybody. The first rebuttal we have is about their paragraph 4, so if your Honours can turn to the respondent's submissions. Now this is a fairly generally submission. They

say: "Once the jurisdictional threshold provided at Stage 1 of the test is met, it is incorrect to treat the settlements differently. To do so would have the effect of creating different types of qualifying nuptial settlements." Now they say this in response to what we say about why this case deserves a look by this Court. We explained how things went down in *Ward v Ward* [2009] NZSC 125 and *Clayton*, being long marriages, and how things went down in *Preston*, being a relatively short marriage, and here we're saying we have a different type of weight to situation where it is a relatively short marriage but it's where both parties contribute to the assets, and they are arguing that this Court shouldn't bother themselves with different types of nuptial settlement. To that we say this submission can't be right because 182 is a very broad section. It doesn't even limit itself to family trusts. I think it's in one of these three judgments from this Court. I can't remember if it was *Clayton* or *Preston* the Court made the point nuptial settlements can come in other forms, more than just family trusts. So by the very nature of this section there will be different types of nuptial settlements and the deserving ones will deserve this Court give it a look. Maybe one day the Parliament will create a new Act that deals with this vast complex body of law. You need boxes like we have in the PRA but until then the Court is all we've got to look at these issues, to look at these different types of nuptial settlements.

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If we can briefly look at paragraph 9 of the respondent's submissions, now there my friend she's explaining a view of "family unit". The second thing I want to point out is she argues that this marriage here is one that lacked the mutual support contemplated in *Preston* and was of poor quality. To that, my friend says, 67 of *Preston*, we don't think 67 of *Preston* really says this, nor do we agree with the characterisation of the marriage was poor quality. For the proposition that marriage was of poor quality we've got footnote 14 and within footnote 14 the – Ms Zhou merely makes the concession that where the phrase "poor quality" was used was not in fact to do with the marriage, sorry, was not referring to the marriage itself; it was referring to the periods after the relationship had broken down. The Family Court Judge was saying the reconciliation was of poor quality.

We accept that the relationship ended with an instance where Ms Zhou alleges violence Mr Lassnig and it does appear that towards the end of the relationship it was not a happy one, but it's all-reaching to say the entire relationship was a happy one. The parties married in July 2012. Within four months they decided the relationship was happy enough, stable enough and strong enough for them to set up a lasting Family Trust and within the span of a year they obviously felt that the relationship was strong enough, loving enough and stable enough to purchase three properties. It's unclear on the evidence when did the relationship turn sour. I think it's a point that the Family Court Judge didn't think was particularly important or evidence necessary pointed either way.

MILLER J:

Are you accepting here that if it were so the fact that a relationship was of poor quality would be a relevant factor here?

MR ZHANG:

No, we don't.

WILLIAMS J:

Unless that affects expectations, obviously. Unless the poor quality of the relationship meant that even if the parties had mutual investments they were carefully separated because of poor quality. Or the contributions are carefully separated and accounted for, if you like. In other words, quality is something that goes to expectation but is not itself a factor unless it goes to expectation. Maybe I'm explaining myself really badly there.

1045

MR ZHANG:

No, no, I understand where your Honour is coming from. I think in many other circumstances, not 182, quality, expectation, there can be quite a bit of interplay. Why I'm very hesitant to conclude this point of 182 is because in order to trigger 182 in the first place you've got to have, you've got to be married. It's a conscious act of adults. You got to take the step to make a nuptial

settlement. See it's unlike where you have two adults just decide, you know what, let's live together, let's try out a family life and then just without, not necessarily intentionally, but just start accumulate wealth and then by the end of the relationship, you know, one may say well can I work through this kind of expectation. But yet we know that even in a PRA we don't shift away from equal share if the relationship is more than three years based on quality of the relationship or expectation. We only shift away if there is a significant difference in contribution so that the expectation thing, sorry the quality of relationship point, it doesn't even feature in the cases where a party can be said to have inadvertently walked into that relationship. So I say well where the parties made the conscious choice of getting married and have a nuptial settlement should the Court really say well but it's of poor quality, let's do something about it. It just feels it erodes the autonomy of the adults.

WILLIAMS J:

It's a different point though. It's not that it's of poor quality but that the nature of the relationship, probably one of poor trust, is such that it affects the way in which they organise their affairs, so that when they jointly engage in investments and so forth they do so with careful attention to who put what in and what the proportions are and what the expectations are. At least there's some indication of that.

MR ZHANG:

I understand your Honour's point but that is what I'm trying to say you see. You don't really get into a discretionary benefit, you don't really get into a discretionary trust which requires 182 to resolve if the relationship was like that. If the relationship –

WILLIAMS J:

No, not under the PRA but…

MR ZHANG:

In 182, which is what we're talking about here today, you see –

WILLIAMS J:

But isn't that the test, what are the parties' expectations at point A and point C?

MR ZHANG:

Well it is, it is. What I'm saying is this idea that we look at was it happy, did the parties trust each other, these questions, what I'm saying is they fundamentally don't fit with the factual scenarios that would lead parties to a 182 application in the first place because you're going to make the conscious decision to get married, you're going to make the conscious decision to set up the nuptial settlement. These purposes almost necessarily always mean the parties trust each other, had high expectations, believed in each other. If the parties didn't, if the parties really felt well we've got to be at arm's length, then they probably wouldn't have got married in the first place and if they did get married they probably wouldn't have set up a family trust, had a nuptial settlement that would lead us here today. What we may have in that kind of circumstances would probably be some sort of joint investment vehicle elsewhere requires other bodies of law to resolve. That's the point I'm trying to make.

MILLER J:

The trouble with your argument is that the case is established, the legislation requires us to look at what their expectations were had the relationship continued and compare that with what's actually happened so this idea that the very fact they've entered into a settlement is conclusive of this point seems to me wrong.

MR ZHANG:

Well, that's not really the point I'm trying to make, your Honour. Obviously with different nuptial settlements people walk into it with different expectations. I understood Justice Williams' question to be, you know, if the parties didn't trust each other, one of these things where the parties wanted to keep each other at arm's length, you know, how does that affect expectation. What I tried to explain is parties in that sort of scenario are unlikely to enter into a nuptial settlement.

WILLIAMS J:

Well they may or they may not, there's no accounting for folk, but the point is it's not that uncommon that nuptial settlements are entered into in which the expectations are either implicitly or explicitly made clear and they're different to the 50/50 despite marriage.

1050

MR ZHANG:

Yes, yes, I agree. So let's say there are people who enter into nuptial settlement anyway for better or for worse, right, but didn't trust each other and keep each other at arm's length, under that premise yes they would shift the cost assessment of what the expectation was but that's really just a factual finding matter, isn't it? We say look he thought of this of you and you thought of him this way, then you can't possibly have expected this and that.

WILLIAMS J:

Yes, I think that's all I was trying to make. The quality of the relationship can be evidential in itself in some circumstances. It can support inferentially other evidence can it not both ways?

GLAZEBROOK J:

The concern I would have with that is that we're going to have the same sort of thing that you used to get, put the potato peelings in the sink and those sort of affidavits that you get in respect of a marriage, which is understandable when it's already broken down but –

WILLIAMS J:

What's wrong with putting the potato peelings in the sink?

GLAZEBROOK J:

Well, I had a case once where that was a major plank of why somebody shouldn't get custody of a child. Don't ask me. But I use that example because it's so ridiculous in a custody dispute, who put potato peelings down the sink and who didn't.

MR ZHANG:

Yes. We make this point I think in our written submission, your Honour, that is exactly – well not, I have no idea, but very similar along those lines. We got to be careful what we take into account because it could lead to parties slinging mud at each other and that's what we don't want to see. It makes cases messy, it makes the justice more difficult and more expensive and slower to dispense. So, to some extent I agree. Well, you know, obviously the Court has to decide what are the expectations, then any evidence that has probative value in informing the Court on that front must be admissible evidence, Evidence Act 2006, section 7 and section 8. But it does come down to a point where we don't want to be discussing well did he put potato peel, you know, thing that upsets me and therefore I had a dim view of him and therefore I would never have expected him to get X amount of my share. That's just not good for dispensing justice in the Courts.

ELLEN FRANCE J:

It is while the Court in *Clayton* said that subjective views of the parties, especially if mutual et cetera may be relevant to the assessment, you are looking at it objectively so the circumstances overall and that might be relevant to in part, I suppose, getting away from focusing on some of that minutiae.

MR ZHANG:

Yes, yes. Well, I suppose, it's wrong to say either objective assessment or subjective assessment should be excluded but realistically, I suppose, how much weight should be given every given case, that's depending on the case itself and we say for what we came up today which is this case we have the Trust documents which says these two are the primary beneficiaries and we have the part of explaining of why they got into this nuptial settlement. The reasons are slightly different wording but we say they ultimately aim at the same thing which is a joint shared life of wealth and profit. There is no elements of, as the Court of Appeal seems to suggest, that well got to keep at arm's length therefore contribution pro rata.

KÓS J:

I mean all of this takes us back to Justice Glazebrook's third question, this is supposed to be a very broad, robust discretion and a discretion can only be overturned, the exercise of discretion if there's an error of law, failure to consider something relevant or consideration of something irrelevant, potato peelings are neither relevant nor – well they're plainly irrelevant, in other words, we're not supposed to get down into the detail. The question is the error that has been made in the exercise of discretion.

1055

MR ZHANG:

Yes.

KÓS J:

That's what this Court I think needs to focus on, which is why we ask the question.

MR ZHANG:

Yes. If I can take your Honour to the paragraph 35. I explained the contents of paragraph 35. Paragraph 35 is in our 48. This is the discussion about whether Mr Lassnig's expectation is reduced by the burden of him being a trustee. So the way the argument ran was this. Ms Zhou says because Mr Lassnig has to pay rent if he didn't marry me, he wasn't part of Lassnig Family Trust, he's got to pay to live somewhere anyway, and once he became the trustee of Lassnig Family Trust as a borrower to the bank loans he's obliged to the bank. See, he's got to pay some money to live somewhere anyway. So there is no difference between – she's basically saying the fact that he's obligated to pay money as a trustee in order, in exchange to have somewhere to live, that lessens his expectation.

Now in response to that argument we say in our 48 that in the context of the marriage it's more nuanced than that. It's not the case that where he couldn't contribute he would have been expected to vacate the premise. What if his, he's sick, and therefore he can't work. He can't make neither financial nor

non-financial contributions. In that circumstance it is difficult to imagine that Ms Zhou would have then demand Mr Lassnig to leave. That would certainly be at odds with Ms Zhou's own evidence, that she wanted to make Mr Lassnig feel happy and to show him that she loved him and want to help him feel secure. That's what we say.

1100

In response to this my friend in their paragraph 35 say that: "This however is not relevant to the assessment of the gap under stage 2, and bears no relation to what occurred during the marriage. It leads to a number of other answers (and hypotheticals), including the appellant's inability to pay Trust costs which may have made the Trust property unaffordable for the Trust, leading to a forced sale," et cetera, et cetera. So to this we say that we have several responses to this. We say well it's unclear if this – where Ms Zhou says this however is not relevant to the assessment of the gap under stage 2 and bears no relation to what occurred during the marriage is unclear if it's meant to be one or two separate points. It's not really explained. It has to be relevant to the assessment of the gap under stage 2 because we embark our analysis with reference to Court of Appeal 72 which literally is its analysis of a hypothetical which then discusses the expectation. By definition we'll discuss expectations, you are discussing hypotheticals don't you? You discuss when something happens, which hasn't yet happened, what does one expect. And I think Ms Zhou is also saying that because there are other possible scenarios, which of course they wouldn't exist, she says the Court should not or could not entertain reasonable expectations in all these other scenarios. But there is no basis for this submission because that is exactly what the Court could or had of done when it talks about this very specific scenario where the parties would lose out on the lending that they made to the Lassnig Family Trust and the Court of Appeal's argument is under this very specific scenario these two parties stand to lose their money pro rata, therefore, their expectation can only be pro rata. Well putting aside whether that's right or wrong, isn't that a hypothetical scenario that the Court of Appeal analysed and relied on which Ms Zhou supports.

At this juncture I want to make a related point. Much was argued by Ms Zhou, and to some extent accepted by the Court of Appeal, about the risk Ms Zhou takes as a lender to the Family Trust. She lent the Family Trust 1.2 million. What's not been recognised is that Ms Zhou herself is also one of the borrowers, the other borrower being Mr Lassnig himself. So, this is unlike most scenarios where you have a lender who has no control over if or how the borrower would repay the loan. Most lenders, you lend them the money, you sit back and you wait. If they repay great, if they don't repay you got to take steps, enforce and whatnot, and it takes years and may or may not recover. But that's not the case here because Ms Zhou herself, as I said, and Mr Lassnig, they are the borrowers, they are the trustees. They have full control over how the Trust is to manage its assets. So, in a hypothetical scenario where we have a downturn of the market and now the Trust is faced with the prospect of losing money because the investment doesn't turn out to be an investment, the natural thing that these two people would have done was to sell, minimise their loss, and that's why we say in this case the risk of Ms Zhou being a lender, well, the usual risk associated with one being a lender, is much lower in this case than otherwise. The Court of Appeal had given this factor more weight than it deserved.

1105

If your Honours would turn to my friend's submission at paragraph 49. Sorry, paragraph 39, your Honours, of my learned friend's submissions. Now paragraph 39 is intended to be an answer to our paragraph 53. We explain in our 53 that Ms Zhou gave evidence about part of the reasons why they purchased Jack Barry and Young Access, which was to achieve Mr Lassnig's life goal of living rurally and animals on farms.

GLAZEBROOK J:

Is the only thing really being said here is that the expectation is the marriage would continue? As a successful marriage? I'm not sure there's actually a difference between what you and the respondent are saying, is there? Or if there – really when you're doing the answers to what's in the submissions, if it

could be just related to the matters of principle, and how it might change those matters of principle, it would be useful.

MR ZHANG:

Right, the point I want to make about this passage is this argument about "personal financial cushion". So she says, "It is stretching matters to claim that respondent's aim to make the appellant feel happy, loved, and secure meant that she intended the marriage to be a personal financial cushion."

Now putting aside that we have never argued that that is her intent, I do want to make a point about this idea of personal financial cushion, which is something she seems to resist. Isn't that the very nature of marriage, well part of the very nature of marriage? You marry someone, you partnership with someone, you say this is someone I will share my life with. I'm no longer alone. So if I'm out of a job, if I'm sick, unemployed, I have someone there to back me up. Isn't that the very nature of marriage, and didn't these parties take this a step further? They created a family trust, they put a lot of money into it, they set it up and they call themselves primary beneficiary…

1110

It is very common in marriage vows people say the phrase "for better for worse, for richer, for poorer, in sickness and in health, till death do us part". It is contemplated within marriage that we are going to be each other's personal financial cushion.

WILLIAMS J:

It seems the question is really whether that bites immediately or whether it takes a while for the cement to set, and that's really what this case is fundamentally about. PRA says it takes a little while for the cement to set. The question is whether it does here.

MR ZHANG:

In terms of sharing the profit is the main debate in this case but in terms of as a personal financial cushion I would argue that takes effectively immediately we marry.

WILLIAMS J:

Yes, but what's your basis for that?

MR ZHANG:

That's just my outlook in life, your Honour.

WILLIAMS J:

For better or for worse?

MR ZHANG:

For better, for worse, for richer and poorer, that's the vow we made and the vow we live by.

KÓS J:

Well, I suppose you've got another reference point here because we are dealing with a trust and effectively the judicial dissolution of the Trust. The point you've made in your submissions is that it would be inconceivable that distributions during the course of the life of that Trust could have been done on a ratio of four to one. Do you want to expand that point, because I think what you're saying there is that that implies more of an equal sharing outcome because had the trustees been acting under the Trusts they wouldn't have distributed 80% to Ms Zhou –

MR ZHANG:

Yes.

KÓS J:

– and 20% to Mr Lassnig.

MR ZHANG:

Yes, we're saying that's just unrealistic in post-assessment by the Court of Appeal, but that is you're saying or the Court of Appeal's saying because pro rata if they want to make a distribution during the marriage it will be four, four to one. If they didn't say this explicitly it is implicitly how they perceive this, and we say that's just not realistic. Nothing, clearly there is nothing here in the evidence suggest pro rata was contemplated. It would, in our submission, run against the way the Trust deed is worded and it would've run against the set-up that they would claw back the contribution.

As I was explaining in the earlier point, we only have asset to divide due to inflation. So imagine at a certain point of time they were able to pay back themselves and they've now fully paid themselves so that the Trust no longer owes a debt to Mr Lassnig or Ms Zhou and they say, well, let's just wait for another five years. It's really conceivable that at the end of that, as a happy, loving couple, Ms Zhou would demand and Mr Lassnig would agree that Ms Zhou gets 80% if they were to sell a house. It's just unrealistic. That's not how marriage work and –

KÓS J:

Well, it's also not how the Trust deed was established which effectively required unanimity to provide for a majority view but there are two trustees and an ability to ask the appointer to appoint another trustee and that doesn't work very well because the appointer are the two trustees, so you're instantly in a problem.

MR ZHANG:

So you wouldn't really reach an outcome where they agree to give Ms Zhou four times more than Mr Lassnig.

1115

Right, I'm now going to jump into a point which I suppose, depending on your Honours' view, it may be a high-level thing or may be a manual detail. This comes from paragraph 75 of *Clayton*. So where this is explained is in 43 of my friend's submission, 43 onwards. Here we are wrestling with three things.

Depending on how we read *Clayton*, I understand it's being argued this way. So, out of the things that we take into account when considering expectation, three things are involved here. One is past distribution, one is possible future distribution and one is the wider benefit. Because the way it works out in *Clayton* is this. Mrs Clayton did not actually receive a distribution during the 12-year period when Claymark Trust was made. So if you look at historical distribution, she didn't get anything. But this Court considered there is still nonetheless a possibility that she may get distribution had the marriage been a continued one. And then within that part of the analysis, the Court also said that the wider benefit of having a trust is a benefit.

In this case we accept that the Lassnig Family Trust has not made distribution to Mr Lassnig but we say there still is a possibility for short-term and mid-term distribution, unlike the Court of Appeal's view. And Ms Zhou obviously sides with what the Court of Appeal is saying there's no such possibility which we are saying there's no basis to say there's no such possibility. But the other point is wider benefit. She says there is none. We say there are some.

So, before I get into whether there are some, I think the point I want to make here is it seems to me Ms Zhou's position is future possibility of distribution does not count as a valid factor to take into consideration and that comes from her reading of the relevant paragraph from *Clayton*. She is saying, as far as I can understand her submissions, which correct me if that's not the case, I think she is saying you only look at whether there's past distribution and whether there is wider benefit.

WILLIAMS J:
What's the paragraph from *Clayton*?

MR ZHANG:
I think 75, your Honour, 75.

KÓS J:
It's set out at 43 of Ms Crawshaw's submissions.

MR ZHANG:

It's the way this paragraph is explained with the inclusion of the last sentence. So, I think my friend interprets that to mean the wider benefit of the Trust is the only other thing to consider other than the past distribution.

1120

ELLEN FRANCE J:

Where is that in the respondent's submissions? Which is the paragraph you're referring to?

MR ZHANG:

It runs from 43 onwards. Well, 43 reproduces the passage and it runs from 44 onwards, their analysis.

Now in 45 she actually has a slight change in the way it's run. In 45 she does then say, well, the mere possibility may be considered. So that's slightly different to the earlier position that seems to suggest that it's not. But she argues that in this case that mere possibility of future distribution is non-existent. She argues that is so because it's of short duration, a marriage of short duration, and they only intended to benefit after retirement, and given the high level of –

GLAZEBROOK J:

Well, I mean that's a mis – the fact is at this stage you're looking at what would happen if the marriage continued, not whether it was of short duration, so isn't the fact it's of short duration actually irrelevant at stage 2? I think that's what you argue.

MR ZHANG:

So in cases like *Preston* where one party was added as a discretionary beneficiary, made no real financial contribution, short duration matters for stage 2. We agree with that. That is how it went down in *Preston*. But –

KÓS J:

I don't think so. The only question at stage 2 is the difference between the marriage continuing outcome and the dissolution position. Factors like short duration and all the other factors, that great list of them, come in at stage 3. It's *Preston* paragraph 39.

MR ZHANG:

I take it your Honour's view is the expectation really starts from you set up the nuptial settlement. From that point you would obviously be expecting it to be a long, continual relationship so that the short duration is really an after-fact fact. Now we've broke up, we look back, okay, it was of short duration. So that can't possibly affect stage 2, how parties perceived that it was going to be.

GLAZEBROOK J:

Well, I think it was put to you by Justice Williams that it might, depending upon what the expectation, not necessarily at the beginning but over the course of the marriage, might have changed, but – I think that's what you were…

WILLIAMS J:

I mean you could say if they were expecting a marriage of short duration that might affect it.

GLAZEBROOK J:

Yes, exactly.

1125

WILLIAMS J:

It's not unknown despite your own strong view about the matter, Mr Zhang.

MR ZHANG:

Well, of course, I accept that second marriages or marriages often don't last, but that's just not the expectation people have when they walk into a marriage, even if a second one. Yesterday I was looking this up. It's unclear who this quote is – whether this quote is meant to be attributable to Oscar Wilde or

Samuel Johnson. It's said that second marriage is hope triumph over experience.

The point I wanted to make about this part of my friend's submission is that she says the possibility of distribution has to be assessed from the perspective of a family unit which is correct. That's what said in, I think, *Preston*. Then she goes on to say within the dynamic of this family they didn't act as a family unit, so they would never have made the decision to make distribution to Mr Lassnig and therefore you must discount the mere possibility as contended by us. That's her argument.

Now in response to this we say two points. Firstly, unlike she alleges, the Court of Appeal did not find that the parties did not act as a family unit, and it's not – the Court of Appeal didn't find so in the sense that she argues. What the Court of Appeal was saying is the parties here did not act as a family unit the way that *Preston* did. In *Preston* the parties took the effort to keep each other's finance not intermingled but at the same time they did make – both sides made various financial contributions. I think they jointly purchased a property in Pauanui and I think the wife paid for some holiday trips and cars. So nothing more can be said than this couple behaved differently to the Prestons. It can't be taken as far as to say this couple did not act as a family unit. Again, Ms Zhou tries to support using an argument such as it was a marriage of poor quality, et cetera, and as we covered earlier the poor quality reference was about subsequent reconciliation efforts, not about the marriage itself.

The second point we want to make about this is that the conclusion that the parties did not act as a family unit cannot be made in any event for the purpose of this argument because we are looking at the expectation of the parties. The parties obviously felt the relationship was strong enough, stable enough and loving enough that they purchased not one but three properties together. So if it had been a continuing relationship, we assume that it was, it continued to be strong, loving and stable, then it defies logic for Ms Zhou to argue that they were willing to buy a few properties together but they can't possibly agree to a distribution to Mr Lassnig, and here we're not even talking about equal

distribution, we're just talking about any distribution, and that's why we say that this line of argument can't be accepted.

Is now a convenient place to take the morning adjournment?

GLAZEBROOK J:
It is. How much longer do you think you'll be?

MR ZHANG:
Less than 15 minutes, your Honour.

GLAZEBROOK J:
Thank you. We'll take the adjournment.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.47 AM

MR ZHANG:
Your Honours, I only have three main points to explore. The first of the three is, as we put it in our written submissions, the conflation between different roles. So what we're getting at is this. The parties have three roles. One is the are they lenders to the Family Trust, and even with that I suppose we are necessarily conflating something here because although it is said that Ms Zhou's side of the ledger is 1.2 million, in fact a lot of the money came from other legal entities, but for the time being we're not going to get into that nuance. We just take it that she contributed 1.2 million lent to the Family Trust. The second role they take are the trustees of the Family Trust and at the same time they are the borrowers of the loans from themselves, they're kind of hat-off lenders, and from the bank; and then the third roles they'll take are the beneficiaries, and it is in their capacity as beneficiaries they come to the Court and say: "182, give me something."
1150

Now why we say there's conflation, because the Court of Appeal take the view that because Ms Zhou lent in her capacity as lender four times that of Mr Lassnig she deserves four times more as the beneficiary under 182, and that analysis entirely ignores the different roles and bypasses the fact that they are trustees as well and as trustees they are borrowers. So what we are saying is this. Because as trustees as they were they are obliged to repay back the lenders including the bank and themselves. Really apart from giving up interest in their capacity as lender, they didn't really contribute anything beyond the foregone interest. The bulk of the capital really came from themselves in their capacity as borrowers, in fact, so that's essentially all the capital, bank loan and the personal loans to themselves.

And in support of this proposition we cited the case of *TN v AK*. In that case, I happened to be the lawyer that argued it unsuccessfully, the notion Ms AK's borrowing – I'll just lay the factual background a bit more. So the parents from the N side of the family contributed about one-third of the purchase price of the property. The other two-thirds was jointly borrowed by the son Mr N and the girlfriend, Ms K. I argued that Ms K's borrowing from the bank shouldn't count because there was no risk to her personally that she would ever be called up personally to pay. That proposition was rejected by Justice Fitzgerald. Justice Fitzgerald says that her borrowing is a contribution and, therefore, in that case because her contribution equals to the borrowing aspect of contribution of the son Mr N that was equal contribution.

So, in the Court of Appeal I cited this case for this proposition that when a borrower borrows money and puts into the trust or family home that borrowing is contribution. That was rejected and in our argument, in our submission that that rejection has no real basis. The Court of Appeal purport to have distinguished this case on the basis that it's a PRA case but beyond that it doesn't really explain and we say the fact that that's a PRA case makes no difference to this legal principle, if we can call it that, that when one borrows and contributes to a venture or trust that's contribution.

In support of this proposition we also further cited *Illingworth v Illingworth* [1981] 1 NZLR 1, *H v O* HC Auckland CIV-2008-404-1891, 9 June 2008 and *Bradford v Te Hei* [2021] NZHC 3485. Sorry I take that back. We didn't cite *Bradford*. They did. *Bradford* is by Justice Nation. So, in their rebuttal it's unclear to me whether they actually still take the position that borrowing can't amount or shouldn't amount to contribution given the weight of authority that's against them but they now say *Bradford* says that borrowing is not – sorry, let me rephrase. They're saying *Bradford* says joint borrowing does not amount to equal contribution so that there is – what they're really arguing is that, even if two people jointly borrow money from the bank, it doesn't mean their contribution should be considered equal.

Now, we in response we say this. This passage from Justice Nation simply says that his Honour doesn't think *H v O* has laid out this (**inaudible** 11:54:22) that joined borrowing amounts to equal sharing absolutely. Sorry, equal contribution absolutely. To that end, his Honour is correct that *H v O* doesn't quite say that but that doesn't mean that there is any reason to say where there's a joint loan absent of some good reason it shouldn't be counted as equal contribution. When you take a joint loan you are jointly liable. You are against each other, in law you are equal. So there is no real principled basis to say it shouldn't be taken as equal contribution. Certainly in *H v O*, if memory serves, I think it was counted as equal contribution and certainly in the *TN v AK* case that we cite it is taken as equal contribution.

1155

In the *Bradford* case itself we would submit that the outcome also adheres to equal contribution. So what happened in *Bradford* is that when they purchased the property together I think the man contributed 60,000 and the lady contributed about 10,000 and the rest was borrowed from the bank. So if we were to assume that the borrowing from the bank amounts to equal contribution, then we factor in the difference between the money they're actually putting up front. The issue you get is 57 to the man and 43 to the lady. But then they also accumulated joint account cash savings and on that front their contributions were 63 to 37. So just note these two numbers; for the house 57:43, for the

joint account 63:37. What is the outcome of the case? The division was 60/40. So we say, despite Justice Nation's dictum about *H v O* didn't lay down this absolute rule, his Honour in fact followed equal sharing joint loan amounts negotiating in that particular case. In fact, this is spelt out as well at paragraph 52 of the *Bradford* case. That is my first point about the contribution and conflation of the two roles.

The second point I want to make is Ms Zhou in her submission claims that she was able to buy off the properties herself therefore it couldn't have been her expectation to have equal sharing with Mr Lassnig. We say that's unsupported by the evidence. Her rationale is that the first property East Coast Road it wasn't a very expensive property. That's the one that Mr Lassnig initially contributed more than she did but she contends it's – she acknowledged that she was able to buy it herself. Fair enough. And then she contends for the second property, which is Jack Barry, she did in fact pay upfront the bulk of the purchase price. I think the purchase price was 900 and something thousand. I think she paid 700 and something thousand and they borrowed –

GLAZEBROOK J:
I think we are probably getting into detail here rather than the point.

KÓS J:
We could deal with this in reply. I just don't know why this is important myself. If it does turn out to be important you could –

MR ZHANG:
I'm saying factually the evidence doesn't support she can buy all three and therefore that point shouldn't be accepted.

I want to make a quick point, the last point about what happened post-separation. Well two things happened in post-separation. One is that Ms Zhou herself and her company Wiki continued to occupy the access to this day and we say that's a significant benefit she's received. In response she says I'm not allowed to argue this point because this wasn't raised before. I accept

this wasn't raised before. I say this should be allowed to argue for two reasons. One, the fact itself I don't think it's controversial but the Court in 182 looks at it should be permitted to look at all the relevant factors. Two, Ms Zhou herself had raised new points on appeal. I name two that she raised on appeal. First is this argument, which I addressed earlier, which she says the gap is necessarily very small because Mr Lassnig had to pay rent had he not married to me and had to live elsewhere and therefore he can't have, he can't be expecting half share. That's a point she didn't, as far as I understand, it was not present in the Family Court. It was first raised in the High Court.

1200

The second point she raised in appeal, which she appears to have abandoned now, which is the effect of alleged violence. That's a point I don't think she – sorry, let me be clear. So the point she ran in the High Court in passing and probably more happening in the Court of Appeal, which wasn't accepted, is that the presence of family violence should affect 182. I am simply explaining that to say well she's raised new points on appeal, we ought to be allowed to do so. So that's the first point I make about post-separation that she and her company has been non-compliant.

The second point I want to make about post-separation events is that now we are pointing out in our submission that she had in fact been repaying herself after separation. Now the context of making that point is this idea that the ledger is ever shifting so it's wrong in principle to say we are going to determine expectation or split based on what the ledger says on the day. We are saying the ledger could change all the time. She could eventually pay off herself and then what do we have; zero on her side, 290,000 on Mr Lassnig's side. Would she accept that she should get nothing and Mr Lassnig should get all of it?

Now in response she says she didn't actually continue to repay herself. She stopped repaying herself sometime before the trial in the Family Court and she refers to her affidavit of 31 August 2020. So that reference is provided in my friend's submission. So what happened there is that she says under advice of accountant she stopped having her company Wiki paying the Trust rent. Now

how it worked before was she counted, she would have Wiki, her company, paying the Family Trust rent, then the Family Trust would pay this money directly to her and she would take this as reducing $3,000 per month at the time of her end of the ledger so she says: “I actually have stopped that.”

Now we make a few points about this. Firstly, effectively she is allowing a non-beneficiary to get benefit from the Trust property. That is, isn't it, a breach of the terms of the Trust. Now whether that should amount to anything in 182 exercise I – to be honest I haven't really thought about that because we can only turn to this issue fairly late in the piece.

And the other thing I want to make about this is it demonstrates the point that we made earlier that as the trustee/borrower she actually has a lot of control over whether and how the Trust is to manage its own assets and repay herself as the lender, so the risk that the Court of Appeal assigns to her as a lender is exaggerated. That concludes all my submissions, your Honours.

GLAZEBROOK J:
Thank you very much, counsel.

MR ZHANG:
As the Court pleases.

GLAZEBROOK J:
And now the respondent, thank you.

MS CRAWSHAW KC:
Thank you, your Honours, and thank you for the indication that the preference is to look at matters at a high level. There is a risk with these sorts of matters getting into the weeds too much. I was very conscious of that in preparing for today that there's a lot of weeds in both counsel’s submissions and it's probably not that helpful to the Court looking at things, in terms of your Honours’ decision, and its applicability to other marriages of the kind that we find here.
1205

So the three questions are the parties' position in a continuing marriage, how in this case should the failure of the premise of that marriage be factored in by the Court, and I see that as being the exercise of discretion at the stage 3 test actually, and then what, if anything, did the Court of Appeal or the High Court get wrong in the exercise of their discretion. That's a separate question as I understand it. Have I got those three points right?

GLAZEBROOK J:
That's right.

MS CRAWSHAW KC:
Well the first question I think in a case such as this, which is what would the parties' position in a continuing marriage have been, was actually answered by the Court of Appeal and the Court of Appeal correctly considered that was the Court's task and at para 21 of the decision, and I can pull that up in the ClickShare if that's helpful.

GLAZEBROOK J:
If you do that at the third stage, the first stage was really what's your client's position on that first question.

MS CRAWSHAW KC:
On that first question.

GLAZEBROOK J:
I mean you can certainly say the Court of Appeal got that right but it's the fact is that –

MS CRAWSHAW KC:
What is the position for the respondent, your Honour, yes. So –

KÓS J:
So this is defining C?

MS CRAWSHAW KC:

Yes, this is the finding of C as opposed to B following dissolution.

KÓS J:

Yes.

MS CRAWSHAW KC:

So the interesting thing, and I was scratching my head about this, is in a case such as this, which is a very short marriage, when you're looking at that forward looking exercise of a continuing marriage, how far forward do we fast-forward? Do we look at it in another three years, another 13 years, another 30 years and the further forward we look at the continuing marriage when we're assessing that the more remote it becomes from the position of B dissolution.

Now I understand that *Preston* and *Ward* and *Clayton* have talked about the length of the marriage being a relevant consideration at the stage 3 exercise. I'll just double check that. I don't think the Court of Appeal actually factored in the length of the marriage in this case, particularly when it looked at the reasonable expectations of the parties, because the reasonable expectations of the parties gets factored into the consideration of what they might objectively have expected had the marriage continued.

KÓS J:

Aren't you at C looking at what the expectation was in terms of the settlement, the nuptial settlement? So if, for instance, the settlement had been a special purpose vehicle, purchase a factory with a particular lease on it with the expectation that it will be sold in say 15 years because that's when the lease was due to expire, well that would be a different position from perhaps one where what you're doing is buying a matrimonial home as part of that settlement but it's the expectation of the settlement that matters, isn't it?

MS CRAWSHAW KC:

Well, that is one factor but I don't think it is the only factor that you're considering when you're considering in this particular case under this particular settlement

what the expectations, the reasonable expectations, might have been in this marriage. I don't think the legislation requires you to solely focus on the nature of the settlement itself.

KÓS J:

No, I'm responding to your point about how long is a continuing marriage.

MS CRAWSHAW KC:

Right. So you do look at the settlement I accept that.

KÓS J:

Yes, right.

MS CRAWSHAW KC:

I accept that. This is a common garden variety gnome sort of family trust. I don't think there's any magic in it. I mean whether it was called the Lassnig Retirement Family Trust or the Lassnig Family Trust I don't think matters. I think the Court is able to look at the circumstances of this particular marriage in assessing what the marriage would have looked like had it continued.

WILLIAMS J:

Why would it not matter? I know that was my question but why would the use of a term like that not be an indication of the expectations, at least an indication, I'm not saying a definitive one, but something worth taking consideration of.

MS CRAWSHAW KC:

Well, it might be, it might –

WILLIAMS J:

Well it would be.

MS CRAWSHAW KC:

I don't think it will be definitive.

WILLIAMS J:

No, well –

1210

MS CRAWSHAW KC:

I'm not saying it wouldn't be but here we had a commonality of evidence between the parties that their expectation was that the properties invested would have borne fruits for their retirement. They both acknowledged that. So there was an evidential basis for the Court reaching that conclusion in the Court of Appeal.

WILLIAMS J:

And only for that purpose.

MS CRAWSHAW KC:

And only for that purpose. It was a long-term investment. They both acknowledge that.

GLAZEBROOK J:

Why does that matter? You say you should only look forward. If you're looking at expectation you should only look forward. I mean if we had a marriage, somebody starts a marriage at 20, it breaks up at 30, there've been unequal contributions financially because there often are in marriages, especially if there're children, are you saying, well, at that stage you should only look forward 10 years and if, in fact, they were waiting till retirement, it was a buffer for them for retirement, the wife misses out? I mean let's put it in those sort of –

MS CRAWSHAW KC:

No, no.

GLAZEBROOK J:

So what is the submission then? What's the significance of it being a retirement fund?

MS CRAWSHAW KC:

Well, they had a long – they, objectively, both had –

GLAZEBROOK J:

Yes, but what's the significance in terms of the split then? So if, objectively, they thought it was going to be a retirement fund for both of them equally, what does that have – what effect does that have, in your submission, on what they get now when that expectation falls over?

MS CRAWSHAW KC:

So I did want to answer the 10-year marriage with children issue first and then answer the question about the long-term nature of the investment. So there were two points your Honour's made actually there.

GLAZEBROOK J:

Well, they must be, because you're saying because they thought it was going to be retirement, their expectations must have been different, or is that not the submission? If I haven't misunderstood the submission then tell me why.

MS CRAWSHAW KC:

I think we got onto retirement because I started talking about the Lassnig Retirement Trust and then I started talking about the parties' evidence about their retirement. I now want to pare that back because the retirement issue became relevant to the reasonable expectations of the parties as to whether they would have had an expectation of distributions and the Court of Appeal I say rightly found that that would not have been for some time and, in fact, instead of distributions it would have been more likely that if there was some profit they might have been repaid their current accounts first.

KÓS J:

Doesn't that suggest that in the long term the interests of the parties would have equalised?

MS CRAWSHAW KC:

In the long term, and if the relationship had matured.

KÓS J:

Yes, so doesn't (c) therefore suggest effectively an equal sharing and the only question is whether the fact that the thing was arrested so early means it shouldn't be equal?

MS CRAWSHAW KC:

Well, does (c) necessarily mean "equal sharing"? That's –

KÓS J:

But your long-term retirement would have seen an equalisation over time, surely?

MS CRAWSHAW KC:

And the Court of Appeal acknowledged that.

KÓS J:

Yes.

MS CRAWSHAW KC:

They said, well, if the marriage had subsisted it's reasonable to expect there would have been, ultimately –

WILLIAMS J:

So if there had been no – sorry, this is interesting and I think key – if there had been no distributions in this marriage over 10 years, what would the Court of Appeal have reasoned or more particularly what would you say would have been the result of that? On the same facts, no distributions, divorce after 10 years.

MS CRAWSHAW KC:

So the fact of the no distributions is just one factor and I've acknowledged that that isn't decisive in itself. The wider benefits, the parties might by the 10-year

period have enjoyed wider benefits, they might have retired more mortgage debt, have started to enjoy – they might have been able to purchase further properties, those sorts of things might have occurred in that 10 –

WILLIAMS J:

Why would that have made a difference?

MS CRAWSHAW KC:

Well, their expectations, their reasonable expectations at the 10-year point might have been different from what the reasonable expectations of these parties were, as the Court of Appeal found.

WILLIAMS J:

It's hard to see the logic of that. The reasonable expectation is that it be a payout on retirement but not before, according to the Court of Appeal's reasoning. As a factor, I admit, as a factor.

MS CRAWSHAW KC:

That is a factor. I mean the question is…

WILLIAMS J:

It's hard to see why that's relevant at all, in fact, when you think about it.
1215

MS CRAWSHAW KC:

Well, the Court of Appeal took into account the very sort of heavy borrowing at that stage prior to the sale of the East Coast Road property that the parties were sort of labouring under at that point and took that into account in terms of the remoteness of distributions.

WILLIAMS J:

Yes, and that's the point, isn't it, it's the remoteness of the payout and this –

MS CRAWSHAW KC:

Well the point is, the point –

WILLIAMS J:

– does get down to just a kind of series of factual inferences coalescing around the vibe.

MS CRAWSHAW KC:

I think what we have here is, is that in evolving, and marriages do evolve, so an evolving expectation that over a period of time would have been realistic and the question I suppose for the Court is when you're considering position C, which is the continuing marriage, you might say in a case such as this, which is a short marriage, well let's assume this marriage had continued for 20 years, mortgages paid down, properties sold, there is a significant gap because they would have been able to enjoy the fruits of their investments, albeit unequal, and then oh abruptly this marriage has ended and there's a real gap between position C and B. Now, the gap here in a short duration marriage will be larger possibly than in a longer marriage because there will have been an opportunity perhaps to have some of those benefits enjoyed at that point, but then when you go to the exercise of discretion at stage 2 you then must factor in, and the length of the marriage becomes more important the shorter it is says *Preston*, and I think rightly so, and so too do the financial contributions become more relevant. But I still come back to the point that there's an artificiality and a remoteness in assuming a continuing marriage and for how long do you assume it continues. It's not required in the legislation either.

KÓS J:

Well I don't think we're going to revisit *Ward*, *Clayton* and *Preston*.

MS CRAWSHAW KC:

And I'm not encouraging that but we can say that this does sort of create a bit of an artificiality in a short marriage where it's in its infancy, it hasn't borne the fruits that you would have expected it to but we assume a continuing marriage is a forward looking exercise and I did want to –

MILLER J:

Can I just ask one question about the nature of the expectations in C? You've accepted that they would benefit in the long run, and we're not talking 10 or 20 years, we're talking a lifelong relationship is what they had in mind clearly, do you say that there's a distinction to be drawn there between the repayment of advances made to the Trust and the sharing of equity in the properties, in other words, when you first repay the debt in the long run and then share the residue equally, or would the whole of it simply go into the wash?

MS CRAWSHAW KC:

Well, the way in which the Court of Appeal has approached it, the whole of it does go into the wash and it's divided proportionately. Well, in effect, the parties are repaid their contributions and then it's divided proportionately in accordance with those contributions.

MILLER J:

Right, and you say that's the correct approach?

MS CRAWSHAW KC:

I say it is in this, in these particular circumstances, yes. It won't always be the case of course, you know, and in a short marriage you can imagine a situation where there was significant non-financial contributions that would change that approach. For example, in a case such as *Illingworth* where one party has completely given up their career, even in a short marriage, that was considered to be relevant. In a case where two children were born in a short relationship and one party was looking after those children that's not – this isn't an inextricable result.

1220

KÓS J:

I know but that's about qualifying contributions. What's the contribution here? They are lenders. They didn't put in capital. They lent money and under the approach the High Court took they were paid out and then you have an equity.

MS CRAWSHAW KC:

Well the contribution is, as the Court of Appeal noted, the opportunity cost, it is the interest. I mean Ms Zhou hasn't just had 700,000, for example, sitting in a bank account that she's lent to the Trust. She's borrowed that through her own entity.

KÓS J:

Okay, well I accept the foregone interest is clearly a contribution.

MS CRAWSHAW KC:

Yes.

KÓS J:

But I don't think you can say that these contributions are the amount of the loans.

MS CRAWSHAW KC:

Well, it is interesting, isn't it? If we stand back from this for a minute, the only reason they're lenders is because of the Trust structure, right. Had there been no Trust structure and we were looking at this under the PRA, they wouldn't have lent money to themselves obviously, they would have just thrown it in but it would have had the same effect. It would have been a contribution. We're treating it as a contribution rather than a loan I agree and that's the way in which both the High Court and the Court of Appeal did.

KÓS J:

Yes. I mean you choose structure, you live by the structure.

MS CRAWSHAW KC:

Yes, you do, I agree with that and what we know here in this particular Trust is that this was a bit of a DIY job, there were no lawyers involved, Ms Zhou used the Zhou Family Trust deed as a template and went about it I say sort of unwittingly. It's not a contracting out agreement where people got legal advice. Does it then miraculously mean that had there been – where in a situation

where there was no trust there would never have been an equal sharing in this case that that happens as a consequence, that seems like a windfall, inadvertent windfall for Mr Lassnig and I don't think – I think the Court of Appeal recognised that that would result in an unfair benefit to him which is what section 182 is designed to avoid.

ELLEN FRANCE J:

Sorry, can I just go back slightly. I'm a little unclear quite what your answer is to the first question so can I – the proposition that the appellant put forward is it's a vehicle to establish life and wealth together. What do you say is the matter with that?

MS CRAWSHAW KC:

That it's a vehicle to establish life and wealth together, that that was his subjective view about it. The Court of Appeal's analysis, which I say is the right one, is that – and I'll just find the passage because it is, I did look at it before, the Court of Appeal's analysis was the focus –

ELLEN FRANCE J:

What paragraph, sorry?

MS CRAWSHAW KC:

Sorry para 48. The position assuming a continued marriage meant the focus, and this is a stage 2 analysis, being the gap in expectations which was the framework. So the Trust was settled and the purpose of the Trust, I say the parties weren't in dispute about this, the purpose of the Trust was for investment for retirement. It's a relevant factor for the continued marriage. So all of the circumstances in this marriage must be taken into account in factoring into their reasonable expectations. So the Court considered that, and this is para 55 which is the Court of Appeal's decision about the continued marriage, that the sorts of factors that needed to be considered were the parties' ages, the fact they didn't have children together, the source of the Trust funds and the disparity in their contributions.

ELLEN FRANCE J:

Yes, so where do you say they get to in relation to that?

1225

MS CRAWSHAW KC:

And so the following para 55, at 55, they talk about: "It is common for parties who bring accumulated wealth to a marriage later in life to maintain a degree of financial separation. In our view, that approach can be expected to continue throughout the marriage albeit potentially subject to some relaxation the longer the marriage continues," which was the point I was making about the longer it lasted the less stringent that separation of finances would be.

The Court correctly at 57 said there was a reasonable expectation that had the marriage continued of the parties financially supporting this joint venture. I think that is correct.

They then talk at 58 about the fact that there hadn't been a sharing of Trust income, and at this stage it was remote, but one would expect at position C, the continuing marriage, that ultimately there would have been a sharing and a relaxing of that separation of finances in terms of enjoying the fruits.

KÓS J:

The expression common in this situation is "washing its face". In other words, you invest in things that basically pay themselves off over time and at the end you have a nest egg which is all equity and no borrowing. You repay the banks first, you pay yourself second, and then there's a net out result.

MS CRAWSHAW KC:

And so when it got to the stage of washing its face, that change in approach could well have been expected in terms of assessing position C, the continued marriage, continuing marriage. I agree with that. I can't take issue with that. But what I do say is that then you've got – you might have a gap because you look at what his position is following dissolution and he doesn't have that expectation any longer and he's not able to enjoy living in a Trust property,

albeit meet, helping to meet liabilities. So there is a gap, but then when you go to the stage 3 considerations you bring into your consideration and the exercise of discretion those other factors that are particularly relevant for a short-duration marriage.

KÓS J:

So why if in the long term we were going to have an effectively equal sharing outcome, that's what they would be looking towards at their retirement, why –

MS CRAWSHAW KC:

Well, we assume so. We assume so.

KÓS J:

Yes, well, we assume so, I mean…

MS CRAWSHAW KC:

There's no evidence to that effect and that must be an objective analysis.

KÓS J:

Let's put it the other way round. I don't think we could have been expecting inequality in that, as a result of that particular Trust deed.

MS CRAWSHAW KC:

And there's no evidence of that either.

KÓS J:

Correct.

MS CRAWSHAW KC:

Exactly.

KÓS J:

Okay. So assuming therefore likely that there wouldn't have been unequal sharing in the long term, why is equal sharing of the more modest early equity after repayment of borrowing, why is that a windfall to Mr Lassnig?

MS CRAWSHAW KC:

Because effectively he's contributed a very small proportion –

KÓS J:

So it's back to contributions?

MS CRAWSHAW KC:

We are back to contributions, yes. I think analysing it as a loan when in fact these are interest-free loans, that's what the parties decided to do, there's an artificiality in that too. It's in the ledger. There's no actual loan documents or anything like that but that's how it's treated, and in fact they both make contributions and that's how the lower Courts have considered this to be. The fact they didn't charge interest tends to be supportive of it being in fact a contribution. It gets repaid, I understand that.

1230

KÓS J:

Sure.

MS CRAWSHAW KC:

But there's a windfall at this point in time. I do not consider that you could say that if the marriage had lasted a lot longer and there had been other non-financial contributions, for example. That would be a very harsh analysis, not warranted.

So the Court of Appeal at 70 concluded that Mr Lassnig's position, this is the assumption of a continued marriage, was that he and Ms Zhou would have lived in a house owned by the Trust but subject to the liabilities and expectations of liabilities. As at the time of dissolution he couldn't have had a reasonable expectation of a mortgage-free home or any reasonable expectations from the Trust, and they have at para 70 really gone into his position B actually.

MILLER J:

70 seems incomplete, doesn't it, because the actual end state is one in which they retire and there's this pool of assets that have been put into the Trust for their retirement? To use Justice Kos' expression the properties would have washed their faces by then and they would just have equity left which they would share, right?

MS CRAWSHAW KC:

Yes.

MILLER J:

That's pretty clear, isn't it?

MS CRAWSHAW KC:

Yes. I suppose to some extent the Court of Appeal's position on the continued marriage is somewhat truncated or attenuated.

GLAZEBROOK J:

Meaning that they don't go on to say: "And in the long term it would've been equal"?

MS CRAWSHAW KC:

That's right, and I don't have any issue with that conceptually provided that at the stage 3 exercise of discretion the other factors that were considered to be appropriate, in *Preston*, for example, the length of the marriage and the source and character of the assets, were significant in this particular case.

GLAZEBROOK J:

Well, to be frank, I think that's the better place for it under the type of analysis we're doing because one of the difficulties of doing that middle analysis is what do you do with a 10-year marriage when the parties are very young, which was the indication I gave because retirement is still a long way off for people who are, say, well, could be sort of 30, late thirties, for instance?

MS CRAWSHAW KC:

And that is the correct place, so you've got your 10-year marriage but you could still have quite a significant gap, but then you go on at the exercise of discretion and you would be more generous in that exercise of discretion for a whole raft of different reasons.

GLAZEBROOK J:

And what you have to meet there is that in this case actually the 50 – the short term shouldn't have been taken into account although an acceptance that the High Court – an acceptance that that not challenging the High Court, but…

MS CRAWSHAW KC:

I'm not –

GLAZEBROOK J:

Are we ready to go on to that second question now then?

MS CRAWSHAW KC:

Yes, we are. I'm not sure that the Court of Appeal actually wrongly took – I don't think they took into account the short duration of the marriage in the position C. I don't see that they did that unless I've missed it. I think they were looking at the –

GLAZEBROOK J:

Well, what they're saying at the second stage you look at the contributions and then assess from the contributions that – well, to be honest, I'm not entirely sure what they were saying so – because they've obviously left out the last part of it that there would be equal sharing later.

MS CRAWSHAW KC:

Well, they have acknowledged at 57 that there was a reasonable expectation had the marriage continued of the parties financially supporting this joint venture. So I don't think they have taken into account, or not overtly, the short

duration of the marriage in the stage 2 assessment. I don't see they have but I mean –

1235

GLAZEBROOK J:

Well then it makes it even worse, doesn't it, because with my example, whether it was a four-year marriage or a 20-year marriage, if it's long-term you don't take it – you actually rely on contributions for expectation.

MS CRAWSHAW KC:

Yes, I –

GLAZEBROOK J:

I mean yours is more subtle, your argument is much more subtle than that.

MS CRAWSHAW KC:

Yes, yes. I think – was there a point I needed to make in response to that question, your Honour? I thought the Court of Appeal hadn't got it wrong at stage 2 in terms of taking into account the short marriage because I don't think they did at stage 2.

GLAZEBROOK J:

I'm just saying that makes it worse then because you've conceded I think that it will be different with a 10 or a 20-year marriage than it would be with a short-term marriage.

MS CRAWSHAW KC:

Stage 2 assessment, no not necessarily. I think it is a forward looking analysis. We're not revisiting –

GLAZEBROOK J:

All right, so whether it's a 10 or a 20-year marriage, the fact that there's no reasonable expectation of a mortgage-free home or distributions in the short or medium term would mean that you would say there was an expectation in

proportion to the parties' respective advances, which is what is said at paragraph 70, because I didn't understand you to say that in fact.

MS CRAWSHAW KC:

So what the Court of Appeal has said in terms of the stage 2 assessment was that he couldn't have had a reasonable expectation in the short or medium term to any distributions from the Trust and yet it has said, as I've just taken you to at 57, that had the marriage continued there would have been an expectation of being able to financially support this joint venture and presumably also enjoying its fruits. So they hadn't said that at 57. They've said about financially supporting it, propping it up.

KÓS J:

Well, I don't know what they're doing at 69 to 70 because the overall question they're asking themselves from paragraphs 55 through to 70 is what is C –

MS CRAWSHAW KC:

Yes.

KÓS J:

– and then at 71 they launch onto what is B but what they seem to do at 69 to 70 is to, I mean I have no problem with 69 until you get to the final sentence, so the penultimate sentence, the parties might well have envisaged joint sharing of the benefit, but then we have a process of qualification that enters the picture and C –

MS CRAWSHAW KC:

Yes, and that's – but we do not consider.

KÓS J:

C is suddenly rebated at the end of 69 and through 70 something less than C was when we got to the penultimate sentence of 69.

MS CRAWSHAW KC:

So they're correct from the words: “It is reasonable to conclude that, had the marriage been of longer…” and stop there.

KÓS J:

Absolutely, I would say so.

MS CRAWSHAW KC:

I agree with that.

KÓS J:

You agree?

MS CRAWSHAW KC:

Yes, I do, I do, because I think that’s –

KÓS J:

Okay, so a problem enters after that.

MS CRAWSHAW KC:

That is the correct approach at stage 2 and then, your Honour, when you go to is there a gap, you say well it's hardly negligence that that has got to be correct.

KÓS J:

Yes, but then you would justify that under the discretions at stage 3.

MS CRAWSHAW KC:

That’s absolutely right.

KÓS J:

Yes.

MS CRAWSHAW KC:

So we can get to the same result but through a different route here and that is through the *Preston* factors and the exercise of discretion and bearing in mind

you've got *Bethell v Bethell* [2018] NZHC 3171 a long marriage, 15% of the Trust equity, *Preston* 15% and here 20%, *Preston* being a little longer than this marriage but I'm jumping ahead to discretion too quickly. I think at 77 the trouble is that the Court finds the gap is negligible having given Mr Lassnig a remedy. Well there is no gap. That's what the remedy is meant to answer. 1240

What is important though, and this is where I say the Court of Appeal was right to interfere with the High Court's exercise of discretion –

GLAZEBROOK J:
Sorry, I don't understand what's being said at 77 or what your submission on it is.

MS CRAWSHAW KC:
Para 77 says the gap is negligible once the uncontested refund to Mr Lassnig is made and a receipt of the pro rata share of his, of the trustee –

GLAZEBROOK J:
Well it is if all he was entitled to is an – that must be right if his expectation was only that that's what he got.

KÓS J:
Because that's what they, where they cut back in 69 and 70 C. That's the problem.

GLAZEBROOK J:
Yes.

WILLIAMS J:
The question is does that matter and you say it doesn't.

KÓS J:
Yes.

WILLIAMS J:

Because they would have come to the same result under C and that's where you have to do your work.

MS CRAWSHAW KC:

That's right and I will.

WILLIAMS J:

Under B I should say.

MS CRAWSHAW KC:

Sorry, under stage 3.

KÓS J:

Stage 3.

WILLIAMS J:

Stage 3.

MS CRAWSHAW KC:

Yes, stage 3. The Court of Appeal is right though to say that the analysis of stage 2 does feed into the exercise of discretion and the discretion isn't entirely at large of course. It does have to take into account certain factors. And that was why they considered that they were entitled, and I'm coming to the third question too quickly, but to interfere with the learned High Court Judge's assessment of discretion and I will come to that third but it does feed into the stage 3 discretion.

The second point, question that your Honour asked was, how in this case should the failure of the premise of the marriage be factored into by the Court and this is not a formulaic or presumptive exercise. We know that. Here we look at the failure of the marriage and how to remedy those consequences. We do take into account the source and nature of the Trust's assets and in *Preston* it was considered that those factors were not decisive and neither should they

have been in *Preston* which was more of a traditional family unit and there was evidence of considerable non-financial contributions which had been discounted by the High Court when they were sort of wrapped up in a constructive trust-style argument.

At para 85 the Court listed the factors that I said were relevant and were mitigating factors. I think the very important point though at the exercise of discretion stage is that there is no presumption of equal sharing. We're not inextricably drawn to an equal sharing premise when we're considering the exercise of discretion. That is not. We're very clear. Although there's been some relationship property creep to the exercise of discretion and actually the consideration of section 182, we're now at the stage I think of these cases and realising that these are very different sections. They are carried out on the premise of a broken marriage, as the PRA, is but they are different sections and we don't start from that premise and even in some cases there are awards in even long marriages where one party is, I'm thinking of *Stiles v Stiles* [2019] NZHC 3462 which went to the High Court, where the husband was a used-car dealer and had not paid his taxes and the wife ended up with more than an equal share in that case in exercise of discretion which was entirely proper and was upheld on appeal. It was another factor that went into the mix. You can see that happening. But we don't start from a premise of a 50/50 division and I think that's one of the issues. I'm going to come to it but Justice Venning's decision was that that was the premise he started from and then departed only slightly.

1245

WILLIAMS J:

It's hard to think yourself outside, all other factors being equal in a marriage, in a western liberal democracy of the 21st century, in the absence of countervailing factors, 50/50 is quite a good place to start, not because a statute says so but because of the culture and including the legal culture of the place. It's just that unlike the PRA the counter-indicators are a much broader group of factors. Otherwise we're ignoring where the world has got to in Aotearoa in 2025 and we're not allowed to do that because it's the law.

MS CRAWSHAW KC:

No, and I wouldn't encourage that. I'm not suggesting that either. I suppose –

WILLIAMS J:

But what you do need is counter-indicators, albeit there's a broader palate of counter-indicators than one could find under the PRA, one of which, of course, is a marriage of short duration.

MS CRAWSHAW KC:

Yes, but you would equally find that under the PRA though, but – and, you know, I've already said in my opening, and it's, I suppose, a shadow for this case, no trust, 80/20 division, no question, possibly slightly more in favour of the respondent, but we put that to one side. The Court of Appeal considered that was a relevant comparator. I mean is it prohibited from considering that in terms of the exercise of discretion? No. But it's not going to be the leading…

KÓS J:

No, but when we get to question 3 we'll be asking you what the High Court did that entitled the Court of Appeal to invade it's territory, it's discretionary territory.

MS CRAWSHAW KC:

I will come to that and I have got some answers to you for that.

KÓS J:

Could I ask you two things? First of all, *Preston* 52 gives a heavy nudge towards 50/50. There it is, it's up on the screen now.

MS CRAWSHAW KC:

It does in marriages of similar duration and circumstances to *Ward* and *Clayton*. It does give that nudge in those longer marriages.

KÓS J:

Secondly, we're dealing with settlements here, nuptial settlements, and they're often in the form of a trust.

MS CRAWSHAW KC:

Yes.

KÓS J:

Are we doing anything really different than dissolving the Trust early and asking ourselves what decent, fair-minded trustees who could reach agreement would do in terms of distributing the equity of the Trust? Isn't that really what the Court's doing? It's kind of standing as a kind of super-fair trustee and saying: "What's the fair distribution? What's left here?"

MS CRAWSHAW KC:

Well, that proposition was put to this Court in *Preston* and the Court rejected that paradigm. That was what the appellant was suggesting be done. The Court has a greater ability than would a lay trustee, for example, to take into account various factors in the exercise of its discretion, I think, and which are consistent with the authorities than would a fair-minded trustee be able to. I think the Court's reach in terms of its discretion is very important and takes into account not only the case law but the risk of ensuring there is no unfair benefit to one party that perhaps a fair-minded trustee might not quite appreciate. So it is a judicial exercise. I don't really want to tell you how my experience is with some trustees where people are indeed (**inaudible** 12:49:56). It's pretty awful and it gets extremely expensive.

1250

GLAZEBROOK J:

I suppose the historical origins of this tend to have been settlements on wives, especially when they couldn't own their own property.

MS CRAWSHAW KC:

Yes.

GLAZEBROOK J:

And so the idea was to protect the wife. That's not really the modern, I think as Justice Williams was saying, it's not really the modern paradigm.

MS CRAWSHAW KC:

Paradigm. No, and we mustn't forget that this section has its origins prior to even the 1963 Act.

GLAZEBROOK J:

But there was still sharing in those even clearly set up to protect a wife.

MS CRAWSHAW KC:

Yes. It was the Court's ability to review settlements that had occurred and whether they were fair and sometimes they were also post-separation settlements which the Court was able to review through the predecessor of section 182. I mean *Ward* goes through the history very well. So in fact did *X v X [Family Trust]* [2009] NZFLR 956, 182, there was quite a lot of historical analysis in that.

MILLER J:

Can I ask a question about it? What interests me here, looking at your 85 and the Family Court Judge's findings, is that in the context of a PRA claim, because he's dealing with a whole range of assets here –

MS CRAWSHAW KC:

Sorry, my 85, my submissions, or…

MILLER J:

That's 85 of the Court of Appeal judgment.

MS CRAWSHAW KC:

Of the Court of Appeal decision, yes.

MILLER J:

So the Family Court Judge has said at his paragraph 142 that contributions to the marriage were more or less equal. He's making that finding for purposes of settling relationship property which obviously we're not talking about the assets of this Trust.

MS CRAWSHAW KC:

That's right.

MILLER J:

In 85 you're asking the Court of Appeal, and it's clearly a feature of the argument here, to take into account what you've called the quality of the relationship, essentially her much greater investment in it than his as part of your failure of the premise argument.

MS CRAWSHAW KC:

Yes.

MILLER J:

And I'm just wondering does the history of the section tell us anything about that being a permissible approach? Don't we just look at contributions in the same that we would for purposes of the PRA? I'm wondering whether it's even permissible to take into account his behaviour as you seem – you've mentioned the abuse that she suffered.

MS CRAWSHAW KC:

Well, on that question, the abuse talked about psychological and physical violence and the Court of Appeal did not find in my favour on that point but it did say, and I think the conclusion is correct, that section 182 is less sort of dictatorial in terms of what can be taken into account in the exercise of discretion and there might be a case where there has been, for example, sort of long-term violence which might impact the exercise of discretion where it's very difficult except as set out in *Hewson v Deans* [2020] NZHC 1465, [2020] NZFLR 262, and the PRA to do so, the conduct must be gross and palpable and have impacted on the property itself. I think it is permissible, your Honour. It wasn't in this case and it's not being argued. I'm not refreshing that argument here. The Court of Appeal did leave that open and I think that is a correct conclusion.

WILLIAMS J:

What's the decision that sets that standard?

MS CRAWSHAW KC:

Sorry, *Hewson v Deans*.

WILLIAMS J:

Hewson, right, I –

MS CRAWSHAW KC:

And that was referred to in…

WILLIAMS J:

Yes, I remember it being referred to. I just…

MS CRAWSHAW KC:

Under the violence issue. It's referred to at para 102 of the Court of Appeal's decision. It was a High Court decision of Justice Cooke, and that was where he suggested the contributions of one party to a relationship may become relatively more significant because they're provided in very difficult circumstances. It was in the context of the PRA, not section 182. But I haven't addressed that –

WILLIAMS J:

You don't suggest that reaches, this reaches that standard?

MS CRAWSHAW KC:

No, well, I'm not refreshing that submission in this Court because the Court of Appeal found in these particular circumstances the physical violence had occurred right at the end of the marriage, wasn't punctuated, the violence. The argument for the then-appellant in the Court of Appeal was that there was psychological violence and there was a flatmate who had witnessed it but the Family Court concluded it wasn't to a level that would have altered his

conclusion about the duration of the marriage but he did conclude it wasn't ideal.

1255

ELLEN FRANCE J:

The discussion in *Ward v Ward* perhaps suggests that it's not a relevant factor –

MS CRAWSHAW KC:

Sorry at?

ELLEN FRANCE J:

The quality?

MS CRAWSHAW KC:

The quality. In what paragraph of *Ward*?

ELLEN FRANCE J:

I'm looking at the discussion that begins from 21 –

MS CRAWSHAW KC:

In *Ward*?

ELLEN FRANCE J:

In *Ward*. I'm thinking of the idea that you don't have to suggest there's some sort of injustice there.

MS CRAWSHAW KC:

And this is about really that theme that her Honour Justice Glazebrook was discussing about unedifying –

ELLEN FRANCE J:

Yes.

MS CRAWSHAW KC:

– issues being raised –

ELLEN FRANCE J:

Yes.

MS CRAWSHAW KC:

– and our need, a desire to try and avoid that if at all possible. I think we have developed a little since *Ward* and I don't – I think the Court of Appeal's conclusion on that issue is correct. We have not had a case, for example, where there might have been say, for example, horrendous abuse. I don't think the Court is prohibitive from taking that into account in exercising discretion. There might have been consequences of that abuse.

GLAZEBROOK J:

Well certainly I agree on consequences of the abuse. It is likely to be the case in that we all know the psychological and even physical in many instances consequences and that will obviously have some effect on the person's ability to continue with their life.

MS CRAWSHAW KC:

And it may be that that in the exercise of discretion that's taken into account so as to put the person into a position where they're yes, and I think we need, we need, as your Honours were saying, to look at it in the 21st century where we acknowledge that those sorts of things are very important and they do have impact.

WILLIAMS J:

Without opening the Pandora's box of fault.

MS CRAWSHAW KC:

Well –

WILLIAMS J:

Which is really the potential for that argument if not set at a relatively significant level.

MS CRAWSHAW KC:

I suppose it's not so much fault, it's actually assessing the positions of both parties as at the point of dissolution and following it and that's the *Stiles* case. The wife in that case too wasn't able to bring a section 15 claim because the husband had eroded the relationship property through this non-payment of taxes and so she was left in a very vulnerable position. Is that about fault or is it about considering parties' circumstances? I think that's a better –

WILLIAMS J:

Well sometimes they are –

MS CRAWSHAW KC:

They co-exist.

WILLIAMS J:

Yes, they overlap significantly. That's a classic example of it where bad behaviour unrelated to the relationship has diminished the pool.

MS CRAWSHAW KC:

I suppose non-payment of taxes is related to the relationship if it has a deleterious impact on the property available for division. I mean we don't get into who's had an affair or how many affairs you've had and all of that sort of thing. That is really irritating to be on the other side of it. It doesn't impact your division of relationship property. It ought not to impact your division on section 182 and I'm not saying that for a minute. What I am saying is that where the Court looked at the impact of violence it said: "This isn't the case but there may be a case where it might be relevant" and I don't think the Court of Appeal strayed in reaching that conclusion.

1300

I think the quality of the marriage is more relevant in terms of how did the parties operate in terms of the separation of their financial contributions, rather than were they kind and nice to each other because that's an impossible inquiry and I accept that and here of course we had, you know, even the contributions in

terms of paying the mortgage were credited to the appellant so he got – that wasn't considered to be sort of in the round he was going to get that back. There was no question about that so that was a relevant consideration in terms of the separation, the parties' fin –

GLAZEBROOK J:

I must admit I was very puzzled by the Court of Appeal conclusion that that was a benefit to him as against just a repayment of what he had paid out but maybe we can deal with that after the adjournment.

MS CRAWSHAW KC:

Yes, this is a convenient time, thank you.

GLAZEBROOK J:

So we'll take the adjournment, thank you, and 2.15.

COURT ADJOURNS: 1.01 PM

COURT RESUMES: 2.17 PM

GLAZEBROOK J:

Thank you.

MS CRAWSHAW KC:

Your Honours, I won't be long. I'm going to briefly address you about stage 3 and then why I say the learned High Court Judge was wrong.

Before I do that, there is one matter that I was going to do in my opening and that is there is an error in the Court of Appeal judgment at para 58 as to the – and it's not an error that's the Court of Appeal's fault in any way but as to the external borrowing at the time of separation 2.163 and then noting that the Court of Appeal thought that became 1.198 after the sale of East Coast Road. Your Honours have probably picked up on the discrepancy between that and para 78 because para 78 correctly says that the borrowings at that point were 658 and

you might have wondered why there was a jump from 1.198 to 668,000 inexplicably because I did and I realised in my preparation only yesterday that there must be a mistake somewhere and there is and it's para 58 assessing the quantum of liability as at separation at 2.163 because when you go to the applicant's affidavit of assets and liabilities which is 201.00 –

KÓS J:

Could you just tell us what number has to change in 58 and then we can get the back story?

MS CRAWSHAW KC:

I'll tell you what it is. I've added it all up and the actual amount at separation is 1.719 but you can take it from me that is the number. I've spoken to my learned friend about it.

KÓS J:

Instead of 2.163?

MS CRAWSHAW KC:

Yes and Mr –

GLAZEBROOK J:

Can you also just do a memo?

MS CRAWSHAW KC:

I can do a memo on it.

GLAZEBROOK J:

It will be much easier.

MS CRAWSHAW KC:

I'm happy to do that.

GLAZEBROOK J:

Thank you.

MS CRAWSHAW KC:

I just wanted to alert the Court –

GLAZEBROOK J:

No, thank you.

MS CRAWSHAW KC:

– because I didn't want to not alert the Court about it now that once I found that error. That is in the weeds and I can do a memo on that very briefly. I spoke to my friend about it and we're in agreement.

The first issue, before I get to stage 3, was your Honour finished about asking why the Court of Appeal thought it was a benefit to the appellant to have his mortgage payments credited to him, his current account, and I think the benefit is this. It's that he gets the payments he's made repaid to him plus any principal component of those payments he also gets a share of however that might be shared. We say proportionately 20%. So he gets a repayment and an increase in equity.

1420

GLAZEBROOK J:

Sorry, I still just don't understand the Court of Appeal comment.

MS CRAWSHAW KC:

So, for example, if he's paid $10,000 towards a mortgage and $5,000 of that is principal payment, he's getting the full 10,000 back as well as a share of the increased equity to the extent of $5,000 so that is a benefit to him.

GLAZEBROOK J:

Or was it, is that right?

MS CRAWSHAW KC:

Yes, it must be right because he's going to be –

GLAZEBROOK J:

Well, do we know what the principal component was?

MS CRAWSHAW KC:

Well, we know that the principal has reduced over time and there's evidence of that though it is a very short period during the marriage of course.

GLAZEBROOK J:

Why is that an advantage to him?

MS CRAWSHAW KC:

Because he is sharing in the equity as a result of reduction of mortgage, he gets repaid his full payments that he's made, he gets credited with his full payments as well as sharing in the increased equity. So he's really, to the extent that the payments represent principal, he is getting effectively paid twice, albeit not to the same extent when he shares in the equity because he's not getting an equal share, he's certainly not getting a full share and we say he's not getting an equal share of the entity, the increased entity.

The second minor point was your Honour Justice Kós said what's the difference between equity now and equity in 10 years, I think was the question you asked, and I just didn't answer on the spot but the difference between equity now is that it's mostly attributable to the financial contributions. Equity in 10 years would be likely to be attributable with a combination of financial contributions and non-financial contributions.

KÓS J:

So it's back to contributions?

MS CRAWSHAW KC:

Yes.

MILLER J:

It's a noteworthy feature of this case that they separated a very long time ago and there was a very long delay until the hearing in the Family Court, I think it's 2015 and 2022. There doesn't seem to have been any debate about the date chosen for valuation. Everyone used valuations as at 2021.

MS CRAWSHAW KC:

They did.

MILLER J:

Right. And so these issues didn't surface in that because obviously the choice of – the Court has a discretion as to the date of valuation. It's another way of looking at this issue. There was no debate about that?

MS CRAWSHAW KC:

In the Family Court there wasn't and there hasn't been since but under the Property (Relationships) Act 1976 the parties that start with section 2G which we now know in various cases it must be a date of hearing valuation. Under section 182 there's no such requirement but that could be another way of addressing unfairness perhaps in the exercise of discretion, could be a way of factoring in possible windfall gains. There's nothing in section 182 to require a date of hearing valuation and it's nine and a half years now since the parties separated.

MILLER J:

At any rate the opportunity was not taken to make something of that?

1425

MS CRAWSHAW KC:

No, it wasn't in fairness. The second question your Honour asked at the beginning was how in this case should the failure of the premise be factored in by the Court, and I say at that discretion stage the sorts of things that should be factored in are those that I submitted to the Court of Appeal, which the Court of Appeal referred to at paragraph 85 of its decision. In fact, the Court of Appeal

in my submission correctly exercise their discretion by taking into account the sort of factors that I suggested they do, albeit it in a slightly different manner. They took into account the short duration of this marriage at paragraph 111, they considered at paragraph 108 that the short duration nature of a relationship enabled the Court to give greater weight to disparity of financial contributions, noting that the respondent's financial contributions to the Trust outweigh those of Mr Lassnig by a considerable margin, and they rightly talked about a non-financial contribution would have to have been significantly greater to justify focusing on other contributions. The Court of Appeal –

KÓS J:

How would that work in a more conventional analysis where the person who has not made the financial contributions is the wife who stayed at home with the children. Now ordinarily we would tweak that as being a 50/50 split, wouldn't we? That's really what *Preston* hints at towards the end. Assuming she has done all she can.

MS CRAWSHAW KC:

Well *Preston* was the very sort of case where, I mean there weren't children in that relationship, of the marriage, but that was a case where her non-financial contributions were factored in, but it still resulted in only a 15% of the equity of the Trust in Mrs Preston. So it wasn't a 50/50 division.

KÓS J:

That was a six year marriage?

MS CRAWSHAW KC:

Five. Well I think it was a six year relationship, five year marriage.

KÓS J:

Yes, that's right.

MS CRAWSHAW KC:

Yes. So if that had been present, that would have changed, or perhaps ameliorated the impact of the financial contributions, and that's not to say that that wouldn't occur in short duration marriages. It can. There are some examples that are in the casebook.

KÓS J:

But I mean *Preston* is a very different case where most of the assets predated the relationship. The Trust itself predated the relationship.

MS CRAWSHAW KC:

The Trust itself did, but not the nuptial settlement.

KÓS J:

No.

MS CRAWSHAW KC:

Because there was a deliberate attempt to make more – and a deliberate inclusion of her in the Trust during the marriage, but the source and character of the assets in *Preston* are not materially different from this case. There was the source and character of the contributions here, and I note the Court of Appeal did refer to them as "contributions" not just lending, the source and character of the contributions came from each party's separate property.

The Court of Appeal did factor in the opportunity cost to the respondent in its exercise of discretion. It noted that as at 2021 the interest cost had been calculated at $708,000, that's at paragraph 90 of the Court of Appeal's decision. The appellant's expert didn't differ materially on that interest calculation. But the Court of Appeal also considered that the respondent could have invested herself, and was in a position to do so, and considered that in the exercise of discretion.

The Court of Appeal also considered that the respondent was the driving force behind the Trust property investments but concluded that overall there wasn't

evidence of, that the respondent as having made a materially greater non-financial contribution to the Trust than Mr Lassnig. The slight difficulty with that finding, and it isn't a matter that really got pursued with any great detail, is that the only finding about the non-financial contributions was made in the context of the Family Court considering the non-financial contributions to the relationship property specifically, and the Family Court Judge in fact didn't make findings about non-financial contributions to the Trust. Not splitting hairs here, that does make a little bit of a difference because there weren't findings about the respondents non-financial contributions to the Trust, and the Court of Appeal was correct to talk about her being the driving force behind the Trust property investments. As I have said, which was set out at paragraph 85, I still say, and we can take out the abuse because that's been determined, I'm not pursuing that, but I say all of those factors at paragraph 85 are relevant to the answer to question 2 about how the Court exercises its discretion in the failure of the premise of this marriage.

1430

Now the third question, which I'm coming to now, is what if anything did the Court of Appeal or High Court get wrong in exercise of the discretion. In terms of the Court of Appeal, the Court of Appeal didn't particularly emphasise, it did mention the short duration nature of the marriage, but didn't particularly emphasise that in the consideration of the exercise of discretion, and I think it should have placed more emphasis on that here.

In terms of the High Court exercise of discretion, and whether the Court of Appeal was correct to interfere with the High Court's consideration, the Court of Appeal correctly considered that the High Court had made an error in the consideration of stage 2, which then infiltrated into the learned High Court Judge's exercise of discretion at stage 3, and that, and the Court of Appeal did say correctly that it was entitled to interfere, this is at paragraph 46, and this is: "If this Court reaches a different view from the High Court in its assessment of the gap at the second stage," the High Court, the learned High Court Judge at the second stage in considering position B, following the dissolution of the marriage, considered at paragraph 57 –

KÓS J:

The High Court?

MS CRAWSHAW KC:

This is the High Court. I'm just pulling that up now. Here we go, that had, in the present case, so they mean post-dissolution, paragraph 58, he's: "… entitled to repayment of his loans to the Trust but is no longer able to live in one of the Trust properties and will have no ability to call on the Trust for income or capital distribution in the future." What he didn't add there was, "and have the continuing liability or responsibility to service a mortgage", and that led him into an error in the exercise of discretion because what he did to remedy the consequence was to make provision for him so he would have effectively a mortgage-free property, and that was an error.

GLAZEBROOK J:

Sorry, you'll have to explain why it's an error. Whether they actually found it was an error, because I think, I'm not following.

MS CRAWSHAW KC:

Well the Court of Appeal found that his expectation was not to live in a property mortgage-free.

GLAZEBROOK J:

That's not actually what has been asserted anyway, is it?

MS CRAWSHAW KC:

Well I –

1435

GLAZEBROOK J:

Isn't the finding in the High Court that his expectation would be that there'd be equal sharing of anything over and above the repayment of the funding?

MS CRAWSHAW KC:

No, the finding in the High Court, I am just talking about the analysis at stage 2 and the comparison in terms of the analysis of the gap.

GLAZEBROOK J:

Well perhaps you need to take us to the High Court.

MS CRAWSHAW KC:

Yes, I was at para 57 and 58. So the Court of Appeal didn't find that that analysis of the gap was correct because under position B he is no longer able to live on one of the Trust properties but he's also no longer obliged to service a mortgage. So Justice Venning didn't factor that part into position B and that stage 2 analysis was therefore not correct. The second –

KÓS J:

I'm not sure that's a fatal error. I mean at the end of the day that will be worked out in the maths.

MS CRAWSHAW KC:

Well what is a fatal error is the error at para 60.

KÓS J:

Okay. Well what the…

MS CRAWSHAW KC:

The arithmetic is seriously out.

KÓS J:

Well that – well it might be seriously out but again you just correct that. Where's the error of principle?

MS CRAWSHAW KC:

Because it leads Justice Venning to conclude that the split between the parties should be 60/40 and the Court of Appeal correctly said if what you were wanting to come up with was a sum of money when you understood what the proper

calculations were, you would have done that on a 70/30 basis, and I'll take you to the –

KÓS J:

Is that what the Judge is doing? It's certainly what the Court of Appeal is trying to do but is that what the High Court Judge was doing, or was he simply reasoning to a proportion?

MS CRAWSHAW KC:

Well, if you go to para 70 of the High Court decision –

KÓS J:

I see, yes, okay.

MS CRAWSHAW KC:

– he says: "A sum of that amount would enable Mr Lassnig to buy a home for himself" and that's how he gets to 60/40.

KÓS J:

Well possibly or else that's the outcome of the 60/40 bearing in mind 69.

MS CRAWSHAW KC:

The exercise of discretion by the learned High Court Judge is difficult to follow in my submission. He does take into account the fact that without their respondent's contributions the Trust would not have been in a financial position to purchase the properties and he does that at 65. He does take into account the shorter the duration of the marriage the more weight that may be needed to give to other factors including financial contributions. He does that at 68. He says that the Judge at 64 had found the parties' overall contributions were broadly equal but, as I've said, the Family Court Judge's findings about those were actually specifically related to relationship property contributions, not related to the Trust. If we go back to the family –

GLAZEBROOK J:

Well, do you say that there was evidence that there was more contribution because actually we've got findings of the Court of Appeal against that?

MS CRAWSHAW KC:

Yes, because there was evidence that it was Ms Zhou, the respondent, who was the driving force behind –

GLAZEBROOK J:

But the Court of Appeal says no they were equal.

MS CRAWSHAW KC:

Well, the Court of Appeal says that the contributions were broadly equal relying on the Family Court decision which was focused on relationship property. That's the trouble with that. It was –

GLAZEBROOK J:

Well, what are we supposed to do if there's no evidence and no argument in respect to a greater contribution and respect for the Trust properties?

MS CRAWSHAW KC:

In the overall –

GLAZEBROOK J:

Was she out there on the roof fixing them up?

MS CRAWSHAW KC:

In the overall exercise of discretion, you can take into account the Court of Appeal's findings that she was the driving force behind the Trust properties.

1440

GLAZEBROOK J:

Well, that would be the case in Mr Clayton's case for sure. He would have been the driving force because she actually had nothing to do with the business assets, including the Trust.

MS CRAWSHAW KC:

No, and Mrs Clayton was the driving force behind the household contributions no doubt in that case. So they would have netted off, I would have thought. But here the significant contribution is the financial contribution.

GLAZEBROOK J:

Well, I think you need to stick to that.

MS CRAWSHAW KC:

The learned High Court Judge –

WILLIAMS J:

Isn't it one problem with that proposition, at least in respect of the house that they lived in owned by the Trust – and that happened with two of them, was it?

MS CRAWSHAW KC:

Yes, there was initially the Jack Barry property and then the Young Access property.

WILLIAMS J:

You can presume, can't you, that the contributions, at least in those regards, were equal, given the background to them?

MS CRAWSHAW KC:

In terms of cooking dinners and things?

WILLIAMS J:

Well, given the background to the relationship property contributions that makes sense.

MS CRAWSHAW KC:

Yes, and that's what the Family Court Judge found in respect of the relationship generally but I was talking about specific contributions to the Trust property.

WILLIAMS J:

Well, except that we – yes, well, what does that mean? If it's contributions to the house when the guy's an electrician –

MS CRAWSHAW KC:

Yes.

WILLIAMS J:

– if it's contribution to the house, including its upkeep and so on, there's no reason to depart from the idea that that was, wasn't roughly equal?

MS CRAWSHAW KC:

Well, there weren't specific findings in relation to the non-financial contributions to the Trust by the Family Court and perhaps the reason for that was that the Family Court Judge did divide the Trust property equally so didn't need to.

WILLIAMS J:

Yes, but looking behind that to the human reality of what's going on, "driving force" is a nice label but it doesn't tell you much about what contributions are actually made to houses that are lived in and so forth. You can draw inferences from that.

MS CRAWSHAW KC:

Well, the sort of managing of tenants and sourcing of tenants and those sorts of things because these were investment properties.

WILLIAMS J:

Yes, well, we know he did manage at least some tenants in respect of Wiki and so forth.

MS CRAWSHAW KC:

Well, Wiki was a separate entity –

WILLIAMS J:

I understand that but –

MS CRAWSHAW KC:

– and he was trying to claim an increase in value in –

WILLIAMS J:

That's right, so –

MS CRAWSHAW KC:

– in Wiki.

WILLIAMS J:

Yes. So you can draw some sorts of inferences about one stepping in for the other in some circumstances. You can't assume that he's completely neutral as a contributor in respect of the Lassnig Trust properties.

MS CRAWSHAW KC:

No, I think that's a fair point, your Honour.

The final thing I was going to say about Justice Venning's decision where he gets to the 60/40 is there is actually no real analysis of how, having taken into account the short duration and these other factors he's listed above, he comes to 60/40, and my argument in the Court of Appeal, which I repeat here, in terms of the High Court decision, was there did seem to be a gravitational pull to equal sharing and then he just discounted it slightly. I don't think that was the correct approach in this short-duration marriage.

I'm just going to finally address your Honours about the occupation rent issue and then my learned junior, Ms La Mantia, is just going to address you very briefly on the issue of the external debt, and then that's the respondent's submissions unless there's any other matter you'd particularly like me to focus on. I think I've focused on the three questions and left my submissions entirely but…

GLAZEBROOK J:

I still haven't got why the High Court Judge was wrong and why the Court of Appeal was right to overturn.

MS CRAWSHAW KC:

Well, as I said –

GLAZEBROOK J:

Yes –

MS CRAWSHAW KC:

I said that the learned High Court Judge didn't approach the second test correctly on the Court of Appeal's analysis and I think the Court of Appeal is right about that, but secondly –

GLAZEBROOK J:

No, sorry, you'll have to start again. Can you just go slowly through that?

MS CRAWSHAW KC:

I'm sorry.

GLAZEBROOK J:

So the High Court Judge did not?

MS CRAWSHAW KC:

Approach the stage 2 test correctly.

GLAZEBROOK J:

Okay, so identify the paragraphs where the Judge was wrong. This is very important for you so I want to give you the chance to be absolutely clear where you say the High Court went wrong.

1445

KÓS J:

As I understand your argument, it is, that argument is at 57, and you are saying that he understated B because he didn't take into account the mortgage consideration.

MS CRAWSHAW KC:

Well that's just in terms of the comparison of the gap. But what the Court of Appeal did, and I say correctly, except perhaps insofar as factoring in the short duration nature of the marriage is concerned, is really to consider an objective analysis of the reasonable expectations of the parties, and I say that the learned High Court Judge didn't embark on that exercise to the extent that the Court of Appeal did and the Court of Appeal was right to find that the stage 2 test wasn't properly undertaken. Now I understand that the questions around the stage 2 test in the Court of Appeal from your Honours focused on the continuing marriage, but the Court of Appeal's analysis of the parties' objective expectations was the correct one, and was more informed than that of the learned High Court Judge. Now I can take you through my written submissions about this point if that's of assistance to the Court.

ELLEN FRANCE J:

Could I just check, if you look at paragraph 57 of the High Court judgment, would it have solved the concern you have about that if in that last sentence it had said, "and he would have to make mortgage repayments", "while making mortgage repayments"?

MS CRAWSHAW KC:

While having obligations to service the Trust indebtedness, that would have solved that issue, but his Honour Justice Venning in considering "the gap" in the analysis from paragraph 52 really into 59, that really is the analysis of the gap in the High Court decision.

ELLEN FRANCE J:

So what else is missing then?

MS CRAWSHAW KC:

If I can take you to my, well, to the Court of Appeal judgment rather than my submissions.

MILLER J:

Is it 79 you're looking for.

MS CRAWSHAW KC:

Well it's from paragraph 48 of the Court of Appeal judgment, and the Court of Appeal analysis, in my submission, of the intention of the Trust as a retirement vehicle, and the reasonable expectation of the parties at paragraph 55, their ages, the disparity in the contributions, the fact they didn't have children together, factoring into their reasonable expectations was a correct lens through which to view the gap. In my submission I think the Court of Appeal's analysis of that was correct and the learned High Court Judge, his analysis did not include those factors.

GLAZEBROOK J:

Sorry, start again, I was just seeing what the High Court Judge had said earlier about that so perhaps if you could start again in terms of what you say was wrong?

MS CRAWSHAW KC:

So, I'll go back to the High Court judgment, so the High Court judgment, in terms of assessing the gap is from paragraph 52 through to paragraph 60. Then from paragraph 60 onwards really is the exercise of discretion. What isn't undertaken, what is absent from the High Court decision, but which is present in the Court of Appeal's decision, is a consideration in a more fulsome way, and I say –

1450

GLAZEBROOK J:

Can you just move over to the microphone a bit more, just in case it's not coming through to the transcript?

MS CRAWSHAW KC:

Sorry. In my submission the Court of Appeal's consideration about the stage 2 test from paragraph 48 onwards is a more informed and proper analysis of the reasonable expectations of the parties that inform the analysis at stage 2 because the learned High Court Judge didn't undertake a consideration of the important factors which of course as we know is the framework through which the discretion is exercised.

ELLEN FRANCE J:

So what then do you say as a result of looking at those further factors, how would you summarise then the difference between which the High Court gets to, I'm not talking about the end result, but in terms of the description of the tap, what's the difference in the description of the gap between, you say between the High Court and the Court of Appeal?

MS CRAWSHAW KC:

The Court of Appeal's conclusion is that the gap is narrow. That may be something that your Honours take issue with. But they said that nothing, this is at paragraph 75 of the Court of Appeal's decision, and they consider this material, and I agree, nothing, therefore: "…to justify, as the High Court appeared to assume, Mr Lassnig's expectation of a mortgage-free home for his sole use in the circumstances of a relationship lasting less than three years."

So the reasonableness of expectations is analysed from paragraph 48 –

GLAZEBROOK J:

But isn't the expectation, if the marriage had continued, whereas this expectation being talked about is if the marriage didn't continue. I mean he probably did expect a mortgage-free home over the long-term, if they'd continued to be married, I suspect.

KÓS J:

In C.

GLAZEBROOK J:

Yes, because I mean they would've expected they would've paid the mortgage off. The external mortgage anyway.

MS CRAWSHAW KC:

His position in B though following separation – dissolution –

GLAZEBROOK J:

I get that, I understand that point.

MS CRAWSHAW KC:

Yes. The learned High Court Judge's analysis of stage 2 is fairly brief.

GLAZEBROOK J:

But can be brief but right.

MS CRAWSHAW KC:

Is not quite right though.

GLAZEBROOK J:

Then you have to point to a…

MS CRAWSHAW KC:

Well it's not quite right because it doesn't factor in obligation.

WILLIAMS J:

You mean the mortgage obligations?

MS CRAWSHAW KC:

Yes, paragraph 58.

WILLIAMS J:

But Ms Zhou would have the same obligations.

MS CRAWSHAW KC:

Yes, but we're not –

WILLIAMS J:

But that doesn't, that suggests it's irrelevant to the gap.

MS CRAWSHAW KC:

No, because –

GLAZEBROOK J:

He does have to pay rent once he leaves and she takes over the mortgage presumably.

MS CRAWSHAW KC:

Yes, I mean if we're going to start looking at the gap and her expectations, that's actually not ever form part of the analysis in any of the Court decisions, which is the irony of section 182 really, because the person who's out in the cold, if you like, it's their position that's being compared to with their position in the marriage, not the person who's not.

WILLIAMS J:

Yes but they have to be in the factual context of the case and in this case his expectation is the mortgage-free home in the short-term are no different, or his lack of them are no different to her lack of them. So that's relevant context, isn't it, otherwise you risk coming to a decision that's irrational.

MS CRAWSHAW KC:

I understand that but neither of them could have had an expectation following dissolution of a mortgage-free property.

WILLIAMS J:

Correct.

MS CRAWSHAW KC:

So that's neutral, I guess.

1455

WILLIAMS J:

Yes, so one can't really complain when a judge says the expectation was of a mortgage-free property, because they both had that expectation.

MS CRAWSHAW KC:

No, I say neither of them did. Neither of them could of.

KÓS J:

On dissolution?

MS CRAWSHAW KC:

No.

WILLIAMS J:

On dissolution, yes.

MS CRAWSHAW KC:

No, on dissolution.

WILLIAMS J:

But they both had that expectation to start with.

MS CRAWSHAW KC:

Yes, I'm sorry, I'm perhaps a bit confused. So they might have ultimately, had the marriage survived insipient sort of infancy, there’s no question of that.

WILLIAMS J:

Right, so if you take into account the opposite proposition on dissolution, then the opposite proposition will apply to both. I really they, the focus is on the applicant, but in fact they both bear the burden of the mortgage obligations.

MS CRAWSHAW KC:

Yes.

WILLIAMS J:

And so the gap is proportionately no different.

MS CRAWSHAW KC:

As between the two of them?

WILLIAMS J:

As between the two of them. I realise – you see if you don't apply that lens to this, you get to completely illogical results.

MS CRAWSHAW KC:

I accept that but that little triangle –

WILLIAMS J:

Yes, I understand your point.

MS CRAWSHAW KC:

Isn't really looking at as between the two, it's not the comparison between them.

WILLIAMS J:

No, I understand that point, but you still should avoid coming to irrational conclusions.

MS CRAWSHAW KC:

Indeed, I totally accept that.

WILLIAMS J:

And that's my point to you, that what you suggest does that.

MS CRAWSHAW KC:

But she also fears mortgage obligations, so there's no question.

WILLIAMS J:

It just seems to me this is something you can cancel out each side like you're doing long division or long multiplication or something.

MS CRAWSHAW KC:

I don't think you can quite when you're looking at his position B. I don't think you can discount the obligations to service a mortgage.

GLAZEBROOK J:

Well it would certainly diminish the value, wouldn't it?

MS CRAWSHAW KC:

Yes. When you –

GLAZEBROOK J:

So why would you double count?

MS CRAWSHAW KC:

Sorry, I'm not seeing why you're double counting?

GLAZEBROOK J:

Well the value of the properties is the net equity, isn't it?

MS CRAWSHAW KC:

Yes.

GLAZEBROOK J:

So why are mortgage obligations even relevant?

MS CRAWSHAW KC:

Well, the equity is what you're taking into account when you're doing a percentage analysis once you get to the exercise of discretion and consider various factors. But back at stage 2 you're still looking at position B, which is what is position is and he says he's entitled to repayment of his loans but he's no longer able to live in one of the Trust properties, and he doesn't also add and he's no longer contributing to the servicing of the mortgages.

KÓS J:

Yes but surely say that makes him better off under B, on your argument?

MS CRAWSHAW KC:

Yes, that's true.

KÓS J:

But we haven't talked about the fact the now has to rent a property instead, and so that makes him worse off again. He's just temporarily better off because he's not paying the mortgage, but then he thinks, "where am I living, ah, rent a house". So he's worse off again, and surely in the end, as you'd expect economically, the mortgage and the rent might roughly cancel out. So –

GLAZEBROOK J:

Well in fact without the actual building up of equity in a property.

KÓS J:

Exactly. So I'm not sure you've proved you've established an error here actually because the Judge hasn't mentioned two considerations which are more or less cancelled out, leaving us with B as he said it.

MS CRAWSHAW KC:

We don't have evidence before the Court as to the quantum of rental. We don't have evidence as to whether that actually is putting him in a worse position.

KÓS J:

Okay, but we can't take into account the benefit you're identifying without taking into account the disbenefit of having to pay rent.

ELLEN FRANCE J:

See on one view of it that's all the Judge is saying. At the moment he's living in one of the properties owned by the Trust and contributing to the mortgage. The other, if it had continued, et cetera. So in a way it is just expressing the practical reality of the difference for him. Arguably.

1500

MS CRAWSHAW KC:

Well I suppose what the Court of Appeal did when it undertook the objective analysis of reasonable expectations, the Court of Appeal considered that the expectations of distributions was at that stage remote, a remote possibility, and Justice Venning has said he'll have no ability to call on the Trust for income or capital distribution in the future. Well, in the future at some stage but when.

I do think there is a problem in the exercise of discretion in that that calculation error does lead the Court to its 60/40 finding in the High Court. I don't think there can be any question that that is the case.

KÓS J:

Well, only if you're reasoning to a house which he does at 70.

MS CRAWSHAW KC:

Yes.

KÓS J:

But unfortunately at 69, he's already got the 60/40, hasn't he?

MS CRAWSHAW KC:

Well, that paragraph appears above 70 but he might well have re-ordered those paragraphs.

KÓS J:

Well, we don't know, do we?

MS CRAWSHAW KC:

We don't know.

WILLIAMS J:

Isn't the point really that you could have picked 60/40 here or you could have picked 70/30 on this basis and probably not want to interfere with that, that's a matter of judicial judgment, because the stage 3 process is importantly a matter

of impression or we're going to get round after round of fact-based niggling arguments coming up, not in this particular case but in case after case as really we've seen? We need to avoid that and leave it to the impression of the trial Judge so that we stop bleeding litigants' money in fighting over these sorts of things?

MS CRAWSHAW KC:

Well, the trouble is this doesn't sit easily. The 60/40 doesn't sit easily next to cases like *Preston*, five years, largely separate property involved, and that's a 15% share, and then *Bethell*, long marriage, 20% share of the Trust equity. So it doesn't sit neatly in terms of the way in which that exercise of discretion happens. It happened somewhat abruptly and it does seem to be linked to the gravitational pull of the equal sharing that the Family Court Judge did. So there is a problem, I think, with the learned High Court Judge's decision and not factoring into those –

WILLIAMS J:

Right, so your system-based problem with it is that it's out of step with similar cases or cases dealing with the same issue with distinctive facts –

MS CRAWSHAW KC:

Well, this is a bit of a standalone case, I have to say, but it does create a bit of a problem if you've got a very short marriage and one person's put in, you know, considerably more than the other and there aren't any other ameliorating factors and you're suddenly getting a 60/40 split in a section 182 case which would never in a month of Sundays happen under the PRA. That starts raising people's expectations in section 182 cases above and beyond and that's not helpful for the lower Court trial Judges to grapple with, and I think the Court of Appeal's decision has been reasonably helpful thus far in saying, well, if you've got a *Clayton* and *Ward* type marriage you're really looking at an equal sharing. If you've got a *Preston* type shortish marriage but you've got some other non-financial contributions you would expect to get a share of equity but not a lot. A short-duration marriage with significant financial contributions by one

party, you will still get a share but it will be proportionate, and there's logic to that and that's helpful for the lower Courts.

WILLIAMS J:

Yes. The difficulty I have with the Court of Appeal decision here is the extent to which it poses quite a detailed counterfactual on very remote matters that don't seem to me to be consistent with what should be an impressionistic justice-based approach. Now you may be right about this being out of whack with the ordinary Judges but if that is true then we need more than a detailed counterfactual narrative purporting to justify that. We need an in-principle point that needs to be made and, frankly, this is just me speaking for myself, the idea that they weren't going to be getting any money until they turned 65 seems a big call to make on a highly contingent matter.

1505

MS CRAWSHAW KC:

Well, they both were agreed about though in their evidence. They both agreed that the long-term idea was it was for their retirement so that wasn't too remote.

WILLIAMS J:

Yes, but across the course of a 20-year marriage stuff changes and, you know, if there's a big boom in the house market and you want to cash up and go for a holiday or do something else with it, or if there's a big flop and you need to get out of it, then you might want to cash up. These are all contingencies that need to be thought about before you start saying that nothing, no one's going to get anything until they turn 65.

MS CRAWSHAW KC:

This is the difficulty with – that's inherent in section 182 is we are looking at this forward looking exercise from the point of view of what was a short marriage but we are looking at it forward and it becomes quite speculative. I think we can still get to the same conclusion that the Court of Appeal reached without the complicated counterfactuals because we could just do it –

WILLIAMS J:

Well, that's where I personally would be helped if you could say what are the big issues in principle rather than the construction of a detailed counterfactual to justify it which –

MS CRAWSHAW KC:

Well, I'd say that –

WILLIAMS J:

– get you there?

MS CRAWSHAW KC:

Yes, I hear your Honour. I just say what you can do here is on the exercise of discretion say, as this Court did in *Preston*, the shorter the marriage, the more important the financial contributions are.

WILLIAMS J:

Yes, I don't think there's any debate about that –

MS CRAWSHAW KC:

That's very simple and straightforward.

WILLIAMS J:

– but tell me why 60/40 is wrong in principle and 80/20 is right?

MS CRAWSHAW KC:

Because the shorter the marriage the more importance that financial contributions have, the more likely that a fair result is to order proportionate relief based on contribution absent countervailing factors of a non-financial contribution nature and if there was evidence, such as a raising of children or giving up of careers or something like that, that would then discount it back from a pro rata division.

WILLIAMS J:

Right, so you say the principle to be applied here is short marriage contributions only –

MS CRAWSHAW KC:

Yes.

WILLIAMS J:

– unless there's some countervailing fact –

MS CRAWSHAW KC:

Yes.

WILLIAMS J:

– such as children or, you know…

MS CRAWSHAW KC:

Giving up a career, looking after an elderly aunt.

WILLIAMS J:

Right.

MS CRAWSHAW KC:

Those sorts of things.

WILLIAMS J:

Okay.

MS CRAWSHAW KC:

I say it doesn't have to more complicated than that actually.

WILLIAMS J:

It's been made more complicated than that it seems to me.

MS CRAWSHAW KC:

Yes, and I'm sorry for my part in that.

GLAZEBROOK J:

Although this is equative. I don't necessarily have a problem with that if you are just looking at contributions but you're not just looking at contributions, you're looking at the share of the excess over and above contributions, leaving aside interest for now, because neither party has asked for it because, in fact, they did get their contributions back under that and under the High Court analysis first.

MS CRAWSHAW KC:

I'm sorry that was loose terminology and the reason I've used that is because the Court of Appeal actually did treat the lending as contribution. So when I'm talking about contributions, I'm talking as though they were the – well money that the parties said (**inaudible** 15:08:47) –

GLAZEBROOK J:

No, but that's fine, that's fine.

MS CRAWSHAW KC:

– and I'm saying –

GLAZEBROOK J:

So am I, so am I. So, they had unequal contributions, the loans I'm treating as contributions, they get those back…

MS CRAWSHAW KC:

And I'm saying that in the case of a –

GLAZEBROOK J:

In the case of a short marriage, what you're saying is that any excess should also be shared –

MS CRAWSHAW KC:

Proportionately.

GLAZEBROOK J:

– proportionately and that's where I don't quite understand why that has to be the case.

MS CRAWSHAW KC:

Well, it doesn't always have to be the case if there are countervailing circumstances. I say that it should be –

GLAZEBROOK J:

So you would always get back. So, the argument is that whatever it would always be, well let's say 80/20 in this case, which isn't quite right, because it was 17 or 18 or whatever it was, so the argument would be it would just always be split on those bases unless they were countervailing factors?

MS CRAWSHAW KC:

And the countervailing factors would include such things as non-financial contributions that either – that the other party made because that would obviously reduce or increase their –

GLAZEBROOK J:

Well is that only where you've only got a short marriage, or is that where it's 15 years or where do you draw the line there?

1510

MS CRAWSHAW KC:

Well in short or long marriages non-financial contributions are relevant. We know that from *Preston* which was –

GLAZEBROOK J:

Let's assume that, as in this case, over the 15 years they've been equal.

MS CRAWSHAW KC:

So if it was a 15-year marriage and this was a section 182 case and the final contributions had been as they are, by that stage in the marriage it is very likely that those financial contributions would have been perhaps eclipsed, or if not eclipsed, nearly eclipsed and I've never argued otherwise.

KÓS J:

I mean you're treating this as if it's a share club pay-in. You know, you and I have a share club, you pay in four dollars, I pay in one dollar. We make a lot of money. At the end of the day we split it up four to one. Why do we bother with applying the whole *Clayton/Preston/Ward* analysis to this?

MS CRAWSHAW KC:

You're suggesting it's a bit bleak and emotionless?

KÓS J:

It is. I am rather.

MS CRAWSHAW KC:

Which is to –

WILLIAMS J:

Shares can be very emotional.

MS CRAWSHAW KC:

– to coin a phrase from *Harrison v Harrison* [2005] 2 NZLR 349, look it is a bit bleak and emotionless and so too it is in the section 14 short duration marriage division and that's a reality and the reason, and I've referred to this in the decision of Justice Barker, an old one from 1993 in *Clarke v Clarke* HC Auckland HC 104-92 2 August 1993 in my submissions, is that it does get a bit like the business end of things where you've got a short marriage and that's –

WILLIAMS J:

Well your point though is where you've got a short marriage and no other factors?

MS CRAWSHAW KC:

And no other factors but where there are other factors, it's not bleak and emotionless. It's not your share club, is it?

WILLIAMS J:

It's bleak and emotional.

MS CRAWSHAW KC:

Bleak and emotional and hopefully not too emotional because that can get unedifying.

GLAZEBROOK J:

All right, so you've – I mean as I see it you're making two points; with short duration marriage it should be a proportion based on contributions and that actually equates to what would in fact happen under the PRA as well so that that is the way it should be?

MS CRAWSHAW KC:

Yes, it is but don't forget my countervailing factors point. I did say unless there were –

GLAZEBROOK J:

No, no, I understand, I understand.

MS CRAWSHAW KC:

Because that, of course, applies under section 14(2).

GLAZEBROOK J:

Yes, of course.

WILLIAMS J:

I would have thought that most cases would have some sense of countervailing factors unless their marriage was from the outset bleak and unemotional.

MS CRAWSHAW KC:

This marriage –

WILLIAMS J:

The giving up of a job, that sort of thing.

MS CRAWSHAW KC:

That's right but this marriage was unusual in the sense that they meticulously recorded their financial contributions. Now that of itself is different from the norm, if you like, it is a meticulous –

GLAZEBROOK J:

I shouldn't think it is really, is it?

MS CRAWSHAW KC:

In a second relationship –

GLAZEBROOK J:

If you're –

MS CRAWSHAW KC:

– well it's recorded in a –

GLAZEBROOK J:

Sorry, all I'm saying is if you are accounting for a trust, you actually have to account for where contributions come from, don't you?

MS CRAWSHAW KC:

Well you should and that's kind of honoured in the breach usually with family trusts.

GLAZEBROOK J:

I understand but if you are going to do accounting properly, which they were, then you can't just sort of go “well here’s some money.”

MS CRAWSHAW KC:

No, but every single item of expenditure and every mortgage payment is credited and I say that that is actually inconsistent with the notion of equally sharing equity here.

1515

I just wanted to briefly address you about the occupation rental argument because this has come in very late in the piece. It's 104 of my submissions. That claim wasn’t argued in the Court of Appeal. I don’t believe it was argued in the High Court but my learned friend can correct me on that if I'm wrong. If it had been, there would have been arguments provided in opposition. I just make the point, and I think your Honour Justice Miller made the point that we’re nine and a half years down the track and there’s a considerable benefit to the appellant of course now with the increase in value in the properties that has occurred over that nine and a half years, in terms of the capital gain.

My learned junior Ms La Mantia will address you on just three very short points regarding the external indebtedness, and then that is the submission for the respondent, unless there is any other matters I can assist with.

GLAZEBROOK J:

No, thank you. So we’re hearing from, sorry?

MS CRAWSHAW KC:

Ms La Mantia.

MS LA MANTIA:

Good afternoon. These points relate to financial contributions and perhaps the first point is a comment on the pro rata sharing the respondent proposes. There was a concession made by the appellant in the Court of Appeal decision

that if there were losses such that the personal debts could not be repaid by the Trust, those losses would be shared by the parties pro rata. He hasn't resiled from that position. His submissions make clear that that is what he maintains. So therefore he's asking losses on the Trust, and benefits, to be treated differently. So on the exercise of discretion he would like to receive 50/50 sharing, but if there were any losses he would only want to be suffering those on a pro rata basis.

Next, the cases referred to by the appellant. I'm not going to go through every one in detail. *Bradford v Te Hei* sets out the various cases, *Illingworth*, *H v O* and *TK [sic]* – I don't think it talks about *TK v AN [sic]*, but it's clear after that analysis that the mortgage borrowing does not necessarily equal contributions equal to the amount that's advanced. That is the proposition there. Each of those cases were decided on the facts. In the *Illingworth* case, for example, the parties both were liable on the bridging finance, which carries considerable risk. Despite that, the sharing was not equal.

Then finally, in this particular case the risk of liability on the bank loan was very remote, because of the respondent's significant contributions, of equity, or initial contributions of $1.211 million.

Those are the points that I'm making.

GLAZEBROOK J:

Thank you. Thank you counsel. So in reply?

MR ZHANG:

Yes your Honour. I have some. Hopefully it won't take up to 4 pm. The first point –

WILLIAMS J:

Are you going to need 45 minutes to reply?

MR ZHANG:

Hopefully not that much.

WILLIAMS J:

Well not hopefully.

GLAZEBROOK J:

Yes, I would have thought 10 minutes at the most.

MR ZHANG:

Ten, I'll be done in 10 minutes your Honour.

KÓS J:

Big points in reply Mr Zhang.

MR ZHANG:

First is the supposed concession that we have made in the Court of Appeal. This is what I was getting at earlier about conflating different roles. What we were talking about there was Mr Lassnig and Ms Zhou in their capacities as lenders, one lent four times as the other. If the Trust would not have sufficient money to repay these two, they (**inaudible** 15:19:36) necessarily as a matter of logic suffer losses pro rata, in other words together the Trust owed them 1.5 million, 1.22 Ms Zhou and 290 to Mr Lassnig. If the Trust only has $1 million left to pay them, how does the Trust pay? The Trust would obviously pay Ms Zhou 800,000 and roughly 200,000 to Mr Lassnig as creditors, so they would obviously suffer the bit that weren't paid pro rata. That's all that we were agreeing to in the Court of Appeal. That's got nothing to do with this other hat they wear which are the trustees and it's got nothing to do with this other hat they have as beneficiaries under the Trust. So for them to argue, see, that's… 1520

WILLIAMS J:

We've got the point. You don't need to labour it.

MR ZHANG:

Move on, yes? Much arguments were made about windfall profit. Where does this come from? It actually first came from the Court of Appeal judgment. I have personally found no reference of this in any previous 182 cases and it's unclear why the Court of Appeal suddenly says, use this term "windfall profit". Can we not look at Ms Zhou, say, well, isn't she getting a windfall profit? Isn't she here in this Court asking for windfall profit? She is going to get every cent of her contribution back and then she says: "I'm not happy with 50% of the equity. I would like 80%, please." Isn't the extra 30% windfall? The parties start equal footing. The parties started off as a married couple, entered into this Trust, put in what they could, contributed as the way they agreed, and now suddenly he's the one that's getting windfall profit? That can't be right.

My next point is that I think Justice Miller asked about the valuation point. That's actually answered in Family Court judgment, paragraph 255. Basically, the Family Court has explained at time of settlement, of the resettlement of the Trust, there will need to be either agreed value of the Trust properties or failing, parties failing to agree, there will need to be valuation. So that is still yet to happen.

Now my next point isn't really a point about what we explain but more of a clarification of an earlier point. So earlier Justice Kós asked me the question about do we agree with the High Court decision? I explained, well, we actually were the cross-appellant. I want to clarify that. Our cross-appeal was not that Justice Venning got it wrong in his analysis of the way it was exercised, rather his Honour was wrong to say the Family Court got it wrong, therefore warranting his intervention. Now the reason we didn't press this argument in the Court of Appeal is by the time we had a hearing it fell to the Court of Appeal – to the Court of Appeal it was a foregone conclusion that Justice Venning was warranted to re-do the exercise and the Court of Appeal was happy to re-do the exercise. That's why we didn't press that. But our fundamental position hasn't changed. The Family Court never got it wrong. The alleged error on the Family Court's again weren't actually errors. These points were actually made. What

Justice Venning says the Family Court failed to make the points were actually made.

I'm not too sure if the Court is interested but if the Court is I'm happy to provide the written submissions that was filed in the Court of Appeal on this point, and I would obviously agree to my learned friend to file their counter-submissions on our cross-appeal to the Court of Appeal.

GLAZEBROOK J:
If it becomes relevant we'll ask you for them but I don't think so.

MR ZHANG:
All right, so –

KÓS J:
I suspect we're past that point.

GLAZEBROOK J:
No, I agree. I was just –

MR ZHANG:
My junior just explained that they are actually in the bundle, so they are there.

My next point is about this idea that my learned friend was driving that, hey, look, the Family Court judgment in this case is a bad one, confuses everyone. The High Court one is also a bad one, confuses everyone. Court of Appeal one is a good one. Now we also mentioned that we disagree with that. Family Court's decision is actually pretty simple. It recognises Ms Zhao contributed a lot of money but says, well, but it's advanced by way of loan. She will get it back, so it carries a lot of weight. That's one way to look at this. We say that's a correct way. It's clear cut. There's not a lot of confusion can be caused by that at all.

The High Court takes it a bit further saying: “Well, notwithstanding that contribution, it’s really a loan and the loan will be paid back, but because Ms Zhao’s put in a bit more she should be recognised for that,” so she gets extra 10%. That’s also fine.

1525

The real problematic judgment is really with the Court of Appeal, but I won’t labour all that again because that’s really our general appeal submissions and hence why we’re in this Court in the first place.

My last point in reply is this idea that – well it's actually two different points, I suppose, so I really should say that there are two different points here in reply. Much argument had been made about a relationship, sorry a marriage of short duration. If that’s the case then everything would have been pro rata. I think that’s the argument and that argument is this is a marriage of short duration but it's 182 pro rata just the same. That’s legally incorrect because a marriage of short duration, you only look at contribution for everything other than the actual main thing that people end up dividing which is the family home. Marriage of short duration is treated differently under PRA to de facto relationship of short duration. The difference is under quite a lot of circumstances the family home is split 50/50 but it's other stuff that’s not split 50/50.

What does that indicate to us? It indicates to us that marriage matters. If two adults walk into a marriage, buy a house together, the law binds you to it. You split a house 50/50 even if one contributes more than the other. Even there it's a case where the parties contribute the money outright. Here the parties did not contribute the money outright because they had advanced them by way of a loan they would get paid back.

And that now ties into my final point which is the point that was made fairly early on in my friend’s submissions. She says the loan structure in this case is somewhat inadvertent. See there wasn’t even a loan document, just a ledger. And it's inadvertent by virtue of there was a trust set up. Now putting aside it is now too late to argue against the existence of the loan and putting aside that a

loan doesn't really require a loan document to prove it exists, this notion that the loan structure is somewhat accidental and somewhat would only come into existence because they set up a trust, that is an incorrect submission.

Now we perceive this case differently. We say that the parties walk into this relationship with some degree of separation. That's why they wanted their contributions to be recorded and to be paid back to them albeit they forego interest. They could have done the same thing had there not have been a family trust. They could either have – instead of family trust, so let's say if they didn't wish to form a family trust but they wanted to invest money in properties just the same and they would be willingly – they would willingly be bound by the relationship property law, they could have done either one of two things. They could either have formed a company, both shareholders and have themselves lending the company money so that they would be able to claim that money back. The whole thing would still fall under PRA. Or even easier, they say well we form a partnership, a partnership to invest and they could both lend money to the partnership as lenders and they would result in the same thing. They would be able to claw back the lending they made to the partnership or the company and then let PRA take care of the rest. So this idea that this lending arrangement is inadvertent and intended we reject the assumption. That's all that we –

WILLIAMS J:

What's your basis for saying that in respect of the family home clearly disproportionate contributions are not relevant to the division of that home in a marriage of short duration?

MR ZHANG:

I think that's the effect of the – that is the effect of that section. It's somewhat convolutedly worded. I think it's 14 –

MS CRAWSHAW KC:

Section 14 it doesn't apply as my friend said.

WILLIAMS J:

Yes, 14(4), section 14(4) I think –

MR ZHANG:

Yes.

WILLIAMS J:

– suggests that the equal division doesn't apply if there's a significant disproportionality.

MR ZHANG:

Yes, your Honour, you're right, you're right, that's correct. So, I suppose, the argument is my submission is wrong if the contribution is clearly disproportionate and greater than the other. My point is absent of that we'll have simply unequal contribution. You wouldn't fall out of equal division.

1530

WILLIAMS J:

So are you arguing that the four to one financial contribution was not sufficient to meet that threshold in subsection 4?

MR ZHANG:

No, I wouldn't go as far as that. I'm simply saying to say that… let me address this point from different angle, your Honour. This case really focus on probably just one simple point. Does the Court think lending to be a contribution? If it is then we have to lose. They out lend us four to one. If the Court agrees with me that lending is not a contribution then there is no disparity in lending. It really comes down to that. And the marriage of short duration point I was making is simply that marriage means something under the Act. You get something different if you're married compared with if you're simply de facto partners. That concludes my reply.

GLAZEBROOK J:

Thank you very much. I thank all counsel for their assistance. We'll take time to consider it and give our judgment in due course.

MR ZHANG:

As the Court pleases.

GLAZEBROOK J:

We will retire, thank you.

COURT ADJOURNS: 3.32 PM