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Some thoughts on a (New Zealand) Judicial Approach to Trust Law¹

Introduction

[1] I thank the organisers for their invitation to address this august body of trust lawyers. I have been asked to speak about the law relating to trusts and trustees from the perspective of a sitting New Zealand Judge. In doing so, I speak only for myself. I add the usual judicial caveat: the views I express are not set in concrete and may be changed after hearing full argument on any particular point.

[2] In order to identify and comment on the judicial perspective, I have chosen two somewhat controversial areas. I have done that to highlight approaches that have been taken in the context of relevant policy imperatives. The two areas are:

[a] The “trust-busting” cases

[b] The “bundle of rights” theory.

[3] Some commentators have suggested that, in these two areas, the Courts have (at least occasionally) stepped outside the orthodox boundaries of trust law and put in jeopardy the purposes for which trusts have historically been formed. I suspect that one of the reasons that view might be held is the approach taken in New Zealand, during the late 1980s to the mid 1990s, to development of the constructive trust. While I do not agree with the notion

¹ By Hon Justice Paul Heath, Judge of the High Court of New Zealand, based in Auckland. I thank Samantha Wilson, Judges’ Clerk, High Court, Auckland for her assistance in the research for and content of this paper. Any errors are mine.

that a controversial indigenous approach exists, my paper will provide some discussion of that issue.

[4] The thesis I present today may be summarised in two propositions:

[a] Those areas in which the Courts have been prepared to “look through” or “bust” trusts are driven by policy imperatives that underpin various statutes enacted by Parliament. The Courts, in interpreting the legislation, have endeavoured to identify the purposes for which the particular enactments have been passed and to establish, where necessary, the outer boundaries of the jurisdiction.

[b] The trust is an invention of equity. The law surrounding the obligations of trustees and the interests held by beneficiaries of the trust estate, while contained in statute to some degree² are capable of being developed. In developing principles to meet contemporary problems, it is necessary for the Courts to have regard to policies identified in particular statutes,³ while keeping intact the underlying foundation on which the holding of property on trust for a third party was historically based.

Development of equitable principles in New Zealand

[5] During the era of Sir Robin Cooke’s Presidency of the Court of Appeal, there were a number of cases in which development of equitable principles and duties were discussed. Taking its lead from a speech given by Lord Diplock, in *United Scientific Holdings Ltd v Burnley Borough Council*,⁴ the Court consistently held that the fusion of equity and law meant that traditional differences between courts of common law and equity had

² Trustee Act 1956.

³ For example, Property (Relationships) Act 1976.

⁴ *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 (HL) at 924–927.

become much less significant. Strict approaches to issues of rights and remedies available under the two streams were eschewed.⁵

[6] It is fair to say that a degree of retreat from that general approach was signalled by the Privy Council's reversal of the Court of Appeal's decisions in *Elders Pastoral Ltd* and *Liggett v Kensington*.⁶ Both of those decisions determined cases on bases other than the controversial constructive trusts imposed by the Court of Appeal. Since 2000, I can find very few references in reported decisions to the approach taken in the 1980s and 1990s, during Cooke P's Presidency, other than in respect of choice of remedies.⁷

[7] Undoubtedly, development of the law of equity is seen differently in New Zealand than, for example, New South Wales. The retention of a discrete Equity Division in that jurisdiction has tended to place greater weight on the historical reasons for development of particular principles, while the New Zealand approach was fashioned to make common law and equity work together more seamlessly. That view can be discerned from an extra-judicial article written by Sir Robin Cooke in 1993.⁸ Sir Robin described the "jurisprudence growing vigorously across the Tasman" in the High Court of Australia as having a "different flavour from ours, and our simplicity can be naive by comparison". Having said that, he also referred to a sense that "the Canadian, Australian and New Zealand courts, according to their several modes [were being] driven by similar forces".

⁵ Examples can be found in cases such as *Day v Mead* [1987] 2 NZLR 443 (CA) at 450–452, *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1989] 2 NZLR 180 (CA) *Elders Pastoral Ltd v Bank of New Zealand* [1991] 1 NZLR 385 (PC), and *Kensington v Liggett* [1993] 1 NZLR 257 (CA).

⁶ See *Elders Pastoral Ltd v Bank of New Zealand* [1991] 1 NZLR 385 (PC) (dealing with the case as one of equitable assignment of a chose in action, rather than a constructive trust) and *Re Goldcorp Exchange Ltd (in receivership); Kensington v Liggett* [1994] 3 NZLR 385 (PC) (treating what had been characterised as a constructive trust case as one concerning the sale of goods).

⁷ However, see *Stevens v Premium Real Estate Ltd* [2009] NZSC 15; [2009] 2 NZLR 384 (SC) at para [33] and *Chirnside v Fay* [2005] 3 NZLR 689 (SC) at para [16]. Those cases focussed on the appropriate approach to remedies from the fusion of law and equity, rather than any broader principle..

⁸ Sir Robin Cooke "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: A New Zealand Perspective" in Donovan W. M. Waters (ed) *Equity, Fiduciaries and Trusts* 1993 (Carswell, 1993) 25 at 28.

[8] Strong views about the appropriateness of the differing approaches led to some unfortunate rhetoric. The learned authors of a leading Australian text on equity wrote, in the preface to the 2002 edition:⁹

In New Zealand, the prospect of any principled development of equitable principle seems remote short of a revolution on the Court of Appeal. The blame is largely attributable to Lord Cooke's misguided endeavours. That one man could, in a few years, cause such destruction exposes the fragility of contemporary legal systems and the need for vigilant exposure and rooting out of error.

Acknowledging that such words did not just flow from the western side of the Tasman Sea, I can recall being at a lecture given by Lord Cooke during which he described Justice Meagher as one of the finest jurists of the 18th Century.

[9] All an exchange of this type demonstrates is that arguments directed against a person prove nothing. There is more than one vantage point from which the development of equitable principles can be viewed. While some may disagree with the more flexible approach that Lord Cooke advocated, there was no less rigour in his analysis of the law than can be found in judgments which approach the issues from a more traditional standpoint. They are nothing more than legitimate differences on the way in which principles of equity can be developed by the courts to meet the needs of society; as evidenced by contemporary statutes.

“Trust-busting”

[10] The provocative expression “trust-busting” evokes an image of a Judge shunning his or her judicial attire for that of a “caped-crusader”. However appealing that view may be, the reality is much more mundane.

[11] The notion of “trust-busting” is captured in various pieces of legislation directed to differing factual situations. The policy drivers are legislative in nature; not judicial. Parliament has made a policy choice that, in certain

⁹ Pitt Meagher, John Dyson Heydon, Mark James Leeming *Meagher, Gummow and Lehane's equity, doctrines and remedies* (4th ed, LexisNexis Butterworths, Sydney, 2002).

areas of the law, the protection of assets otherwise available through use of an orthodox trust structure is unjustifiable, when measured against countervailing considerations. In each of these areas the question is: Why should the advantages of a trust structure prevail over the rights of others?

[12] Few, if any, of the so-called statutory “trust-busting” provisions are directed solely at trusts. Some examples follow.

[13] Section 60 of the Property Law Act 1952 (now repealed and replaced by s 345 of the Property Law Act 2007) was designed to ensure that a person’s creditors would not be prejudiced by a debtor’s alienation of property with intent to defraud them.¹⁰ The policy is unexceptional. Perhaps some were surprised that the element of “intent to defraud”, spelt out in s 60(1) of the 1952 Act, was latterly interpreted “as shorthand for intent to hinder, delay or defeat a creditor in the exercise of any right of recourse of the creditor in respect of property of the debtor”.¹¹ But, while that interpretation might have been contestable under the 1952 Act, it did no more than to align s 60 with the words chosen to express the same policy in s 345 of the 2007 statute.

[14] Section 44 of the Property (Relationships) Act 1976 appears in a Part of that Act which carries the subheading “*Protection of spouses’ or partners’ rights*”. Section 44 empowers a court to set aside a disposition that was made with the intention of defeating a spouse or partner’s rights under the Act, or to order compensation for that spouse or partner. Its terms, while relevant to situations involving trusts, do not limit its scope. It is the subsequent provisions of the Act that identify the type of order that courts may make when dispositions of relationship property to trusts are in issue: see ss 44B and 44C.¹² The policy underlying these provisions is to ensure that a spouse or partner is not, through a qualifying disposition to a trust

¹⁰ See *Regal Castings Ltd v Lightbody* [2008] NZSC 87; [2009] 2 NZLR 433 at para [86] (per Tipping J).

¹¹ Ibid at para [52] (per Blanchard and Wilson JJ).

¹² I discussed exercise of jurisdiction under s 44C of the Act, and its interrelationship with s 44, in *Babylon v Babylon* (2009) 27 FRNZ 622 at paras [42]–[47]. Sections 44B and 44C are set out at para [28] below.

associated with the other spouse or partner, improperly disadvantaged in the ascertainment or calculation of the share of relationship property to which he or she is entitled.¹³

[15] On the making of an order dissolving a marriage or civil union, s 182 of the Family Proceedings Act 1980 empowers a Family Court to inquire into the existence of any agreement between parties to a marriage or civil union, including post-nuptial settlements made on the parties. The Court is given a jurisdiction to cancel or vary any such arrangement if, at the end of the marriage the applicant no longer derives the benefit he or she reasonably expected to receive from the arrangement. The purpose of the provision is to protect the rights of the spouses or civil union partners by enabling the Court to restore that reasonable expectation to the extent possible.¹⁴ This provision is not unique to New Zealand. It can be traced back as far as s 45 of the Matrimonial Causes Act 1859 (UK).¹⁵

[16] Section 8 of the Legal Services Act 2000 focuses on the circumstances in which legal aid may be granted for criminal proceedings. The policy behind this Act is to ensure that those who may have access to funds (for example, through trust structures) do not receive assistance from the general body of New Zealand taxpayers to pay for a defence of criminal charges that could properly be mounted from resources to which they would otherwise use for their own and family purposes.¹⁶ The “means” of an applicant are taken into account. As one of the criteria, the Legal Services Agency is required to determine whether the applicant has “sufficient means ... to obtain legal assistance”.¹⁷

¹³ See, for example, *Nation v Nation* [2005] 3 NZLR 46 at para [143] in respect of s 44C.

¹⁴ *Ward v Ward* [2010] 2 NZLR 31 (SC) at para [15].

¹⁵ *Ibid*, at para [14]. The issue in *Ward* was primarily directed to whether relief should be granted in a case where, potentially, to do so might defeat or vary any agreement entered into under Part 6 of the Property (Relationships) Act 1976, a point on which the High Court ([2008] 3 NZLR 383) and the Court of Appeal ([2009] 3 NZLR 336) had differed. The Supreme Court sided with the Court of Appeal.

¹⁶ *Petricevic v Legal Services Agency* [2011] 2 NZLR 802 (HC) at para [50].

¹⁷ Legal Services Act 2000, s 8(1)(b).

[17] In *Petricevic v Legal Services Agency*,¹⁸ Wylie J considered an appeal against a decision of the Legal Aid Review Panel to uphold the Legal Services Agency's decision declining Mr Petricevic's application for legal aid to enable him to defend criminal proceedings.

[18] The primary issue on appeal was whether the Panel erred in law by treating Mrs Petricevic's expectancy as a discretionary beneficiary under a family trust as a "resource" which could be taken into account in assessing Mr Petricevic's means under the Act. The trustees of the trust were Mr and Mrs Petricevic. There was no independent trustee. Mr Petricevic was the settlor, and had power to remove either trustee and to appoint new trustees. The discretionary beneficiaries were Mrs Petricevic, Mr Petricevic's children, and any grandchildren or great grandchildren he and his wife may have.

[19] The Agency was of the view that, under cl 4 of the First Schedule of the Legal Services Act 2000, resources that were potentially available to Mrs Petricevic as a discretionary beneficiary of the trust were to be treated as Mr Petricevic's resources. The Agency treated all assets held by the trust as Mr Petricevic's assets and income and held that, as a result, Mr Petricevic had sufficient means to pay for his own legal representation. While the Review Panel questioned the value that the Agency had placed on Mrs Petricevic's interest in the trust, it nonetheless concluded that the Agency was entitled to conclude that Mr Petricevic had sufficient means to enable him to obtain legal assistance.

[20] In determining whether or not an applicant has sufficient means to enable him or her to obtain legal assistance, the Agency is required to have regard to the applicant's income and disposable capital,¹⁹ concepts which are defined in Schedule 1 of the Act.²⁰ Both definitions are subject to cl 4, which provides that, except in particular circumstances, any resources of a person's spouse must be treated as that person's resources. Upholding the decision of the Panel, Wylie J held that "resources" must include both income

¹⁸ *Petricevic v Legal Services Agency* [2011] 2 NZLR 802 (HC).

¹⁹ Legal Services Act, s 8(4).

²⁰ Legal Services Act Schedule 1, cls 2 and 3, respectively.

and capital and therefore, in the context of the Act, “the expectancy Mrs Petricevic [had] as a discretionary beneficiary in the RM Petricevic Family Trust” was one of her resources.

[21] If the discretion vested in her husband as her co-trustee was exercised in her favour, she would receive financial aid or assistance from the trust. The possibility that this discretion might have been exercised in her favour (as a means of remedying any financial deficiency) was held to be one of her resources”, albeit ... not a certain resource.”²¹

[22] Wylie J considered this conclusion was further reinforced by regulation 8 of the Legal Services Regulations 2006, which provides that, in valuing an applicant’s “disposable capital” any discretionary interest in the assets and income of trust is able to be treated as assets and income of the applicant. Wylie J was satisfied that the definition of “applicant” should be given the extended meaning in clause 4 so as to include an applicant’s spouse.

[23] Section BG 1 of the Income Tax Act is a general anti-avoidance provision, designed to enable the Commissioner of Inland Revenue to claw back benefits received from tax avoidance. The policy underlying the general anti-avoidance provision is to negate any structuring of a tax-payer’s affairs, whether or not this is done as a matter of “ordinary business or family dealings” to obtain an illegitimate tax advantage.²² It is clear that the use of trust structures can bring s BG 1 into play, even though the particular structure that is used is unexceptional of itself.²³

[24] In the examples that I have given, the policy questions are:

²¹ *Petriceovic v Legal Services Agency* at para [41].

²² *Penny and Hooper v Commissioner of Inland Revenue* [2011] NZSC 95; [2012] 1 NZLR 433 (SC) at para [47]; .

²³ *Ibid*, at para [33]. The Supreme Court described the test under s BG 1 as whether the use of the particular structure which was adopted when the salaries were fixed was “beyond Parliamentary contemplation” and therefore resulted in a tax avoidance arrangement.

- [a] Why should creditors of a debtor be disadvantaged by transactions designed to put assets into a trust at a time proximate to insolvency, for the purpose of placing those assets beyond the reach of genuine creditors?²⁴
- [b] Why should a partner or spouse be permitted to retain trust property that has been used for family purposes to the detriment of the other on separation?²⁵
- [c] Why should the general body of New Zealand taxpayers meet the cost of legal services designed to provide access to justice for the indigent litigant when, prior to the litigation, his or her lifestyle was supported through income from a trust?²⁶
- [d] Why should the general body of New Zealand taxpayers suffer through the use of a trust to avoid payment of income tax owed by a particular ratepayer?²⁷

[25] While there may be questions about the way in which statutory provisions have been interpreted, the decisions given by New Zealand courts are attempts to interpret legislation passed to give effect to Parliamentary policy choices, as opposed to the invention of “principles” designed to defeat the purposes for which a trust might be formed.²⁸

[26] I am the first to admit that trust structures that appear, at first sight, to have been formed for ulterior purposes can be (and often are) used for legitimate purposes. For example, insolvency practitioners have long been

²⁴ Property Law Act 1952, s 60 and Property Law Act 2007, s 345.

²⁵ Property (Relationships) Act 1976, ss 44, 44B and 44C and Family Proceedings Act 1982, s 182.

²⁶ Legal Services Act 2000, s 8 and Schedule 1 (cl 4 and 5) and Legal Services Regulations 2006, reg 8(4).

²⁷ Income Tax Act, s BG 1.

²⁸ See, for example, *Ward v Ward* at para [29] where the Supreme Court emphasised that a fact-specific judicial assessment is required in each case. In that case, the Court considered that references to “fairness and justice” were capable of being understood on too broad a basis, if they were not sufficiently related to the purpose of s 182.

distrustful of the concept of a “trading trust”. In *Levin v Ikiua*,²⁹ I expressed some views about the use of a “trading trust” structure and the circumstances in which its use might be unobjectionable. I said:

[101] Because the use of an assetless corporate trustee has the potential to defeat the interests of genuine creditors of a company, there is (rightly) a healthy degree of cynicism surrounding its use. However, it is as well to remember that a trading trust may be used for legitimate purposes, without its directors or shareholders having any intention to defeat the rights of creditors with whom it does business. In each case the intention of those who settle the trust and trade through this commercial vehicle will need to be considered.

[102] The benefits of establishing a trading trust are discussed in Dal Pont and Chalmers *Equity and Trusts in Australia and New Zealand* (2nd ed, 2000) at p 695. Four advantages are identified:

- (a) Use of a trading trust can avoid the level of restrictive regulations imposed on other companies.
- (b) A more tax-effective distribution of business income can be achieved through the use of a discretionary trading trust.
- (c) The discretionary trust can offer flexibility in changing circumstances; particularly, in respect of the selection of beneficiaries and the amounts distributed.
- (d) Because trust property lies outside of assets that are available to satisfy the claims of creditors of the corporate trustee, the trading trust may be a useful asset protection mechanism in the event of insolvency.

[27] Similar comments can be made in relation to other types of trusts. Judges do realise that trusts are, much more often than not, established for good reasons and with honest motives. In each case, the question is whether the use of a trust has infringed the legislative policies that have provided a means of challenging it.³⁰

²⁹ *Levin v Ikiua* [2010] 1 NZLR 400 (HC) at paras [101] and [102]. My decision was upheld by the Court of Appeal ([2011] 1 NZLR 678 (CA)) without any comment on this aspect of the judgment.

³⁰ *Ward v Ward* at paras [29]–[30]. See also *Penny and Hooper v Commissioner of Inland Revenue* at paras [47] and [49] where the Supreme Court made it clear that the focus is on a particular use of an otherwise legitimate structure.

Bundle of Rights

[28] In *Nation v Nation*,³¹ the Court of Appeal considered the scope of s 44C of the Property (Relationships) Act 1976. Section 44C provides:

44C Compensation for property disposed of to trust

- (1) This section applies if the Court is satisfied—
 - (a) that, since the marriage, the civil union, or the de facto relationship began, either or both spouses or partners have disposed of relationship property to a trust; and
 - (b) that the disposition has the effect of defeating the claim or rights of 1 of the spouses or partners; and
 - (c) that the disposition is not one to which section 44 applies.
- (2) If this section applies, the Court may make 1 or more of the following orders for the purpose of compensating the spouse or partner whose claim or rights under this Act have been defeated by the disposition:
 - (a) an order requiring 1 spouse or partner to pay to the other spouse or partner a sum of money, whether out of relationship property or separate property:
 - (b) an order requiring 1 spouse or partner to transfer to the other spouse or partner any property, whether the property is relationship property or separate property:
 - (c) an order requiring the trustees of the trust to pay to 1 spouse or partner the whole or part of the income of the trust, either for a specified period or until a specified amount has been paid.
- (3) The Court must not make an order under subsection (2)(c) if—
 - (a) an order under subsection (2)(a) or (b) would compensate the spouse or partner; or
 - (b) a third person has in good faith altered that person's position—
 - (i) in reliance on the ability of the trustees to distribute the income of the trust in terms of the instrument creating the trust; and
 - (ii) in such a way that it would be unjust to make the order.
- (4) The Court may make 1 or more orders under subsection (2) if it considers it just to do so, having regard to—
 - (a) the value of the relationship property disposed of to the trust:
 - (b) the value of the relationship property available for division:
 - (c) the date or dates on which relationship property was disposed of to the trust:
 - (d) whether the trust gave consideration for the property, and if so, the amount of the consideration:
 - (e) whether the spouses or partners, or either of them, or any child of the marriage, civil union, or de facto relationship, is or has been a beneficiary of the trust:
 - (f) any other relevant matter.

[29] The Court of Appeal, in a judgment of a Court of five delivered by Hammond, William Young and O'Regan JJ, described s 44C as “a new and important part of the relationship property reforms in 2001”, the object of

³¹ *Nation v Nation* [2005] 3 NZLR 46 (CA).

which “was to strengthen [the Act] in relation to trusts where a disposition of relationship property had the effect of defeating one of the party’s rights under the [Act], but where there was no intention, or at least no evidence of an intention, to defeat that party’s rights”.³² Section 44C can, therefore, be seen on one view as being of a “trust-busting” nature.³³

[30] In *Nation*, a trust had been established during the parties’ marriage, of which Mr Nation, the family accountant and the family’s solicitor were the trustees. Under the trust deed, the “principal family member” was the husband, and in that capacity he had power to appoint and remove discretionary beneficiaries and power to appoint and remove trustees.³⁴

[31] The Court acknowledged “some concern in the legal profession” about the extent to which orthodox discretionary trusts might be put in jeopardy through this legislation. The Court said it was “important to distinguish between a prospective claim against an interest in a trust, and the operation of s 44C”.³⁵ The Court reiterated orthodox thinking that “a discretionary beneficiary has no legal or equitable interest in the assets of the trust until the trustees have exercised their discretion in favour of the particular beneficiary”.³⁶ However, in determining whether that principle or s 44C applied, the Court said:

[149] In an instance such as the present – really a paradigm case – the fact situation is that the husband has transferred a half-interest in the farm (which was relationship property) to a discretionary trust in respect of which he has considerable power (see para [18] above). He has put that asset beyond the usual reach of the statute, and substituted an asset which is frozen in value because it is a debt instrument and no interest accrues on it. He has thereby “defeated” the wife’s claim in that respect. This is not a case where an asset has been exchanged for another asset of similar worth, with equal scope for increase in value and risk of loss of value. The section provides that the husband can be required to compensate the wife – on a personal basis – in cases where the wife’s claim is “defeated”. That is the very purpose of s 44C, and it is to that issue of compensation we now turn.

³² Ibid, at para [143].

³³ See para [13] above.

³⁴ *Nation v Nation* [2005] 3 NZLR 46 (CA) at para [18].

³⁵ Ibid, at para [147].

³⁶ Ibid, at paras [74] and [148].

[32] In another decision of the Court of Appeal, *M v B*,³⁷ Robertson J discussed submissions made in the context of “mirror” trusts. The Judge was responding to a submission for the appellant that a valuation, for relationship property purposes, could be undertaken of “a bundle of rights which each of [the] parties had in the mirror trusts which owned what had been the matrimonial home and which had continued to be the family residence after ownership was acquired by the two trusts”.³⁸ Counsel for the appellant had acknowledged that the sole reason for advancing that submission was to ensure a sufficient pool of relationship property against which s 15 of the Property (Relationships) Act 1976 could apply.³⁹ In discussing the topic, Robertson J observed that the amendments made to the Act in 2001 had not “entirely [removed] the protection offered by a trust”. Rather, it had provided particular statutory mechanisms through which the Court could operate when trusts were used (for what the Legislature had regarded as an improper purpose) to defeat the interest of a spouse or partner.⁴⁰

[33] In a separate judgment in *M v B*, Hammond J, citing *Nation*, said that there were some circumstances in which interests in trusts could be brought to account. But, he reserved for a case in which the issue squarely arose, whether it was possible “to entirely look through, ..., a trust set-up by one or other of the parties”.⁴¹

[34] In *Walker v Walker*,⁴² the Court of Appeal commented on the way in which relationship property interests had been calculated in a case where a family trust was involved with a debt back to the settlor. The focus of the decision was on quantification of the debt owed by the trustees to the spouse. Delivering the judgment of the Court, Chambers J said:

³⁷ *M v B* [2006] 3 NZLR 660 (CA).

³⁸ *Ibid*, at para [112].

³⁹ Section 15 allows a Family Court to award a lump sum payment or to order transfer of property to redress economic disparities.

⁴⁰ *Ibid*, at para [119].

⁴¹ *Ibid*, at para [243].

⁴² *Walker v Walker* [2007] NZFLR 772 (CA).

[38] We agree the fact the debt is a private debt can lead to complications in valuation. For instance, if a debt owed by a family trust cannot be paid or can be paid only in part, the devaluation of the debt may be compensated for, at least in part, by an increase in value of one party's or both parties' interests in the trust — whether his, her, or their interests as settlor, trustee, appointor, or beneficiary, which interests may be relationship property.

[39] But none of this leads to the proposition that “in a family trust context, there are no sound reasons for the sum of the debt to increase or reduce”. If by “the sum of the debt” Priestley J meant its face value, then clearly that will not increase or decrease — but that is a self-evident proposition true of all debts, not just private debts. In a property relationship context, we are not primarily concerned with a debt's face value but rather with its market value. If Priestley J meant that, in a family trust context, a private debt's face value is always to be treated as its market value, then the statement is, with respect, wrong. If the debt is interest-free, then clearly it could never be worth more than face value, but equally clearly it could be worth less. If the debtor trust has to pay interest, then the debt could be worth either more than face value or less. The former could occur in circumstances where the trust is good for the money and the interest rate is higher than current market rates for an investment of that kind and with that category of risk.

[40] And further, of course, if a debt falls in value because the debtor trust has not the means to repay it, it may rise in value again if the trust's fortunes improve.

[41] On this issue, we find that Judge Doogue was correct to try to establish a value for the debt; she was not bound to assign it its face value.

...

[48] Thirdly, the wife should not suffer because of a perhaps unwise concession on her part. It seems to have been assumed in the Family Court that the debt was to become the husband's property. Further, the wife seems to have conceded that certain other assets, which were relationship property and which are related to the debt, were to become the husband's property. Those other assets were:

- (a) the directorship of the trustee company;
- (b) the shares of the trustee company;
- (c) the power to appoint and remove directors of the trustee company;
- (d) the power to appoint and remove trustees of the trust;
- (e) the parties' discretionary interests under the trust.

[49] Indeed, those items of property appear never to have been valued. Those five items of property, plus the debt, formed a very valuable package, as together they confer control of the company. The assumption that “the package” was to pass to the husband is confirmed by the draft orders counsel submitted after the hearing. Had the wife put ownership of the package in

issue and offered \$2.275m for it, as she could easily have done, the husband would have had to match the offer. Indeed, on the evidence, she could have sensibly offered more than \$2.275m for the package, as the company had by date of hearing restored its profitability and control of the package gave control of the company. The only reason the husband has felt confident about arguing for the lower value of the debt is his assumption that he would be acquiring the package.

...

[60] Thirdly, it is wrong to focus on the debt in isolation from the rest of the package. Clearly, all six items of property forming the package should have been valued on an assumption that they were for sale together. That would be a reasonable assumption in terms of maximising the value of the relationship property, for, as we have said, together they confer control of the company. Had they been valued together and offered for sale together, either the husband or the wife would have offered far more than \$857,000 for the package. The husband would have been very adverse to his future employment being subject to the wife's discretion and control. He would have offered a substantial sum for the package to keep the company under his control.

[35] Three issues arose in *Walker*. They were identified by Chambers J as:

[5] The first is whether a debt back from a family trust to one or both of the partners in a relationship should ever be ascribed less than its face value. The wife contends that it cannot be. The husband disputes that. Our view on this issue is that the wife's stance is wrong.

[6] The second issue is whether the High Court was justified in reversing the Family Court's decision to value the debt at date of separation rather than date of hearing? We shall be answering that question "yes". The consequence is that the husband's appeal must be dismissed.

[7] In these reasons, we shall also consider a third issue. It is incidental to our substantive reasoning, given the conclusion we have reached on the second issue. The third issue is whether Judge Doogue was right in any event in fixing the value of the debt at date of separation at \$857,000. Before us, the husband contended she was, but the wife contended she was not. Since counsel presented extensive submissions on that topic, we shall express a view, even though such view is not essential to the result to which we have come.

[36] None of those issues required the Court to consider whether the parties had any interest in the trust, apart from the debt payable by the trustees to one of the partners in the relationship. For obvious reasons, the debt is a distinct item of property that would need to be classified as either separate or relationship property. For classification purposes, this type of debt is no different from any other private debt. After discussing ss 2G(2),

18B and 18C of the Act and *Fowler v Wills*,⁴³ the Court of Appeal upheld the High Court's decision to opt for valuation of the debt as at the date of hearing. The phrase "bundle of rights" does not appear in the judgment.⁴⁴

[37] Given the definition of "property" in s 2 of the Act, it is, with respect, questionable whether all of the interests to which the Court of Appeal referred in *Walker*, at para [48] could be classified as "property" for the purposes of the Act. In any event, what was said was no more than *obiter* and did not deal directly with the issues raised on appeal.

[38] In those circumstances, I suggest that nothing in the Court of Appeal's judgment should be taken as indicative of an adoption of some bundle of rights theory, particularly in light of the clear indications of the need not to put orthodox discretionary trusts in jeopardy, in *Nation v Nation*.⁴⁵ The fact that none of the subsequent cases have directly challenged the views expressed by a bench of five in *Nation* is, significant. It can normally be assumed, in the absence of some clear statement to the contrary, that a three-Judge Court of Appeal does not intend to alter a position taken by a five-Judge Court. If Family Courts, in reliance on *Walker*, have been going further, it is possible that the reasoning might be erroneous.

[39] In *Harrison v Harrison*⁴⁶ the Court of Appeal again used the term "bundle of rights" in the context of a relationship property appeal in which property owned by the trustee of a family trust was in issue. Delivering the judgment of a Court consisting of William Young P, Hammond J and himself,

⁴³ *Fowler v Wills* [2004] NZFLR 252 (CA).

⁴⁴ Rather the term "package", in relation to a number of assets or powers of control is used; seemingly, in a non-specific way: eg see *Walker* at paras [49] and [60]. However, in a discussion of the "bundle of rights" theory, Dr Andrew Butler suggested that the use of a term "package" in the context of a series of "assets" might be seen as a basis for the notion that a "bundle of rights" theory is supported by *Walker*: O'Regan and Butler "Equity and Trusts in a Family Law Context" (paper presented to the New Zealand Law Society Family Law Conference, November 2011) 269 at 286–289. NB: While O'Regan P was a joint author of the paper that part of the paper dealing with the "bundle of rights" theory was prepared solely by Dr Butler and represents only his views.

⁴⁵ See para [34] above.

⁴⁶ *Harrison v Harrison* [2009] NZFLR 687 (CA).

Robertson J used the term in the context of setting out background facts.

The relevant passage of the judgment states:

[10] The position therefore was that, in law, the assets owned by Mr and Mrs Harrison which may be relationship property were the two debts owing back to them by CHFT, household furniture and effects, and the shares they each held in CHTC. There was also a bundle of rights associated with their positions as discretionary beneficiaries under the CHFT, and as the joint holders of the power of appointment of the CHFT trustees. Importantly, however, Mr and Mrs Harrison owned neither the family home nor any (but one) of the “Harrison shares” in HWL.

[40] Nothing is said in *Harrison* to suggest that the Court considered any “rights” attaching to a spouse’s interest as a discretionary beneficiary would be relevant to a distribution of relationship property. Responding to a characterisation of the family trust as “potentially malleable in equity”, the Court reiterated the statutory basis on which an argument of that type might need to be advanced:

[22] The legal structures which the parties have mutually created must be the starting point for an assessment of what property is available for distribution at an interim stage and later, in relationship property proceedings, unless or until the framework is altered.

[23] In these proceedings Mr Knight, counsel for Mrs Harrison, has stated that if the parties fail to agree as to how to deal with the assets owned by the CHFT within the trustee structure, he would either have recourse to s 44C(1)(c) of the PRA (which provides for compensation in relationship property proceedings in respect of property disposed of to a trust) or, alternatively, he could argue for a direct consideration of the house and the shares in division and distribution of the contested property (s 182 of the Family Proceedings Act 1980).

[41] The Court of Appeal confirmed the High Court’s finding that debts owing by the trustee to Mr and Mrs Harrison were relationship property. Plainly, that was correct.⁴⁷

[42] The view that, in the absence of statutory criteria permitting trusts to be dealt with in a particular way, orthodox principles will be applied⁴⁸ has been confirmed in a different context by Winkelmann J in *Financial Markets Authority v Hotchin*.⁴⁹ In that case, in support of an application for preservation of trust property pending investigation into breaches of the

⁴⁷ *Harrison v Harrison* [2009] NZFLR 687 (CA) at para [24].

⁴⁸ *Nation v Nation* [2005] 3 NZLR 46 (CA) at paras [147] and [148].

⁴⁹ *Financial Markets Authority v Hotchin* [2011] 3 NZLR 469 (HC).

Securities Act 1978, the Financial Markets Authority argued that s 60H(1)(f) of that Act provided a jurisdiction to continue orders made against the trustees in respect of “assets they held on behalf of” the respondent.⁵⁰ The Chief High Court Judge held that that provision could apply only in respect of *assets held on behalf* of the relevant person and *not* in circumstances where the *asset was controlled* by that person.⁵¹

[43] In other words, the Court held that the legislation was aimed at proprietary interests that could be preserved while prospective proceedings were investigated and were not directed to assets held on behalf of third parties that were under the control of the person in respect of whom inquiries were being undertaken.⁵²

[44] I suggest that the authorities to which I have referred give no cause for alarm. Basic principles remain intact. Only if the “trust-busting” provisions of the relevant statute apply (because Parliament has decided there is some policy reason to justify interference with otherwise accepted rights) will there be any risk of the interests of those entitled to share in trust property at the discretion of trustees being affected adversely.

[45] In those circumstances, I would suggest that no general form of “bundle of rights” doctrine has been unveiled in New Zealand. Whether Family Courts are correctly applying the law is another question. As a Judge who regularly sits on appeals from that Court, it is better that I say nothing on that topic.

⁵⁰ Ibid, at para [130].

⁵¹ Ibid, at para [131].

⁵² Ibid, at para [133].