NOTE: PURSUANT TO S 169 OF THE FAMILY PROCEEDINGS ACT 1980 AND S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA438/2013
[2015] NZCA 30

BETWEEN	MELANIE ANN CLAYTON Appellant
AND	MARK ARNOLD CLAYTON First Respondent
	BRYAN WILLIAM CHESHIRE AND MARK ARNOLD CLAYTON (AS TRUSTEES OF THE CLAYMARK TRUST) Second Respondents

CA473/2013

BETWEEN	MCGLOSKEY NOMINEES LIMITED (AS TRUSTEE OF THE DENARAU RESORT TRUST) First Appellant
	DEBORAH JOAN VAUGHAN (AS TRUSTEE OF THE SOPHIA NO 7 TRUST) Second Appellant
	CHELMSFORD HOLDINGS LIMITED (AS TRUSTEE OF THE CHELMSFORD TRUST) Third Appellant
	BRYAN WILLIAM CHESHIRE (AS TRUSTEE OF THE LIGHTER QUAY 5B TRUST) Fourth Appellant

AND MELANIE ANN CLAYTON
Respondent

CA474/2013

BETWEEN MARK ARNOLD CLAYTON
First Appellant

MARK ARNOLD CLAYTON (AS TRUSTEE OF THE VAUGHAN ROAD PROPERTY TRUST)
Second Appellant

BRYAN WILLIAM CHESHIRE AND MARK ARNOLD CLAYTON (AS TRUSTEES OF THE STACEY CLAYTON EDUCATION TRUST AND THE ANNA CLAYTON EDUCATION TRUST)
Third Appellants

AND MELANIE ANN CLAYTON
Respondent

Hearing: 14–16 July 2014 (further submissions received 12 September 2014)

Court: Ellen France, Randerson and White JJ

Counsel: D A T Chambers QC and J R Hosking for Appellant in CA438/2013, Respondent in CA473/2013 and Respondent in CA474/2013
C R Carruthers QC for Second Respondents in CA438/2013, Appellants in CA473/2013 and Second and Third Appellants in CA474/2013
R P Harley for First Respondent in CA438/2013 and First Appellant in CA474/2013

Judgment: 26 February 2015 at 3.30 pm

Reissued: 3 June 2015

Effective date of Judgment: 26 February 2015

JUDGMENT OF THE COURT

A Leave is granted for this Court to consider the additional question (c) in relation to the Vaughan Road Property Trust in CA474/2013.

B The questions are answered as follows:

1 Vaughan Road Property Trust (CA474/2013)

(a) Did the Courts below err in finding that the Vaughan Road Property Trust was illusory?

Answer: Yes, but Mr Clayton's right to exercise his general power of appointment under cl 7.1 of the trust deed was "relationship property."

(b) Did the Courts below err in finding the Vaughan Road Property Trust was not a sham?

Answer: No.

(c) Is Mrs Clayton entitled to a compensation order under s 44C of the Property (Relationships) Act 1976 in relation to dispositions made to the Vaughan Road Property Trust?

Answer: It is unnecessary to answer this question.

2 Education Trusts (CA474/2013)

(a) Was there any disposition of property by Mr Clayton to the trustees of either of the Stacey Clayton Education Trust and the Anna Clayton Education Trust so as to support orders made under s 44 of the Property (Relationships) Act?

Answer: Yes.

(b) If there were dispositions made for the purpose of land acquired by the Stacey Clayton Education Trust and the Anna Clayton Education Trust with the intention of defeating Mrs Clayton's claim, does s 44(2) of the Property (Relationships) Act authorise the court to order that Mrs Clayton is entitled to half the net

equity of the Stacey Clayton Education Trust and the Anna Clayton Education Trust?

Answer: Yes.

3 **<u>Claymark Trust (CA438/2013)</u>**

(a) Is Mrs Clayton entitled to a compensation order under s 44C of the Property (Relationships) Act in relation to dispositions made to the Claymark Trust?

Answer: No.

(b) Is Mrs Clayton entitled to provision from the assets of the Claymark Trust or to a variation of that Trust, applying s 182 of the Family Proceedings Act 1980?

Answer: No.

4 **<u>The Post-Separation Trusts (CA473/2013)</u>**

Can the Court be satisfied in terms of s 44 of the Property (Relationships) Act that there has been a disposition of property to any of the trustees of the Denarau Resort Trust, Sophia No 7 Trust, Chelmsford Trust or the Lighter Quay 5B Trust by Mr Clayton in order to defeat Mrs Clayton's claim under the Act where those Trusts have been settled after the date of separation and where s 9(4) of the Property (Relationships) Act applies?

Answer: Yes in respect of the Denarau Resort Trust and the Sophia No 7 Trust. Yes in respect of Mr Clayton's personal loan to the Chelmsford Trust. No in respect of the VRPT's loan to the Chelmsford Trust. No in respect of the Lighter Quay No 5 Trust.

5 **<u>Valuation of business interests (CA474/2013)</u>**

Did the Courts below err in finding that, for the purpose of calculating the value of business interests, an EBITDA of $6,750,000 and a multiple of 6.25 per cent should be adopted?

Answer: No.

C The issue of the appropriate order to be made under s 44 of the Property (Relationships) Act in respect of the Chelmsford Trust is remitted to the High Court for determination in light of this judgment.

D Issues of quantum are remitted to the High Court for determination in light of this judgment.

E By consent, order D in the sealed High Court judgment is deleted.

F The appellants in CA473/2013 and CA474/2013 must pay to the respondent in those appeals 75 per cent of the costs in respect of all the appeals for a complex appeal on a Band B basis with usual disbursements. We certify for second counsel.

REASONS OF THE COURT

Table of Contents

	Para No
Introduction	[1]
Factual background	[6]
Ownership of property during the marriage	[7]
Mr Clayton's business interests	[8]
The trusts settled during the marriage	[11]
The post-separation trusts	[13]
Financial significance of issues	[15]
Family Court decision	[17]
High Court decision	[19]
The Vaughan Road Property Trust (VRPT)	
The 1999 settlement of the VRPT	[22]
The trust deed	[25]
The Family Court findings	[26]
The High Court findings	[28]
The appeal and cross-appeal	[32]
Further submissions	[35]
Analysis	[45]
A sham trust?	[57]
An illusory trust?	[71]
Mr Clayton's power of appointment	[86]
The answers to the questions	[115]
The Education Trusts	
The settlement of the two education trusts in 2004	[117]

The assets of the trusts [121]
Mrs Clayton's claim [126]
The Family Court findings [127]
The High Court findings [128]
The appeal [130]
Were there any dispositions? [136]
Were the dispositions made to defeat Mrs Clayton's rights? [142]
Should there be any order under s 44(2)? [144]
The answers to the questions [147]
Claymark Trust
The settlement of the Claymark Trust [148]
The trust assets [151]
Mrs Clayton's claims [152]
(a) Claim under s 44C of the PRA [153]
The Family Court findings [154]
The High Court findings [155]
The appeal [156]
Discussion [160]
(b) Claim under s 182 of the FPA [165]
The Family Court findings [166]
The High Court findings [167]
The appeal [171]
Discussion [176]
The answers to the questions [178]
The Post-Separation Trusts
The four trusts [179]
Mrs Clayton's claims [180]
A preliminary point [181]
(a) The Denarau Resort Trust [188]
The Family Court decision [192]
The High Court decision [193]
The appeal [194]
Discussion [196]
(b) The Sophia No 7 Trust [200]
The Family Court decision [203]
The High Court decision [204]
The appeal [205]
Discussion [209]
(c) The Chelmsford Trust [214]
The Family Court decision [219]
The High Court decision [220]
The appeal [221]
Discussion [223]
(d) The Lighter Quay 5B Trust [229]
The Family Court decision [233]
The High Court decision [234]
The appeal [235]
Discussion [237]
The answer to the question [239]

Valuation of business interests [240]
The EBITDA figure [246]
The calculation of the multiple [262]
The answer to the question [274]
Result [275]
Costs [276]

Introduction

[1] This appeal concerns nine relationship property questions arising from judgments of the Family Court and the High Court.[1] Leave to appeal to this Court has been granted by the High Court and this Court.[2]

[2] The first eight questions relate to various trusts established by the first respondent in CA438/2013, Mr Clayton, both during his marriage to the appellant in CA438/2013, Mrs Clayton, and after their separation. The answers to these questions determine whether the assets of the trusts are Mr Clayton's separate property as he claims or relationship property as Mrs Clayton claims in which case she will be entitled to half the value of their net equity.

[3] The ninth question relates to the valuation of Mr Clayton's business interests held by his companies and trusts. The parties are in agreement as to the appropriate valuation method, but disagree on two aspects of its application.

[4] In the Courts below there were other issues in dispute, but there is now agreement that:

(a) An ante-nuptial agreement set aside by the Family Court and the High Court should remain set aside.[3]

(b) Mr Clayton is entitled to $500,000 as his separate property.

---

1 *MAC v MAC* FC Rotorua FAM-2007-063-652, 2 December 2011 [Family Court judgment]; *Clayton v Clayton* [2013] NZHC 301, [2013] 3 NZLR 236 [High Court judgment].

2 *Clayton v Clayton* [2013] NZHC 1529; *Clayton v Clayton* [2013] NZCA 633 [Court of Appeal leave judgment]; and *Clayton v Clayton* CA438/2013, 17 July 2014 (Minute of the Court). To the extent it is necessary to do so, we formally grant leave to consider the additional question (c) in relation to the Vaughan Road Property Trust.

3 Family Court judgment, above n 1, at [29]–[35]; High Court judgment, above n 1, at [6]–[14].

(c) Mrs Clayton is entitled to half of the property correctly classified as relationship property.

(d) The assets are to be valued as at 31 March 2011.

(e) The fair market value of Mr Clayton's business interests is to be determined by the capitalisation of earnings methodology.

(f) Issues of quantum are to be remitted to the High Court for determination.

[5] We refer briefly to the factual background and the decisions in the Courts below before considering the nine questions. We address the submissions for the parties and the legal issues in the context of considering the nine questions.

Factual background

[6] Mr and Mrs Clayton separated in 2006 after 17 years of marriage. They have two daughters, Stacey born in 1990 and Anna in 1994.

Ownership of property during the marriage

[7] During the marriage most of the parties' private property, including holiday homes and motor vehicles, was owned solely by entities associated with Mr Clayton, although he owned some assets, including the family home, personally.

Mr Clayton's business interests

[8] Mr Clayton is a successful businessman with significant sawmilling and timber processing interests. His business and other interests are owned and controlled by a number of companies and trusts in New Zealand and the United States, including Claymark Industries Ltd, Claymark Finance Ltd, Claymark International Ltd, the Claymark Trust and the Vaughan Road Property Trust (VRPT).

[9] The shares in the companies are owned by Mr Clayton directly or through trusts in which he is a trustee and/or beneficiary. The interrelationship between

Mr Clayton's various companies and trusts is shown in a diagram included in the Family Court judgment.[4]

[10] Mr Clayton's principal advisers have included the fourth appellant in CA473/2013, Mr Bryan Cheshire, a now retired chartered accountant who was responsible, among other things, for the administration of all the trusts established by Mr Clayton and handled day-to-day running of the VRPT along with Mr Bruce Warden, another chartered accountant. Mr Clayton's financial adviser since 2008 and his accountant since 2013 is Mr Giesbers who has also been chairman of the Claymark group of companies since 2008. Mr Giesbers has had financial oversight of the Claymark group's finances and responsibility for preparing their financial statements.

The trusts settled during the marriage

[11] During the marriage Mr Clayton settled various discretionary trusts, three of which have given rise to the current questions:

(a) the Claymark Trust settled on 10 May 1994;

(b) the VRPT settled on 14 June 1999; and

(c) two separate education trusts for Stacey and Anna respectively settled in 2004.

[12] It will be necessary to describe in some detail the terms of settlement and the operation of each of these trusts, but at this stage it is sufficient to note that:

(a) Mr Clayton was the settlor and a trustee of each trust;

(b) Mr and Mrs Clayton and their daughters are discretionary beneficiaries of the Claymark Trust and VRPT, but Mrs Clayton is not a beneficiary of the education trusts;

4 At [14].

(c) the trustees of each trust held properties closely connected to Mr Clayton's business interests; and

(d) the trusts received and made loans/advances to the others and to Mr Clayton personally and his companies.

The post-separation trusts

[13] After Mr and Mrs Clayton separated, Mr Clayton settled the following further discretionary trusts:

(a) The Denarau Resort Trust;

(b) The Sophia No 7 Trust;

(c) The Chelmsford Trust; and

(d) The Lighter Quay 5B Trust.

[14] Again it will be necessary to describe in some detail the terms of settlement of these trusts. At this stage it is sufficient to note that Mrs Clayton is not a beneficiary of any of them.

Financial significance of issues

[15] Overall the differences between the positions of the parties are stark. Mr Clayton considers that as none of the trust assets constitute relationship property Mrs Clayton is only entitled to sole ownership of the former matrimonial home and chattels (valued at $850,000 as at 31 March 2011) and $30,000 already paid. On the other hand, Mrs Clayton considers that, apart from the value of Mr Clayton's separate property, which is agreed at $500,000, she is entitled to half of the value of the business and trust assets, which she claims constitute relationship property.

[16] As far as the valuation of Mr Clayton's business interests are concerned, if his approach is upheld, his business interests will have a negative value. If, however,

Mrs Clayton's approach is upheld, she will be entitled, according to her expert witness, Mr Brendan Lyne, to the value of half of a property pool estimated at the time of the Family Court hearing at $28,831,000.

Family Court decision

[17] In the Family Court, in addition to setting aside the prenuptial agreement, Judge Munro decided that:

(a) Apart from Mr Clayton's original separate property, which the parties agreed was to be valued at $500,000 as at the agreed date of 31 March 2011, the increase in value of his property over and above that figure was relationship property to be shared equally.[5]

(b) Mrs Clayton's claim in respect of the Claymark Trust was limited to her share in any debt owing by the Trust to Mr Clayton or to any entities found to comprise property in his hands.[6]

(c) The VRPT did not meet the basic elements of a trust and was therefore illusory. Its property was property in the hands of Mr Clayton.[7]

(d) Mrs Clayton was entitled to a half share in the current equity of the two educational trusts.[8]

(e) A further trust, the Claymark International Trust, had no property that could be the subject of a claim by Mrs Clayton.[9]

(f) Mrs Clayton was entitled to a half share in the equity of the four post-separation trusts.[10]

---

5 Family Court judgment, above n 1, at [36]–[66].
6 At [68]–[71].
7 At [72]–[85].
8 At [87]–[93].
9 At [95]–[96].
10 At [97]–[113].

(g) In determining the fair market value of Mr Clayton's business interests as at 31 March 2011 by the agreed capitalisation of earnings methodology, the figure for EBITDA (earnings before interest, tax, depreciation and amortisation) should be $6,750,000 and the multiple should be 6.25.[11]

(h) The value of the former family home at Banksia Place, which had already been transferred to Mrs Clayton, should be $850,000.[12]

[18] Mr Clayton and the other trustees of the various trusts appealed to the High Court against the decisions of Judge Munro referred to in (a), (c)–(d) and (f)–(h). Mrs Clayton cross-appealed against the decision referred to in (b). Mrs Clayton did not cross-appeal against the decision referred to in (e).

High Court decision

[19] In the High Court Rodney Hansen J decided that:

(a) As the evidence relating to the valuation of the former family home was unsatisfactory, the issue was to be remitted to the Family Court for rehearing.[13]

(b) The post-marriage increase in value of Mr Clayton's separate property was relationship property and should be shared equally.[14]

(c) The valuation issues relating to Mr Clayton's business interests (the EBITDA and the multiple) were correctly determined by the Family Court Judge.[15]

(d) For reasons that differed from those that found favour with the Family Court Judge, the VRPT was not a sham, but it was illusory.

11 At [114]–[134].
12 At [135]–[137].
13 High Court judgment, above n 1, at [15]–[22].
14 At [23]–[44].
15 At [45]–[64].

Mr Clayton retained powers tantamount to ownership of the trust property.[16]

(e) The Family Court Judge was right to decide that Mrs Clayton was entitled to a half share in the current equity of the two educational trusts.[17]

(f) The appeal should be allowed in respect of the Denarau Resort, Chelmsford and Lighter Quay 5B Trusts and the issues referred back to the Family Court for further evidence to be adduced and the question of remedy reconsidered.[18]

(g) The Family Court Judge's finding in respect of the Sophia No 7 Trust was upheld, but the issue of remedy was remitted to the Family Court for reconsideration.[19]

(h) Mrs Clayton's cross-appeal in relation to the Claymark Trust failed.[20]

[20] Mr Clayton and the other trustees of the various trusts have appealed to this Court in respect of the questions arising from the decisions of Rodney Hansen J referred to in (c)–(e) and (g). Mrs Clayton has appealed in respect of the questions arising from the decisions referred to in (f) and (h).

[21] We now address each of the nine questions.

The Vaughan Road Property Trust (VRPT)

The 1999 settlement of the VRPT

[22] The settlement of the VRPT is conveniently described by Judge Munro in the Family Court:

---

16 At [68]–[91].
17 At [93]–[102].
18 At [103]–[110] and [118]–[128].
19 At [111]–[117].
20 At [129]–[149].

> [72] This trust was settled on 14 June 1999 by way of a declaration of trust by Mark Clayton as trustee. Effectively, he is the settlor and sole trustee. The discretionary beneficiaries include Mr Clayton as the principal family member, Mrs Clayton as his wife, and the children are the final beneficiaries.

[23] The operation of the VRPT during the marriage is also conveniently described by Judge Munro:

> [74] The Vaughan Road Property Trust acted as a banker. It has largely borrowed from BNZ to advance loans to other entities. Financial statements have been prepared on an annual basis. On behalf of Mrs Clayton, it is argued that this trust is a sham largely as a result of the degree of control which Mr Clayton exercises over this trust in that it could be said that the trust is Mr Clayton's alter-ego.

[24] The VRPT's yearly financial reports show that as at 31 March 2011 the VRPT had current assets (principally loans to the other trusts, including the Chelmsford and Lighter Quay 5B Trusts, and a current account for Mr Clayton) of $5,538,444 and current liabilities (including loans from the Claymark Trust and Claymark Finance Ltd) of $6,240,375. Overall the net asset position was $4,506,152.

The trust deed

[25] For present purposes the relevant provisions of the trust deed are:

> **INTRODUCTION**
>
> …
>
> B. The Trustees hold the sum of ten dollars upon the terms and with and subject to the powers and discretions set out in this deed.
>
> …
>
> **2. DEFINITIONS AND INTERPRETATION**
>
> 2.1 **Definitions**
>
> …
>
> "**Discretionary Beneficiaries**" means:
>
> (a) the Principal Family Member;
>
> (b) the Final Beneficiaries;

(c) the issue of any Final Beneficiary;

(d) any wife, husband, widow, widower, former wife or former husband for the time being of any Beneficiary described in paragraphs (a) to (c) of this definition;

(e) any trust …. which includes … any Beneficiary;

(f) any person appointed pursuant to cl 7.1(a),

but does not include any person who has been removed from the class of Discretionary Beneficiaries pursuant to clause 7.1(b).

…

"**Final Beneficiaries**" means the child or children of the Principal Family Member born or adopted before the Vesting Day.

…

"**Principal Family Member**" means **Mark Arnold Clayton**.

…

"**Vesting Day**" means:

(a) the day upon which the period of eighty years from the date of this deed expires, being a date within the perpetuity period permitted to be specified by virtue of section 6 of the Perpetuities Act 1964, and the perpetuity period applicable to the Trust created by this deed is specified accordingly; or

(b) such earlier day as the Trustees may by deed appoint.

…

4. INCOME DISTRIBUTION

4.1 **Distribution**: The Trustees may, after payment of all expenses and other charges to be met from income, and after making or retaining out of, or charging against, the income of the Trust Fund any payments, reserves or other provisions for any of the purposes of the Trust:

(a) pay or apply all or any part of the income of the Trust Fund to or for such one or more of the Discretionary Beneficiaries who are then living or in existence;

…

6. DISTRIBUTION OF CAPITAL BEFORE THE VESTING DAY

6.1 The Trustees may at any time:

(a) pay or apply all or any part of the capital of the Trust Fund to or for such one or more of the Discretionary Beneficiaries who are then living or in existence;

(b) appropriate all or any part of the capital of the Trust Fund for such one or more of the Discretionary Beneficiaries who are then living or in existence contingently upon the reaching of a specified age or the happening of a specified event.

7. APPOINTMENT AND REMOVAL OF DISCRETIONARY BENEFICIARIES

7.1 **Power to appoint and remove Beneficiaries:** The Principal Family Member may, by deed, before the expiry of the Trust Period:

(a) appoint any person to become a member of the class of Discretionary Beneficiaries …

(b) remove any person from the class of Discretionary Beneficiaries …

…

8 RESETTLEMENT OF TRUST FUND

8.1 The Trustees may at any time resettle by deed all or any part of the Trust Fund upon the trustees of any trust … which includes … any one or more of the Discretionary Beneficiaries … .

…

10. DISTRIBUTION ON THE VESTING DAY

10.1 Distribution of capital: The Trustees shall hold the Trust Fund on the Vesting Day upon trust:

(a) for such of the Discretionary Beneficiaries or such one or more of them to the exclusion of the other or others of them in such shares as the Trustees may by deed appoint on or before the Vesting Day;

(b) in respect of such of the Trust Fund as may not be validly appointed on or before the Vesting Day, for such of the Final Beneficiaries who are then living, and, if more than one, as tenants in common in equal shares and if any Final Beneficiary dies before the Vesting Day leaving issue living on the Vesting Day such issue shall take per stirpes and, if more than one, as tenants in common in equal shares all the interest in the Trust Fund which such deceased Final Beneficiary would have taken had such deceased Final Beneficiary been living on the Vesting Day;

(c) if none of the Final Beneficiaries nor any of their issue are living on the Vesting Day, for such person or persons living who would be entitled, in accordance with the applicable

law governing the distribution of the estates of intestates, to the estate of the Principal Family Member if the Principal Family Member were to die intestate on the Vesting Day and, if there is more than one such person, as tenants in common in such shares as they would have been so entitled.

…

11. TRUSTEES' DISCRETION UNFETTERED

11.1 For the avoidance of doubt and notwithstanding anything in this deed or any rule of law which imposes upon the Trustees the duty to act impartially towards Beneficiaries, the Trustees shall have unfettered discretion as to the exercise of the powers and discretions conferred upon them by this deed even though:

(a) the interests of all Beneficiaries are not considered by the Trustees;

(b) the exercise would or might be contrary to the interests of any present or future Beneficiary;

(c) the exercise results, at any time whether before or on the Vesting Day, in the whole or in any part of the capital or income of the Trust being distributed to any one Beneficiary or to any two or more Beneficiaries in equal or unequal proportions, in either case to the exclusion of the other Beneficiaries.

12. POWERS AND DISCRETIONS OF TRUSTEES

12.1 **Powers**: To achieve the objects of the Trust, the Trustees shall have in the administration, management and investment of the Trust Fund all the rights, powers and privileges of a natural person and, subject always to the trusts imposed by this deed, may deal with the Trust Fund as if the Trustees were the absolute owners of and beneficially entitled to the Trust Fund and, accordingly, in addition to any specific powers vested in the Trustees by law, in dealing with the Trust Fund or acting as Trustees of the Trust, the Trustees may do any act or thing or procure the doing of any act or thing or enter into any obligation whatever, including, without limitation, exercising unrestricted powers to borrow and raise money, and to give mortgages, other securities, guarantees and indemnities.

12.2 **Discretions**: Except as otherwise expressly provided by this deed, the Trustees may exercise all the powers and discretions vested in the Trustees by this deed in the absolute and uncontrolled discretion of the Trustees at such time or times, upon such terms and conditions and in such manner as the Trustees may decide.

12.3 **Appropriated funds**: The powers and discretions vested in the Trustees by law or by this deed may be exercised by the Trustees both in respect of the Trust Fund and, in respect of any property held

by the Trustees but appropriated, credited on account or otherwise held for any Beneficiary, contingently or otherwise.

12.4 **Investment discretion**: In exercising their powers of investment the Trustees may acquire any property, or retain or deal with any property which from time to time comprises the whole or part of the Trust Fund notwithstanding that any act or omission by the Trustees in the exercise of those powers and discretions would be, or could be, contrary to the principles governing the investment of trust funds set out in the Trustee Act 1956. This clause expresses a "contrary intention" for the purposes of section 13D of that Act.

12.5 **Unanimous approval**: Where there is more than one Trustee in office, except as provided in this deed, all powers and discretions of the Trustees shall be exercised with the unanimous approval of the Trustees.

…

14. TRUSTEE/BENEFICIARY

14.1 **Self benefit**: A Trustee who is also a Beneficiary may exercise any power or discretion vested in the Trustees in his, her or its favour.

…

17. APPOINTMENT AND REMOVAL OF TRUSTEES

17.1 **Principal Family Member's power of appointment and removal**: The Principal Family Member shall have the powers, exercisable, from time to time, to appoint and remove Trustees.

…

19. TRUSTEE'S CONFLICT OF INTEREST

19.1 **Negation of conflict**: A Trustee may act as such and exercise all of that Trustee's powers and discretions notwithstanding that:

(a) that Trustee is associated as a director, or otherwise in a private capacity, or as trustee of any other trust, with any company or other person to which the Trustees sell or lease any property forming part of the Trust Fund, or in which the Trustees hold or propose to acquire shares, securities or other rights as part of the Trust Fund, or with which the Trustees otherwise deal as Trustees of the Trust; or

(b) that Trustee may be a trustee of any other trust to or from which the Trustees propose to sell or purchase shares, securities or other rights or property or with which the Trustees otherwise deal as Trustees of the Trust; or

(c) the interests or duty of that Trustee in any particular matter may conflict with the duty of that Trustee to the Trust Fund or any Beneficiary; or

(d) such Trustee is personally purchasing or taking on lease any property forming part of the Trust Fund, or personally selling any property to become part of the Trust Fund, or is otherwise dealing with the Trust Fund in a personal capacity as well as that of a Trustee.

…

23. AMENDMENT OF TRUST DEED

23.1 The Trustees may, with the prior written consent of the Principal Family Member while the Principal Family Member is living, at any time or times during the Trust Period, and without infringing the rules against perpetuities, vary, revoke or enlarge all or any of the provisions of this deed concerning the management or administration of the Trust.

The Family Court findings

[26] In the Family Court Judge Munro found that the VRPT was "illusory" and that consequently its property was property in the hands of Mr Clayton personally, any debts owing to it were debts owing to Mr Clayton and any current account that the VRPT had with any other entity was effectively a current account owned by Mr Clayton.[21] The Judge's reasons for these findings were:

(a) The provisions of cl 11 taken in conjunction with cl 19.1(c) of the VRPT deed negated the beneficiaries' ability to call the trustee to account in the exercise of his discretion. The beneficiaries therefore had no rights under the deed enforceable against the trustee.[22]

(b) Unlike an administrative power to appoint and remove trustees, the power of revocation in cl 23 of the trust deed was a dispositive power which could be exercised selfishly without regard to the interests of others.[23]

(c) The form of the VRPT deed and the manner in which it had been administered indicated that it is a convenient structure for commercial

---

21 Family Court judgment, above n 1, at [85].
22 At [78].
23 At [82] relying on the advice of the Privy Council in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2011] UKPC 17, [2012] 1 WLR 1721 [*TMSF*].

> purposes, carrying few hallmarks of a trust.[24]

[27] In respect of the third reason, the Judge said:

> [84] Although Mr Clayton is the sole trustee, the evidence is consistent that he in fact does not make decisions regarding the administration of the trust, rather those decisions are made by Mr Cheshire and Mr [Warden] and are made on a purely commercial basis. In evidence, Mr Cheshire displayed little understanding of the obligations of a trustee to have regard to the interests of beneficiaries of the trust. It was his evidence that he and Mr [Warden] made decisions and simply placed necessary documentation in front of Mr Clayton to sign. Mr Clayton professed to have very little knowledge of what was contained in any of the documents he was asked to sign. Additionally, Mr Clayton has the role of settlor, sole trustee, principal family member and discretionary beneficiary. He also, in addition to having the power to revoke the trust, has the power to appoint and remove trustees and to appoint and remove beneficiaries.

The High Court findings

[28] In the High Court Rodney Hansen J rejected the argument for Mrs Clayton that the VRPT was a sham.[25] He accepted that it was clear Mr Clayton intended to create a trust and intended to do so for legitimate business purposes. The Judge identified the issue as being whether the trust was "illusory" in the sense that, in light of the provisions of the trust deed, Mr Clayton retained such control that the proper construction was that he did not intend to give or part with control over the property sufficient to constitute a trust.

[29] The Judge did not agree with the Family Court Judge's reasons for finding that the VRPT was "illusory". He did not accept that cls 11 and 19.1(c) eroded the core obligations.[26] The Judge considered that these clauses did not excuse the trustee from acting honestly and in good faith. They merely relieved him from the obligation to act impartially towards beneficiaries.[27]

[30] Nor did the Judge accept that the power of revocation in cl 23 conferred on the trustee rights tantamount to ownership. The Judge considered it could not be

---

24 At [83].
25 High Court judgment, above n 1, at [79].
26 At [81].
27 At [81]–[82].

regarded in any sense as a fiduciary power.[28] The Judge found the power in this case was much more limited than the power in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* (*TMSF*).[29] He said the power in cl 23:[30]

> … is directed only to the provisions of the trust deed which concern the management or administration of the trust. It does not confer in the trustee any power to deal with trust property as he pleases.

[31] Instead Rodney Hansen J upheld the Family Court Judge's decision that the VRPT was illusory on the basis that cls 4.1, 6.1, 12 and 14.1 led irresistibly to the conclusion that Mr Clayton indeed retained powers tantamount to ownership of trust property.[31] The Judge was particularly influenced by comparison with the decision of Winkelmann J in the High Court in *Financial Markets Authority v Hotchin* where Winkelmann J upheld a trust over which Mr Hotchin had extensive powers as not illusory. This finding was principally on the basis of the existence of a clause in the trust deed which prevented self-dealing, a clause with no equivalent in the present case.[32] Rodney Hansen J said:

> [89] Many of the provisions of the trust are identical to or not materially different from those in *Hotchin* where Mr Hotchin, though neither a trustee or beneficiary, had the power to appoint himself sole trustee and a beneficiary. As in the case of the Vaughan Road Property Trust, the deeds conferred unfettered discretion upon the trustees to distribute the property without considering the interests of any beneficiary, including future beneficiaries. However, the trust deeds in *Hotchin* contained a prohibition on self-dealing. Whereas cl 14.1 of the deed in this case expressly permits a trustee who is also a beneficiary to exercise any power or discretion in his or her own favour, Mr Hotchin could not use control as a trustee to distribute trust property to himself. The provision on self-dealing was critical to Winkelmann J's conclusion that a claim that the trusts were illusory had no prospect of success.
>
> [90] In contrast, the provisions of the Vaughan Road Property Trust give Mr Clayton unfettered power to distribute the income and the capital of the trust to himself if he wishes and to bring the trust to an end at any time he pleases. Mr Clayton effectively retained all the powers of ownership. What he has in fact done is neither here nor there, although it appears that, through his delegates, Mr Clayton exercises, in a practical sense, the powers of ownership. It is what he has the legal power to do that is important and that is basically to do whatever he wants with trust property. Within a largely

---

[28] At [84].

[29] *TMSF*, above n 23.

[30] Family Court judgment, above n 1, at [84].

[31] At [85]–[88].

[32] *Financial Markets Authority v Hotchin* [2012] NZHC 323, aff'd *KA No 4 Trustee Ltd v Financial Markets Authority* [2012] NZCA 370.

> conventional framework the trust deed provides an appearance of separation. The reality is, however, that if he chooses to, Mr Clayton is able to deal with trust property just as he would if the trust had never been created.

The appeal and cross-appeal

[32] Mr Clayton, in his capacity as the trustee of the VRPT, appeals against the finding of the High Court that the VRPT was illusory. For Mr Clayton as trustee, Mr Carruthers QC submits that the Judge erred because:

(a) There is no distinction between a "sham" and an "illusory" trust. Once it was accepted that the VRPT was not a "sham" there was no basis for finding it was "illusory". There is "no halfway house" between a sham and a genuine trust.

(b) Mr Clayton's roles as sole trustee, the principal family member and a discretionary beneficiary, and his powers to appoint and remove trustees and to exercise a power of appointment in his own favour, were normal incidents of discretionary trusts in New Zealand and elsewhere.

(c) His roles and powers did not mean in law that the "control" he held over trust property created personal property. He was fully accountable for his trusteeship under the terms of the discretionary trust which were always enforceable against him by any disaffected discretionary object, including Mrs Clayton.

[33] In addition to opposing Mr Clayton's appeal on the grounds that the Courts below were right to find the VRPT was illusory, Mrs Clayton cross-appeals against the High Court finding that the VRPT was not a sham. For Mrs Clayton, Lady Chambers QC submits that at inception Mr Clayton did not intend to create a genuine trust as evidenced by:

(a) His total and excessive control under the trust deed. Properly interpreted the arrangements were, and were intended to be, a legal structure to hold the property for Mr Clayton.

(b) Poor trust administration and documentation; the evidence of transactions subsequent to the settlement of the trust and Mr Clayton's subsequent conduct.

[34] Lady Chambers also submits that a broader approach should be taken to sham trusts in the context of a relationship breakdown. On the facts and evidence of this case the ownership of the assets remained with Mr Clayton at all times cloaked by a trust deed which in substance left him as the owner of the property and consequently free to deal with it in any way he pleased.

Further submissions

[35] In the course of the hearing of the appeal, we raised with counsel two further questions not addressed in the judgments under appeal or in the written submissions for the parties on appeal, namely:

(a) whether Mr Clayton's general power of appointment under cl 7.1 of the VRPT itself constituted relationship property under the Property (Relationships) Act 1976 (PRA);[33] and

(b) whether, in the event we found the VRPT was not a sham or illusory, Mrs Clayton might be entitled to a compensation order under s 44C of the PRA in relation to dispositions of relationship property made to the VRPT.

[36] We raised the first question because under cl 7.1 Mr Clayton has power to appoint himself as the sole discretionary beneficiary of the VRPT thereby becoming the sole beneficiary of the trust.[34] In light of the decision of the Privy Council in *TMSF* it was open to argument that a power of this nature was "tantamount to ownership" of the property of the trust.[35] Then, when the extended definition of "property" in s 2 of the PRA, which includes "any other right or interest", is taken

33 This question was mentioned in passing in the Family Court judgment, above n 1, at [74], but not considered further.
34 By virtue of cls 4.1, 6.1 and 10.1(a).
35 *TMSF*, above n 23, at [42]–[44] and [59]–[60].

into account, it was open to argument that Mr Clayton's right to exercise the general power of appointment under cl 7.1 was "relationship property" under s 8 of the PRA.

[37] We received submissions on this question from counsel during the hearing.

[38] Mr Carruthers submitted that the power of appointment under cl 7.1 would be constrained by Mr Clayton's fiduciary obligations which would apply by virtue of the doctrine of "fraud on a power". He referred in this context to the *Kain v Hutton* litigation.[36]

[39] Lady Chambers rejected Mr Carruthers' submission that Mr Clayton would be constrained by the doctrine of "fraud on a power" if he exercised the power under cl 7.1 of the VRPT in his own favour. She referred to the decisions of *Wong v Burt* and *TMSF*.[37]

[40] In reply Mr Carruthers submitted that the decisions in *Wong v Burt* and *Kain v Hutton* supported the view that there could be a proper and improper use of a power.[38] If the donee exercised the power with an improper intention, the court would exercise its supervisory jurisdiction in equity and intervene.

[41] As we did not receive full submissions from the parties during the hearing on the second question we had raised, we sought and obtained further written submissions from them following the hearing.

[42] Lady Chambers submits that Mrs Clayton is entitled to a compensation order under s 44C because:

(a) The accounts for the VRPT show that from 2000 until 2006, the year of separation, Mr Clayton made substantial interest free on demand advances to the VRPT (in 2005 the balance was $3,099,637, dropping to $1,682,137 in 2006).

---

36 *Kain v Hutton* [2007] NZCA 199, [2007] 3 NZLR 349 [*Kain v Hutton* (CA)]; *Kain v Hutton* [2008] NZSC 61, [2008] 3 NZLR 589 [*Kain v Hutton* (SC)].

37 *Wong v Burt* [2005] 1 NZLR 91 (CA).

38 *Wong v Burt*, above n 37, at [27]–[32]; and *Kain v Hutton* (SC), above n 36, at [46]–[47] per Tipping J.

(b) In the absence of any contrary evidence from Mr Clayton, the Court must infer that these funds were derived from the Claymark business that Mr Clayton operated throughout the marriage. They were therefore relationship property.

(c) As interest free on demand advances, they were dispositions of relationship property.

[43] Mr Carruthers opposes the Court considering the s 44C question because it was not argued in the Courts below and was not the subject of the grant of leave by this Court. He also submits that evidence is necessary to explain the financial arrangements involving the funds in the VRPT. The evidence would show that the money was to finance the businesses and was not available to Mr Clayton personally so as to constitute relationship property.

[44] In reply, Lady Chambers has taken issue with aspects of Mr Carruthers' submissions. She accepts that issues of quantification will need to be the subject of further evidence in the High Court, but that does not affect the question of the application of s 44C.

Analysis

[45] The starting point is to note the following features of the VRPT:

(a) It was established by way of a formal deed of trust.

(b) Mr Clayton was the settlor, the sole trustee, and the "Principal Family Member".

(c) The original trust fund was $10.

(d) The beneficiaries were "Discretionary Beneficiaries" and "Final Beneficiaries". The "Discretionary Beneficiaries" were Mr Clayton as the "Principal Family Member", his children who were also the "Final Beneficiaries", their issue, Mrs Clayton, any trust including

any beneficiary, and any person appointed by Mr Clayton under cl 7.1(a).

(e) In his capacity as the sole trustee, Mr Clayton had power to:

(i) distribute the income and capital of the trust to himself as one of the discretionary beneficiaries: cls 4.1, 6.1 and 10.1(a);

(ii) make such distributions to himself without considering the interests of the other beneficiaries and notwithstanding any duty to act impartially towards beneficiaries: cls 11.1, 12.2 and 14.1;

(iii) subject to the terms of the trust, to deal with the trust fund as if he was the absolute owner of it and beneficially entitled to it: cl 12.1;

(iv) exercise all the trustee's powers and discretions notwithstanding any conflict of interest: cl 19.1; and

(v) revoke any of the provisions of the deed concerning the management or administration of the trust: cl 23.1.

(f) In his capacity as the "Principal Family Member", Mr Clayton had power to:

(i) appoint and remove any of the discretionary beneficiaries: cl 7.1; and

(ii) appoint and remove trustees: cl 17.1.

[46] We note that there is nothing untoward in Mr Clayton being the settlor, the trustee and one of the discretionary beneficiaries of the VRPT. It is well-established that:

(a) a person may be both the settlor and trustee of a trust.[39] A settlor-trustee will be subject to the same equitable obligations as any trustee;[40] and

(b) a person may be both a trustee and a beneficiary of a trust.[41] There is no requirement in trustee law that all trusts must have independent trustees who are not beneficiaries.

[47] At the same time, however, a trustee may not be the sole beneficiary of a trust. This is because when the legal and equitable (or beneficial) interests in the trust property reside in the same person there is no trust.[42]

[48] Consequently, were Mr Clayton to exercise his power of appointment under cl 7.1 of the VRPT and he were to become the sole beneficiary of the trust, there would be no trust. We address the significance of the existence of this power later when considering the submissions relating to the first question raised during the hearing of the appeal.[43]

[49] The next point to note is that the VRPT appears to meet the well-recognised requirements for a valid discretionary trust.

---

39 Andrew S Butler "Creation of an Express Trust" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 69 at [4.1.1(1)].

40 *Drosier v Brereton* (1851) 15 Beav 221, 51 ER 521 (Ch); Andrew S Butler "Breach of Trust" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 255 at [10.3.1(3)].

41 Butler, above n 39, at [4.1.3(1)]; Andrew S Butler "The Trust Concept, Classification and Interpretation" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 43 at [3.1.2].

42 *Re Cook, Beck v Grant* [1948] Ch 212 (Ch); *Re Heberley (deceased)* [1971] NZLR 325 (CA); Law Commission *The Duties, Office and Powers of a Trustee* (NZLC IP26, 2011) at [4.3]; and Richard Gray "Creation of Trusts" in Don Breaden (ed) *Law of Trusts* (online looseleaf ed, LexisNexis) at [2.22].

43 Below at [86]–[114].

[50] First, the three essential certainties for a trust existed:[44]

(a) Mr Clayton, as settlor, intended to create a trust for legitimate business purposes.[45] There are concurrent factual findings to that effect in the Courts below. [46]

(b) There was trust property ($10) held by Mr Clayton in his capacity as a trustee.

(c) There were trust objects able to be ascertained, namely the discretionary beneficiaries.[47]

[51] Second, while the deed of trust conferred wide powers on Mr Clayton in his capacity as sole trustee, it did not (and could not) eliminate the fiduciary obligations imposed on him at law in that capacity which would be enforceable, if necessary, by the other discretionary beneficiaries. In other words, the requirement for "an irreducible core of obligations" was met, as Millett LJ put it in *Armitage v Nurse*:[48]

> … there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts.

[52] The irreducible core of obligations owed by a trustee are the obligations to act honestly and in good faith.[49] Courts are most reluctant to find that those obligations do not apply.[50] Here, as Rodney Hansen J held in the High Court,[51] the provisions of the VRPT deed did not erode those core obligations.

[53] The powers of Mr Clayton as trustee under the VRPT to deal with the trust property for his own benefit and without regard to the interests of the other

---

44 See generally Butler, above n 39.

45 *Official Assignee v Wilson* [2008] NZCA 122, [2008] 3 NZLR 45 at [45] per O'Regan and Robertson JJ and [100] per Glazebrook J.

46 Family Court judgment, above n 1, at [73]–[74]; High Court judgment, above n 1, at [79].

47 Butler, above n 39, at [4.2.4(6)]–[4.2.4(8)].

48 *Armitage v Nurse* [1998] Ch 241 (CA) at 253. See also AS Butler and DJ Finn "What is the Least That We Can Expect of a Trustee? Exclusion of Trustee Duties and Exemption of Trustee Liability" [2010] NZ L Rev 459.

49 *Armitage v Nurse*, above n 48, at 253–254.

50 *Spencer v Spencer* [2013] NZCA 449, [2014] 2 NZLR 190 at [120]–[131].

51 High Court judgment, above n 1, at [81].

beneficiaries did not mean that he owed no obligations at all to those beneficiaries or that they had no rights enforceable against him as trustee. Mr Clayton's core duties as a trustee of honesty and good faith remained at law and were enforceable by the other beneficiaries, namely the existing "Discretionary Beneficiaries" and the "Final Beneficiaries".[52]

[54] While discretionary beneficiaries have a mere hope or expectation a trust will be exercised in their favour,[53] it does not follow that the absence of a proprietary interest removes all rights from a discretionary beneficiary, nor all duties from the trustee. Discretionary beneficiaries have rights enforceable against the trustees to ensure that a trustee properly considers whether the beneficiaries of a discretionary trust should have the discretion exercised in their favour and to compel proper administration of the trust.[54]

[55] We do not agree with Rodney Hansen J in the High Court that the specific powers of Mr Clayton as trustee under cls 4.1, 6.1, 12 and 14.1 of the VRPT meant that he retained powers tantamount to ownership of trust property. As we have said, Mr Clayton in his capacity as trustee of the VRPT was obliged by general equitable principles to exercise his powers honestly and in good faith and to account for the trust property, such obligations being enforceable by the other beneficiaries.

[56] The VRPT therefore met the legal requirements for a valid discretionary trust. There was no suggestion that Mr Clayton had in fact exercised any of his powers as trustee in breach of his obligations to the other beneficiaries. Rather Lady Chambers' argument was that the existence of the powers of control over the trust assets conferred on Mr Clayton under the VRPT meant that the trust was a sham or illusory. We therefore turn to those questions.

---

52 Jessica Palmer "Controlling the Trust" (2011) 12 Otago LR 473 at 478–479.

53 *Johns v Johns* [2004] 3 NZLR 202 (CA) at [31] citing *Hunt v Muollo* [2003] 2 NZLR 322 (CA) at 325; *Gartside v Inland Revenue Commissioners* [1968] AC 579 (HL) at 607 and 615; and *Queensland Trustees Ltd v Commissioner of Stamp Duties* (1952) 88 CLR 54 at 62–65.

54 *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26, [2003] 2 AC 709 at [37]–[42]; *Johns v Johns*, above n 53, at [34]; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 (CA) at 416. See also *In re Gulbenkian's Settlements, Whishaw v Stephens* [1970] AC 508 (HL) at 518; *Re Baden's Deed Trusts, McPhail v Doulton* [1971] AC 424 (HL) at 449 and 457.

A sham trust?

[57] The legal requirements for a sham in New Zealand are conveniently summarised in the majority judgment of the Supreme Court in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*:[55]

> In essence, a sham is a pretence. … A document will be a sham when it does not evidence the true common intention of the parties. They either intend to create different rights and obligations from those evidenced by the document or they do not intend to create any rights or obligations, whether of the kind evidenced by the document or at all. A document which originally records the true common intention of the parties may become a sham if the parties later agree to change their arrangement but leave the original document standing and continue to represent it as an accurate reflection of their arrangement.

[58] The majority also pointed out that:[56]

> An allegation of sham, being akin to an allegation of fraud, should not be lightly made. Those engaging in a sham are in reality seeking to deceive others as to the true nature of what they have agreed and are intending to achieve.

[59] This approach to the concept of sham reflected authorities in England, this Court and Australia.[57]

[60] In *Ben Nevis* the majority held that the High Court and Court of Appeal had correctly applied the law relating to shams and agreed with their concurrent findings that the particular transaction at issue was not a sham.[58]

[61] To determine whether a particular transaction constitutes a sham, the court will focus on the actual intentions of the parties to the transaction and compare them with the acts done or documents created. In doing so, the court will not be restricted to the legal form of the transaction, but will examine its substance in light of all the

---

55 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289 at [33]. The issue was not addressed in the minority judgment.

56 At [39].

57 *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 (CA) at 802; *Paintin and Nottingham Ltd v Miller Gale and Winter* [1971] NZLR 164 (CA) at 168 and 175–176; *Bateman Television Ltd v Coleridge Finance Co Ltd* [1969] NZLR 794 (CA); *NZI Bank Ltd v Euro-National Corp Ltd* [1992] 3 NZLR 528 (CA) at 539; and *Raftland Pty Ltd v Federal Commissioner of Taxation* [2008] HCA 21, (2008) 238 CLR 516 at [152].

58 *Ben Nevis*, above n 55, at [38].

relevant evidence relating to the parties' intentions.[59] As the issue will be whether the transaction was intended to be genuine, the focus will be on the actions and words of the parties, both contemporary and subsequent.

[62] This approach reflects equity's preference for substance over form and the conceptual basis of the sham doctrine which "lies in the court's ability to see through acts or documents" intended to disguise or conceal the truth of the matter.[60]

[63] There is no dispute that the sham doctrine applies in the context of trusts.[61] If evidence establishes that, notwithstanding the existence of a document described as a deed of trust, the parties to the deed (the settlor and the trustee(s)) had no intention of creating a trust, there will be no trust.[62] In this event any property the subject of the "trust" will be regarded as still belonging to the "settlor". Where legal title to the property has been transferred to a purported trustee who is not the settlor, the trustee holds the property on resulting trust for the settlor, in whom the beneficial interest remains.[63] The property will be available to third party claimants against the settlor.

[64] Issues have arisen in the context of trusts as to the application of the sham doctrine, including:

(a) whether a mutual intention is required on the part of the purported

---

59 *Mills v Dowdall* [1983] NZLR 154 (CA) at 159; *A Taxpayer v Commissioner of Inland Revenue* (1997) 18 NZTC 13,350 (CA) at 13,360; *Re Securitibank Ltd (No 2)* [1978] 2 NZLR 136 (CA) at 168; *Buckley & Young Ltd v Commissioner of Inland Revenue* [1978] 2 NZLR 485 (CA) at 490–491; *NZI Bank Ltd v Euro-National Corp Ltd*, above n 57 at 539; *Commissioner of Inland Revenue v Europa Oil (NZ) Ltd* [1971] NZLR 641 (PC) at 647–648; *Finnigan v Commissioner of Inland Revenue* (1995) 17 NZTC 12,170 (CA) at 12,173–12,174.

60 Matthew Conaglen "Sham Trusts" [2008] CLJ 176 at 178; *Raftland Pty Ltd v Federal Commissioner of Taxation*, above n 57 at [152]; *KA No 4 Trustee Ltd v Financial Markets Authority*, above n 32, at [52]; Deborah Hollings and John Brown "Trust Busting" in John Brown (ed) *New Zealand Master Trusts Guide* (3rd ed, CCH, Auckland, 2011) 63 at [¶4.23]; and Chris Kelly and Greg Kelly *Garrow and Kelly Law of Trusts and Trustees* (7th ed, LexisNexis, Wellington, 2013) at [10.15].

61 Ross Holmes "When is a trust or trust transaction valid?" in Don Breaden (ed) *Law of Trusts* (online looseleaf ed, LexisNexis) at [A.5]; Lynton Tucker and others *Lewin on Trusts* (19th ed, Sweet & Maxwell, London, 2015) at [4–020],

62 David Fox "Private Express Trusts" in John McGhee (ed) *Snell's Equity* (33rd, Sweet & Maxwell, London, 2014) 645 at [22–070]; Tucker, above n 61, at [4–27]; and Geraint Thomas and Alastair Hudson *The Law of Trusts* (2nd ed, Oxford University Press, Oxford, 2010) at [2.47].

63 Thomas and Hudson, above n 62, at [2.47].

settlor and trustee when they are not the same person;[64] and

(b) whether, as a matter of law, proof of a sham requires establishment of some kind of specific shamming intention, or whether what is being proved is really just a lack of certainty of intention on the part of the settlor, meaning nothing more is needed.[65]

[65] It is unnecessary for us in this case to express a view on the first of these questions because, as Mr Clayton is both the settlor and sole trustee of the VRPT, the focus is solely on his intentions in respect of the creation of the VRPT.

[66] In respect of the second question, we adopt the approach of this Court in *Official Assignee v Wilson* where it was indicated that a subjectively assessed shamming intention is required.[66] As Glazebrook J pointed out:[67]

> … where a sham is alleged, the search is for subjective intent that the transaction is a sham. After all, the whole point of a sham is that it is intended to have an effect other than the effect it would have if looked at objectively.

[67] Applying this approach here, we agree with the concurrent findings in the Courts below that Mr Clayton genuinely intended to create a trust when he established the VRPT. In the Family Court, Judge Munro found that the trust was set up to separate and distance the underlying land ownership from the operating assets of his company, Claymark Industries Ltd.[68] In the High Court, Rodney Hansen J found that it was clear that Mr Clayton intended to create a trust and intended to do so "for legitimate business purposes".[69]

---

64 Most notably, contrast Jessica Palmer "Dealing with the Emerging Popularity of Sham Trusts" [2007] NZ L Rev 81 at 92 and 94; Jessica Palmer "Sham Trusts" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 393 at [15.3.1(2)] and [15.3.2]; and Conaglen, above n 60, at 184.

65 *Official Assignee v Wilson*, above n 45, at [50]; *Financial Markets Authority v Hotchin*, above n 32, at [47] and [49]; *Hitch v Stone* [2001] EWCA Civ 63, [2001] STC 214 at [66]; Palmer in Butler, above n 64, at [15.3.2]; Tucker, above n 61, at [4–20]; David Hayton, Paul Matthews and Charles Mitchell *Underhill and Hayton: Law of Trusts and Trustees* (18th ed, LexisNexis, London, 2010) at [4.7].

66 *Official Assignee v Wilson*, above n 45, at [48], [50] and [52]–[53] per O'Regan and Robertson JJ and [106]–[108] per Glazebrook J.

67 At [108]. Footnotes omitted.

68 Family Court judgment, above n 1, at [73].

69 High Court judgment, above n 1, at [79].

[68] There was no suggestion that the VRPT was a pretence or that Mr Clayton intended the deed of trust for the VRPT not to create any rights or obligations of a trust nature. Nor was there any suggestion that Mr Clayton was seeking to deceive anyone as to the nature of the trust. He was not cross-examined on this basis.

[69] We therefore do not accept Lady Chambers' submissions that the provisions of the trust deed or the subsequent administration of the trust establish the requisite intention on the part of Mr Clayton to create a sham rather than a genuine trust. There would need to have been strong evidence at trial undermining the concurrent findings in the Courts below before an appellate court would find an allegation of sham involving pretence and deceit established.

[70] Accordingly we uphold the High Court Judge's finding that the VRPT was not a sham.

An illusory trust?

[71] We understand that this is the first New Zealand case where the concept of an "illusory trust", as distinct from a "sham trust", has been considered.

[72] In the Family Court, Judge Munro decided that the VRPT was "illusory" because Mr Clayton had total control over the trust without the need to account to the beneficiaries and could revoke the trust in his favour at any time.[70]

[73] In the High Court, Rodney Hansen J decided that the VRPT was "illusory" for different reasons, namely because Mr Clayton had unfettered power to distribute the income and capital of the trust to himself if he wished and to bring the trust to an end at any time he pleased.[71] Rodney Hansen J considered that Mr Clayton "effectively retained all the powers of ownership" and in "reality" was able to deal with the trust property "just as he would if the trust had never been created".[72]

---

70 At [85].
71 At [90].
72 At [90].

[74] Neither Judge referred to any authority for the proposition that an otherwise genuine trust, which has not been found to be a sham, might be declared not to exist because its terms somehow made it "illusory". Rodney Hansen J considered that the two concepts (sham and illusory) were "quite different" and the distinction was "important".[73] In his view the VRPT would be "illusory" if:[74]

> … in light of the provisions of the trust deed, Mr Clayton retains such control that the proper construction is that he did not intend to give or part with control over the property sufficient to constitute a trust.

[75] In our view, however, there are several significant difficulties with this approach to the adoption of a concept of an "illusory" trust in New Zealand in this case.

[76] First, it is inconsistent with the findings that:

(a) the VRPT was not a sham because Mr Clayton genuinely intended to create a valid trust and therefore did intend to part with control over the trust property;

(b) the VRPT did not erode Mr Clayton's core obligations as trustee to act honestly and in good faith; and

(c) the other beneficiaries would be able to enforce those core obligations should Mr Clayton act in his capacity as trustee in breach of them.

[77] Second, the suggestion of a distinction between a sham and an "illusory" trust is not supportable. Not only are the terms effectively synonymous but their legal definitions overlap, with definitions of "illusory trust" referring to an arrangement which looks like or appears to be a trust but has no real substance or effect so that no trust was intended.[75]

---

73 At [78].

74 At [79].

75 Bryan A Garner (ed) *Black's Law Dictionary* (10th ed, Thomson Reuters, St Paul (Minnesota), 2014) at 1744; Daniel Greenberg (ed) *Jowitt's Dictionary of English Law* (3rd ed, Sweet & Maxwell, London, 2010) vol 1 at 1132; and Kelly and Kelly, above n 60, at [4.37].

[78] Both terms focus on the real or true intentions of the settlor. The question in both cases is, notwithstanding the existence of a trust deed, did the settlor genuinely intend to create a valid, enforceable trust. In the absence of the requisite genuine intention, there will be no trust at all. As we have already noted, this question involves an examination of all the relevant evidence relating to the determination of the settlor's real or true intentions. The inquiry focuses not on the legal form of the otherwise valid trust deed but on those intentions.

[79] The absence of any real distinction between the terms is reinforced by their use in other jurisdictions:

(a) In the United States the term "illusory trust" is used instead of "sham".[76]

(b) In Canada *Waters' Law of Trusts in Canada* explains "illusory trusts" under the heading of "sham trust".[77] Lady Chambers placed some reliance on the *Waters'* text, but it is apparent from it that, like a sham, the concern is with the intention of the settlor to employ the trust concept to perpetuate an illegality.

(c) In Australia *Jacobs' Law of Trusts in Australia* describes an illusory trust as one where there is no trust at all because there was no intention to create one.[78]

[80] Third, once a court accepts, after an examination of all the relevant evidence relating to the settlor's intentions, that a valid trust has been established and is not a sham, the trust should not be able to be treated as non-existent because the trustee has wide powers of control over the trust property. Such an approach undermines the court's acceptance of the existence of a valid trust and overlooks the trustee's

---

[76] Austin Wakeman Scott, William Franklin Fratcher and Mark L Ascher *Scott and Ascher on Trusts* (5th ed, Aspen, New York, 2006) at [§8.2.2].

[77] Donovan WM Waters *Waters' Law of Trusts in Canada* (4th ed, Carswell, Toronto, 2012) at 155–156.

[78] JD Heydon and MJ Leeming *Jacobs' Law of Trusts in Australia* (7th ed, LexisNexis Butterworths, Chatswood (NSW), 2006) at [510].

irreducible core obligations and the rights of beneficiaries to have them enforced by the court. We agree with criticism of High Court decisions suggesting otherwise.[79]

[81] Our recognition in this context of the rights of beneficiaries is consistent with the approach of O'Regan and Robertson JJ in this Court in *Official Assignee v Wilson* to the analogous situation in the context of an alter ego trust where they said:[80]

> [70] Actual control alone does not provide justification for looking through/invalidating a trust. The uptake of control by someone other than an authorised person cannot be sufficient to extinguish the rights of the beneficiaries under a trust. It is difficult to see the alter ego trust operating in New Zealand as an independent cause of action.

[82] The other member of the Court, Glazebrook J, agreed that the trust itself could not be looked through and that the trust assets would not be available for division under the PRA.[81] But she expressly left open the question whether the trust property might nevertheless be treated as the property of the individual involved for the purposes of a relationship property division.[82] This question arises now in the context of our consideration of Mr Clayton's power of appointment under cl 7.1 of the VRPT deed.[83]

[83] This Court's reluctance to invalidate trusts on grounds other than proof of a sham reflects a concern that a decision doing so might have unintended consequences for other valid trusts in New Zealand, including other discretionary trusts. The Court does not have access to information relating to the generally accepted terms of such trusts. Consideration of reform of the law in this area, if it is required, should be left to the Law Commission and Parliament.

[84] Finally, once it is accepted that there is no real difference between the terms "sham" and "illusory" and there is a finding that the trust was not a sham, then, as Mr Carruthers submitted, there is no "halfway house" between the valid trust and a

---

[79] Palmer, above n 52, at 480–486; Palmer "Dealing with the Emerging Popularity of Sham Trusts", above n 64, at 90–92.

[80] *Official Assignee v Wilson*, above n 45.

[81] At [129].

[82] At [128]–[129].

[83] Below at [86]–[114].

sham.[84] Or, as pointed out in *Lewin on Trusts*, there is no "third state of affairs" between a valid trust and a sham.[85]

[85] For these reasons, we therefore do not agree with the Judges in the Courts below that a trust which is not a sham and is therefore valid may somehow be "illusory". There is either a valid trust or there is not. There is no separate principle justifying the setting aside of a valid trust on the ground that it is "illusory". In the absence of a finding of a sham or the existence of a statutory power to set aside a trust (as in the case of a tax avoidance arrangement),[86] the court has no power to do so. In particular, there is no such power under the PRA.[87] The court does have other powers under ss 44 and 44C of the PRA that may be exercised in the context of dispositions to trusts, but these powers do not enable the court to set aside the creation of the trust itself. As the Supreme Court has pointed out, subject to the relatively limited nature of the court's powers under ss 44 and 44C, Parliament appears to have accepted that trusts will normally prevail over relationship property rights.[88] The Law Commission has not yet recommended any change to this approach.[89]

Mr Clayton's power of appointment

[86] As we have noted, we received submissions during the hearing of the appeal on the question of the nature and effect of Mr Clayton's power under cl 7.1 of the VRPT to appoint himself as the sole beneficiary of the trust.[90] This power is conferred on Mr Clayton not in his capacity as trustee of the VRPT but in his separate capacity as the "Principal Family Member". His other significant power in that capacity is the power under cl 17.1 to appoint and remove trustees.

[87] Powers of this nature are not unique. A power similar to that conferred on Mr Clayton under cl 7.1 appeared in the trust deed was considered by this Court in

---

84 See *Official Assignee v Wilson*, above n 45, at [66] and [69]–[72]; and see generally the authorities referred to above at [61], n 59.
85 Tucker, above n 61, at [4–030]–[4–031].
86 Income Tax Act 2007, s BG1.
87 *Official Assignee v Wilson*, above n 45, at [68] and [129].
88 *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31 at [17]–[19].
89 Law Commission *Review of the Law of Trusts* (NZLC R130, 2013) at [4.15].
90 Above at [35] – [36].

Nation v Nation,[91] but the particular question we have raised about the nature and effect of the power was not raised or considered in that case.

[88] The power under cl 7.1 is a general power of appointment which gives Mr Clayton the unfettered right to remove the other "Discretionary Beneficiaries" of the trust, including those who are also the "Final Beneficiaries", and to leave himself as the sole beneficiary entitled to receive the income and capital of the trust under cls 4.1, 6.1 and 10.1(a). In exercising this power of appointment in his capacity as the Principal Family Member, Mr Clayton owes no fiduciary duties to the other beneficiaries which he might have owed if the power had to be exercised in his capacity as trustee of the VRPT.[92]

[89] We do not accept Mr Carruthers' submission that the doctrine of "fraud on a power" would constrain Mr Clayton in exercising his power of appointment under cl 7.1. Under that doctrine the donee of the power must exercise it in good faith for the donor's purpose.[93]

[90] As Tipping J put it in the Supreme Court in *Kain v Hutton*:[94]

> [46] The expression fraud on a power is historical language for when a power is misused in an ultra vires manner. When an appointment is made pursuant to a power of appointment the person making the appointment (who can be called either the donee of the power or the appointor) is acting pursuant to a mandate granted by the donor of the power and must stay within that mandate. The donor is normally the settlor of an inter vivos trust or the testator when the power is contained in a will.
>
> [47] A general power of appointment entitles the donee/appointor to appoint to anyone at all, including himself. There cannot therefore be excessive execution of, or a fraud on, such a power because it is logically impossible for the donee/appointor to exceed the donor's mandate. By contrast a special power enables the donee/appointor to appoint only to those specifically permitted by the donor's mandate. A special power is one where the objects of the power are limited by the terms upon which the power is granted. An appointment to a person who is not a permitted object will usually represent an excessive execution of the power. The species of excessive execution known as a fraud on the power normally comes about when the appointment is in form to an object but in substance to a non-

---

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

92 Below at [104]–[109].

93 *Kain v Hutton* (CA), above n 36, at [108]–[113]; Geraint Thomas *Thomas on Powers* (2nd ed, Oxford University Press, Oxford, 2012) at [9.01]–[9.02].

94 *Kain v Hutton* (SC), above n 36.

> object. In such a case the object is simply a vehicle through or by means of whom the appointor's purpose of benefiting the non-object is carried out. Hence a fraud on a power is a clandestine excessive execution because it is regular on its face but in reality is undertaken for a purpose not within the donor's mandate.

[91] Here there is little doubt that one of Mr Clayton's purposes as donor in conferring the general power of appointment on himself as donee was to enable him to become the sole beneficiary of the trust if he so wished. In terms of the power it would not have been improper for Mr Clayton to exercise it in this way. No "deliberate defeating" of his own intention would have been involved. It would, as Tipping J recognised, have been logically impossible for Mr Clayton to exceed his own mandate.

[92] We therefore do not accept Mr Carruthers' argument that the court would be able to constrain Mr Clayton from exercising his general power of appointment under cl 7.1 if he decided to do so.

[93] The question then is whether Mr Clayton's right to exercise his general power of appointment constituted "relationship property" under the PRA when he and Mrs Clayton separated in 2006, being the date at which her share is to be determined.[95] As already noted, the question arises because of the extended definition of "property" in the PRA which includes "any other right or interest".[96]

[94] The starting point is to recognise that a general power of appointment of this nature may give rise to property rights in the hands of the donee of the power. The leading authority is the decision of the Privy Council in *TMSF* which was referred to in both Courts below and in argument before us on appeal.[97]

[95] *TMSF* involved two discretionary trusts established by a Mr Demirel in the Cayman Islands with assets of over USD 24,000,000. The trustee was Merrill Lynch Bank and Trust Company (Cayman) Ltd. Mr Demirel and his wife and children were the beneficiaries of the trusts and, as settlor, he retained a general power of

---

[95] Property (Relationships) Act 1976 [PRA], s 2F(1)(b).
[96] Section 2, definition of "property", para (e).
[97] *TMSF* above n 23. See also *Kwan v Poon* (2014) 17 HKCFAR 414 at [36]; and Thomas, above n 93, at [1.06] and [15.38].

revocation of the trusts. After Mr Demirel was adjudicated bankrupt in Turkey the issue was whether the trusts removed Mr Demirel's assets out of the reach of his creditors for bankruptcy purposes or whether the general power of revocation was itself a property right so that Mr Demirel could be required to delegate his powers of revocation to the receivers in his bankruptcy.

[96] Lord Collins of Mapesbury, delivering the advice of the Privy Council, after reviewing the relevant authorities on the question whether a general power of appointment could give rise to property rights, said:

> [41] But even apart from express legislative intervention general powers have been regarded as giving rise to property rights. In *Clarkson v Clarkson* [1994] BCC 921 [(CA)] (a decision on the definition of property in the Insolvency Act 1986, section 283(4)) Hoffmann LJ referred to *In re Mathieson* [[1927] 1 Ch 283 (CA)] and said, obiter, (at p 931):
>
>> I think that even at the time this was quite a remarkable decision. Lord St Leonards [ie Sugden] in his book on *Powers* 8th ed (1861) said: "To take a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes."
>
> [42] So also in *In re Triffitt's Settlement* [1958] Ch 852 [(Ch)], 861, Upjohn J said that "where there is a completely general power in its widest sense, that is tantamount to ownership". That was in the context of the question, discussed below, whether a power could be delegated.
>
> [43] As *Thomas, Powers* (1998) puts it (at para 1-08), the fundamental distinction between the concepts of power and property has not been preserved in all contexts and for all purposes. A donee of a truly general power can appoint the subject-matter of the power to himself. He therefore has an "absolute disposing power" over the property, citing *Sugden*, 8th ed (1861), p 394. Consequently, for many purposes, the law regards the donee as the effective owner of that property.

[97] Then, applying this approach to Mr Demirel's case, Lord Collins said:

> [59] In the opinion of their Lordships the decisions in *Masri (No 2)* [[2008] EWCA Civ 303,] [2009] QB 450 and its predecessors lead to the conclusion that in the present case the jurisdiction should be exercised. The powers of revocation are such that in equity, in the circumstances of a case such as this, Mr Demirel can be regarded as having rights tantamount to ownership. The interests of justice require that an order be made in order to make effective the judgment of the Cayman court recognizing and enforcing the Turkish judgment.
>
> [60] There is no invariable rule that a power is distinct from ownership. Nor (as the cases on the rule against perpetuities show) is there an invariable

> rule that any departure from the distinction between power and property is effected solely by legislation. As Lord St Leonards said (and Hoffmann LJ approved), "To take a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes", and in *In re Triffitt's Settlement* [1958] Ch 852 [(Ch)], 861 Upjohn J said that "where there is a completely general power in its widest sense, that is tantamount to ownership".

[98] On this basis the Privy Council held that the property in the trusts remained Mr Demirel's and ordered him to delegate his powers of revocation to the receivers.

[99] In our view, for the following reasons, the approach of the Privy Council in *TMSF* should be followed here with the result that Mr Clayton's general power of appointment under cl 7.1 of the VRPT constituted a property right in his hands for the purposes of the PRA.

[100] First, there is no good reason why in New Zealand the traditional distinction between the concepts of power and property should be preserved in all contexts and for all purposes.[98] Subject to the terms and nature of the particular power, the context in which it has been conferred and any relevant legislative provisions, when the donee of the power is entitled to appoint the subject matter of the power to himself or herself without regard to the interests of others the law may regard the donee as the effective owner of that property.[99] In such a case, the fact that the donee has an "absolute disposing power" may be recognised in practical terms as conferring a property right.[100]

[101] Second, there is no practical distinction between the power to revoke the trust the subject of the decision in *TMSF* and Mr Clayton's power to appoint himself as the sole beneficiary of the VRPT. If Mr Clayton were to exercise his power in this way, he would become both the legal and beneficial owner of the trust assets and there would then be no trust at all.[101] He would effectively have revoked the trust.

---

98 Thomas, above n 93, at [1.06].

99 Mark O'Regan and Andrew Butler "Equity and Trusts in a Family Law Context" (paper presented to New Zealand Law Society Family Law Conference, November 2011) 267 at 291–292.

100 Thomas, above n 93, at [1.06].

101 See above at [47].

[102] Third, it is clear from an examination of the VRPT deed that Mr Clayton, as settlor, intended to confer the power of appointment under cl 7.1 on himself in his capacity as the "Principal Family Member" and not in his capacity as trustee. There is no reason why this careful bifurcation of Mr Clayton's roles under the VRPT deed should not be recognised and upheld with the consequences that flow from it. We have upheld the findings of the Courts below that Mr Clayton genuinely intended to create a valid trust.[102] We consider that he also genuinely intended to confer the power under cl 7.1 on himself in his separate capacity as the "Principal Family Member".

[103] Fourth, two important consequences flow from the fact that Mr Clayton held this power in this capacity:

(a) the doctrine of "fraud on a power" has no application;[103] and

(b) he would owe no fiduciary obligations to anyone when exercising the power in his own interests.

[104] Fiduciary obligations are not usually imposed by the courts on the exercise of a general power of appointment of this nature.[104] This is because the courts recognise that a power of this nature is personal to the donee and may be exercised by the donee exclusively in his or her own interests. As Buckley J put it in *Re Will's Trust Deeds*, where the trust deed provided that the trust could be wholly or partially revoked and new trusts created for a broad class of beneficiaries:[105]

> If the donee be himself an object of the power so that he could at his own option appoint the whole of the trust property in his own favour, I conceive that it would be impossible to regard the power as having any fiduciary character, for such a power would be equivalent to ownership … .

---

102 See above at [67]–[68].
103 See above at [89]–[92].
104 Hayton, Matthews and Mitchell, above n 65, at [1.76] and [8.88], Fox, above n 62, 285 at [11–001], and Thomas, above n 93, at [1.55].
105 *Re Will's Trust Deeds* [1964] Ch 219 at 228.

[105] Buckley J also recognised the same approach applied when, as in Mr Clayton's case, a power is conferred on a person who is a trustee but in a different capacity:[106]

> … where a power is conferred on someone who is not a trustee of the property to which the power relates or, if he be such a trustee, is not conferred on him in that capacity, then in the absence of a trust in favour of the objects of the power in default of appointment, the donee is, at any rate prima facie, not under any duty recognisable by the court to exercise a power such as to disenable him from releasing the power.

[106] The distinction between a power given to an individual in a personal capacity and a power given to a trustee was acknowledged by Lord Reid in *In re Gulbenkian's Settlements*:[107]

> It may be true that when a mere power is given to an individual he is under no duty to exercise it or even to consider whether he should exercise it. But when a power is given to trustees as such, it appears to me that the situation must be different. A settlor or trustee who entrusts a power to his trustees must be relying on them in their fiduciary capacity so they cannot simply push aside the power and refuse to consider whether it ought in their judgment to be exercised.

[107] The view that fiduciary obligations do not attach to a power conferred on an individual personally, who is also a trustee, was accepted by French CJ in *Kennon v Spry*, which concerned the application of the Family Law Act 1975 (Cth):[108]

> Dr Spry created the trust. He was the settlor. He so designated himself in cl 1 of the 1981 instrument. He appointed himself as trustee. He assumed the power to appoint and remove further trustees. He did so, according to the terms of the 1981 instrument, in his personal capacity. The power to vary the trust he conferred upon himself personally as "the settlor". That power was not constrained by fiduciary duties. …

[108] A general power to appoint and remove beneficiaries, which is held by a person in a capacity other than as a trustee, may therefore be exercised by the holder of the power without consideration of the interests of either the beneficiaries removed or appointed. To hold otherwise would constrain the exercise of the power

---

106 At 237.

107 *In re Gulbenkian's Settlements*, above n 54, at 518.

108 *Kennon v Spry* [2008] HCA 56, (2008) 238 CLR 366 at [46]. Gummow, Hayne and Kiefel JJ determined the case in the same way as French CJ but without addressing this issue. Heydon J dissented. The result reached in that case is not material for present purposes as it was decided in the context of the Family Law Act 1975 (Cth); see Nicola Peart "Intervention to Prevent the Abuse of Trust Structures" [2010] NZ L Rev 567 at 591.

contrary to the donor's intentions. It would have the effect of converting the general power into a special power by requiring the holder of the power to consider the interests of others contrary to his or her entitlement to exercise the power solely in his or her own interests.[109]

[109] Here Mr Clayton as donor intended that he should be entitled as donee to exercise his general power to remove the other beneficiaries and appoint himself as the sole beneficiary acting exclusively in his own interests. While he might have owed fiduciary obligations if the power under cl 7.1 had been conferred on him as trustee, it was not.[110]

[110] We express no view on the question whether Mr Clayton's power as "Principal Family Member" under cl 17.1 to appoint and remove trustees might have been subject to fiduciary obligations because the other discretionary beneficiaries might have been entitled to expect that power to be used to appoint trustees who were suitable for the position.[111] That question does not arise in this case.

[111] Finally, this approach is supported by the provisions of the PRA. As already noted, "property" is defined in s 2 of the PRA as including "any other right or interest".[112] This is an extended definition which should be interpreted consistently with the purpose and principles of the PRA which are to ensure a just division of relationship property by recognising the equal contributions of both spouses to the marriage partnership.[113] On this basis Mr Clayton's general power of appointment under cl 7.1 of the VRPT deed is within the definition because it is a "right" and creates an "interest". Mr Clayton had the right to exercise the power of appointment in his own favour. That right itself constituted "property" and hence was "relationship property" under the PRA when the parties separated in 2006.

---

109 See above at [89]–[91].

110 Cf above at [51]–[55] and Palmer "Controlling the Trust", above n 52, at 490–492.

111 Cf *Kennon v Spry*, above n 108, at [46] and Thomas, above n 93, at [1.52].

112 See above at [36] and [93] and David Hicks "Meaning and Value of Property" in RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [10.2]; *Family Property* (online looseleaf ed, Thomson Reuters) at [PR2.24.01].

113 PRA, ss 1M and 1N. See also *M v B* [2006] 3 NZLR 660 (CA) at [34] per Robertson J and [227] per Hammond J.

[112] We have not overlooked Mr Carruthers' submission that express provisions in the Estate and Gift Duties Act 1968 and the Income Tax Act 1994 relating to general powers of appointment would not have been necessary if such powers constituted property in the hands of the donee.[114] The short answer to this submission is that, as the Privy Council recognised in *TMSF*, general powers may give rise to property rights "even apart from express legislative intervention".[115]

[113] Once it is recognised that Mr Clayton's right to exercise his power of appointment constituted "relationship property" under the PRA, the next question is the value of that right. In our view the value of the right to the holder of the power in a case such as this one will be the value of the property received in the event that the power were exercised, that is, the net value of the assets of the trust. In this case that will be the net value of the assets of the VRPT calculated as at 31 March 2011, being the date agreed by the parties. The parties are also in agreement that the calculation of the quantum should be remitted to the High Court for determination. Mrs Clayton will be entitled to an equal share in the value of that property, being the net value of Mr Clayton's equity in the assets of the VRPT.

[114] In reaching this conclusion, we recognise that, while we have accepted that the VRPT was a valid trust, Mr Clayton, in settling the trust, has failed to remove the value of its assets from the reach of the PRA. This is because he retained the right to exercise his general power of appointment under cl 7.1. This power does not invalidate the trust or mean that Mr Clayton, as trustee, does not hold the property of the trust for the beneficiaries. The trust remains in existence and is enforceable by the other beneficiaries. Their rights and Mr Clayton's obligations as trustee continue unless and until he exercises his power under cl 7.1 to remove them as beneficiaries. But in the meantime, in terms of the extended definition of "property" in the PRA, the existence of the power under cl 7.1 also has the effect of bringing the net value of the assets of the trust as at 31 March 2011 into the pool of "relationship property". This outcome, based on our analysis of recent developments in the recognition of a power of this nature as a property right, is consistent with both the law relating to

---

114 See Estate and Gift Duties Act 1966, s 8; and Ivor Richardson and Robin Congreve *Law of Estate and Gift Duty* (5th ed, Butterworths, Wellington, 1978) at 80–81.

115 *TMSF*, above n 23, at [41] and [60].

trusts and powers and the underlying purpose and principles of the PRA.[116] The fact that Parliament enacted ss 44 and 44C of the PRA does not preclude the Court from reaching this conclusion based on the extended definition of "property" in the PRA.

The answers to the questions

[115] While our formal answers to the first two questions are unfavourable to Mrs Clayton, in practical terms, as our qualification to the first answer records, she has been successful on this issue. For this reason it is unnecessary for us to answer the third question.

[116] Accordingly, we answer the questions:

(a) Did the Courts below err in finding that the Vaughan Road Property Trust was illusory?

Answer: Yes, but Mr Clayton's right to exercise his general power of appointment under cl 7.1 of the trust deed was "relationship property."

(b) Did the Courts below err in finding the Vaughan Road Property Trust was not a sham?

Answer: No.

(c) Is Mrs Clayton entitled to a compensation order under s 44C of the Property (Relationships) Act 1976 in relation to dispositions made to the Vaughan Road Property Trust?

Answer: It is unnecessary to answer this question.

---

116 Cf [81]–[85] above.

The Education Trusts

The settlement of the two education trusts in 2004

[117] In 2004 two trusts were settled by Mr Grant Dunn, a solicitor of Buddle Findlay who were Mr Clayton's lawyers. These were the Stacey Clayton Education Trust (SCET) and the Anna Clayton Education Trust (ACET).

[118] The trusts were settled following advice Mr Clayton obtained in 2003 from Vivienne Ullrich QC discussing the risks to Mr Clayton and his business interests of a marital separation. Ms Ullrich's advice was not in evidence.

[119] The trustees of the SCET and ACET are Mr Clayton and Mr Cheshire. Mr Clayton has power to appoint new trustees. The discretionary beneficiaries of the two trusts are respectively, Stacey and Anna. Other discretionary beneficiaries of both trusts are Mr Clayton, any nominated business associate, employee or consultant of any business connected with him, any child, grandchild or great grandchild of Stacey or Anna respectively, any relative of Mr Clayton, any company in which any of the previous beneficiaries have at least a 10 per cent shareholding, any trust of which any of the previous beneficiaries are a beneficiary, and any charitable organisation. Mrs Clayton is not a beneficiary.

[120] As noted in the Courts below, while the trusts were ostensibly set up for the benefit of Stacey and Anna, neither is a final beneficiary and there is nothing to indicate that they have anything more than an expectation, like any of the other discretionary beneficiaries.[117]

The assets of the trusts

[121] Each trust owns a section at Collingwood Drive in Brunswick Park, Rotorua and a half share in land on which one of the Claymark sawmills operates. The two sections were acquired in 2005. The deposits were funded by part of the proceeds of sale of a holiday property at Lake Rotoiti which had been bought for $410,000 in

---

[117] Family Court judgment, above n 1, at [88]; High Court judgment, above n 1, at [94].

2003 and held in the name of Lake Rotoiti Retreat Ltd. It was sold for approximately $600,000 and the title transferred on 8 March 2004.

[122] The Carter Holt Harvey sawmill business at View and McCloskey Roads in Rotorua was acquired by Rotorua Sawmill Ltd in 2004. The land on which the sawmill was sited was acquired by SCET for $450,000 and ACET for a little over $300,000. It appears that these costs of purchase were funded by borrowings.

[123] As at 31 March 2011, the trusts each owed over $370,000 to Mr Clayton and other entities. The debts were recorded in the trusts' accounts as loans (of $307,675 and $306,781 in relation to the VRPT) and as advances from Claymark Finance Ltd and Mr Clayton. The debts owed to Mr Clayton personally were recorded as $1,605 and $1,604. The advances from Claymark Finance Ltd were assets in the hands of Mr Clayton because he was and remains the 100 per cent shareholder of that company and the value of those shares would be part of the overall pool of relationship property.

[124] In addition Mr Clayton had gifted $20,000 to each of the trusts.

[125] Mr Carruthers for Mr Clayton accepted that the advances of approximately $1,600 to each trust were relationship property.

Mrs Clayton's claim

[126] Mrs Clayton claims that she is entitled to a half share in the current equity of the properties owned by the two trusts. Her claim is based on s 44 of the PRA which provides:

> **44 Dispositions may be set aside**
>
> (1) Where the High Court or a District Court or a Family Court is satisfied that any disposition of property has been made, whether for value or not, by or on behalf of or by direction of or in the interests of any person in order to defeat the claim or rights of any person (**party B**) under this Act, the court may make any order under subsection (2).

(1A) The court may make an order under this section on the application of party B, or (in any proceedings under this Act or otherwise) on its own initiative.

(2) In any case to which subsection (1) applies, the court may, subject to subsection (4),—

(a) order that any person to whom the disposition was made and who received the property otherwise than in good faith and for valuable consideration, or his or her personal representative, shall transfer the property or any part thereof to such person as the court directs; or

(b) order that any person to whom the disposition was made and who received the property otherwise than in good faith and for adequate consideration, or his or her personal representative, shall pay into court, or to such person as the court directs, a sum not exceeding the difference between the value of the consideration (if any) and the value of the property; or

(c) order that any person who has, otherwise than in good faith and for valuable consideration, received any interest in the property from the person to whom the disposition was so made, or his or her personal representative, or any person who received that interest from any such person otherwise than in good faith and for valuable consideration, shall transfer that interest to such person as the court directs, or shall pay into court or to such person as the court directs a sum not exceeding the value of the interest.

(3) For the purposes of giving effect to any order under subsection (2), the court may make such further order as it thinks fit.

(4) Relief (whether under this section, or in equity, or otherwise) in any case to which subsection (1) applies shall be denied wholly or in part, if the person from whom relief is sought received the property or interest in good faith, and has so altered his or her position in reliance on his or her having an indefeasible interest in the property or interest that in the opinion of the court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may be.

The Family Court findings

[127] In the Family Court Judge Munro found that s 44 of the PRA applied to these two trusts so that Mrs Clayton was entitled to a half share in the current equity of the properties owned by the trusts.[118] The Judge's reasons for this finding were:[119]

118 Family Court judgment, above n 1, at [92]–[93].
119 At [92].

(a) The gifts of $20,000, together with the interest free advances by Mr Clayton and his companies, were dispositions of property.

(b) An intention to defeat Mrs Clayton's interests was uppermost in Mr Clayton's mind, given that she was specifically excluded from the wide-ranging list of discretionary beneficiaries.

The High Court findings

[128] In the High Court Rodney Hansen J upheld the Family Court decision in respect of these trusts. The Judge first rejected a submission for Mr Clayton that, as Mrs Clayton was a "relative" of Mr Clayton, she was a beneficiary of the trusts.[120] This submission has not been pursued on appeal.

[129] The Judge then said:

> [101] Of greater substance is the further submission that, contrary to the Judge's finding, there was in fact no disposition. Mr Carruthers submitted that the finding that Mr Clayton made a gift of $20,000 to each Trust is not supported by the evidence. However, it appears that the proceeds of sale of the Rotoiti property were used to fund the deposits. There is nothing to indicate any obligation to repay those amounts. The balance of the cost of acquiring the land appears to have been met by way of advances from the Vaughan Road Property Trust or bank borrowing.
>
> [102] In my view, the Judge's finding that the land was acquired by the two "educational" trusts and dispositions made for that purpose were with the intention of defeating Mrs Clayton's claim is fully justified. The omission of Mrs Clayton as a beneficiary during the subsistence of the marriage admits of no other rational explanation. It is relevant too that the land on which the sawmill stands which was acquired (it appears) for a total of $750,000, was valued in the accounts of each trust as at 31 March 2011 at $1.28m. I was told the land was transferred at book value at the vendor's request. I infer that significant unrealised profits arose on the transfer of the land to the trust.

The appeal

[130] Mr Clayton and Mr Cheshire, as the trustees of the two trusts, appeal against the findings of the Courts below that s 44 applied. Mr Carruthers submits that the findings were erroneous because:

---

[120] High Court judgment, above n 1, at [99]–[100].

(a) The evidence established that no gifts were made to either of the trusts. Mr Clayton advanced $1,605 to the SCET and $1,604 to the ACET.

(b) No interest fee advances were made by Mr Clayton or "his companies" to either of the trusts.

(c) In any event those advances could not constitute a disposition of property for the purposes of s 44(1).

(d) As Lake Rotoiti Retreat Ltd sold its property in 2003 (in fact, it would appear, 2004), the proceeds were not used to fund the deposits for the two sections in Rotorua.

(e) The value of the sawmill land was not $1,280,000 as at 31 March 2011. That value was inclusive of improvements.

(f) In terms of s 44(2), the dispositions, even if made, could not give rise to the award of a half share in the equity of the properties owned by the trusts. The remedy was as to the amount of the disposition to be met from trust income, ameliorated by the factors listed in "s 44(6) [sic]".

[131] The two questions relating to the two trusts are:

(a) Was there any disposition of property by Mr Clayton to the trustees of either of the SCET and the ACET so as to support orders made under s 44 of the PRA?

(b) If there were dispositions made for the purpose of land acquired by the SCET and the ACET with the intention of defeating Mrs Clayton's claim, does s 44(2) of the PRA authorise the court to order that Mrs Clayton is entitled to half the net equity of the SCET and the ACET?

[132] As these questions recognise, three issues arise as to the interpretation and application of s 44, namely:

(a) Were there any "dispositions" by Mr Clayton to the trusts?

(b) If so, were they made with the intention of defeating Mrs Clayton's claim?

(c) If so, should the court make an order under s 44(2) that Mrs Clayton is entitled to half the net equity of the two trusts?

[133] The expression "disposition" is not separately defined in the PRA, but there is no dispute that it should be given a broad meaning extending to include a disposition by way of nomination, that is a direction as to how property is to be transferred.[121] Mr Carruthers did not take issue with this approach.

[134] The meaning of the expression "made … in order to defeat the claim or rights of any person" was considered by this Court in *SM v ASB Bank Ltd*.[122] In the judgment of the Court delivered by Randerson J it was said:

> [52] For the purposes of s 44(1) a disposition of property must be made with the intention or purpose of defeating the claim of a person under the PRA. We do not accept the conclusion reached by the Judge that it is sufficient if the disposition has the effect of defeating a legitimate claim under the PRA. If that were the appropriate test, then any disposition of a property which was the subject of an occupation order (or a claim for such an order) would inevitably be caught by s 44(1). Our conclusion in this respect is supported by the clear distinction drawn between the two concepts of intention and effect in s 47(1) and (2) of the PRA.
>
> [53] The effect of a disposition may be one factor in the assessment of whether it was made in order to defeat the claim or rights of any person but this fact is not dispositive. The task is to assess the intention or purpose of the person or body disposing of the property at the time the disposition is made. That requires an assessment of all the relevant evidence.

---

121 *Re Polkinghorne Trust, Kidd v Kidd* (1988) 3 FRNZ 636 (HC) at 640; Bill Atkin "Protecting the Non-Owner Spouse or Partner" in RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [9.43]; *Family Property*, above n 112 at [PP44.02(1)].

122 *SM v ASB Bank Ltd* [2012] NZCA 103, (2012) 28 FRNZ 782. It is not necessary in this case for us to address the submission for Mrs Clayton that the decision of the Supreme Court in *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 widens the scope of s 44.

[135] In the event that the court is satisfied that dispositions were made which are caught by s 44(1), the court has wide powers under s 44(2) as to the form of relief that may be granted.

Were there any dispositions?

[136] We accept the submissions for Mrs Clayton that the dispositions were established on the evidence.

[137] In respect of the Collingwood Drive sections, the evidence is clear that there was a disposition by way of nomination. Mr Clayton said in his affidavit:

> Funds from the sale of the Lake Rotoiti property were also used as deposits in two sections in Collingwood Drive, Brunswick Park, Rotorua which were acquired in 2005. These were purchased by the Stacey Clayton Education Trust and the Anna Clayton Education Trust respectively with a view that Stacey and Anna would each be able to build on the respective sections in the future. The cost of each section was approximately $300,000. Other than these deposits these purchases were again funded by Bank borrowings.

[138] Mr Clayton's evidence as to the source of the deposits for the two sections was confirmed by the title for the Lake Rotoiti property which showed that it was transferred on 8 March 2004 and the deposit slips dated 8 February 2005 which showed that Mr Clayton paid the two deposits ($33,500 each, totalling $67,000 for both sections).

[139] Mr Carruthers attempted to persuade us that there was evidence in the trust accounts and from Mr Clayton's accountant, Mr Giesbers, to suggest that Mr Clayton's evidence was incorrect. We are not prepared to accept this accounting evidence in the face of Mr Clayton's own evidence which he has not sought to correct.

[140] In respect of the Rotorua sawmill land, the evidence is also clear that there was a disposition. Mr Clayton said in evidence in the Family Court:

> Further expansion of the Claymark business occurred in 2004. In particular the Carter Holt mill business at View and McCloskey Roads, in Rotorua was acquired by Rotorua Sawmill Limited and the relevant land was acquired by the Stacey Clayton Education Trust for approximately $450,000 and the

> Anna Clayton Education Trust for a little over $300,000 through borrowings made by those trusts.

[141] As Lady Chambers for Mrs Clayton submitted:

(a) Mr Carruthers has not challenged the High Court finding that there was no indication that the amounts advanced by Mr Clayton and the VRPT were to be repaid;[123] and

(b) it is well-established that loans and advances are dispositions to which s 44 can apply.

Were the dispositions made to defeat Mrs Clayton's rights?

[142] There is no real dispute that the dispositions were made to the two trusts in order to defeat Mrs Clayton's rights. The exclusion of Mrs Clayton as a beneficiary after advice from Ms Ullrich showed that this intention was uppermost in Mr Clayton's mind. Mr Cheshire, the other trustee, shared that intention. His evidence was that:

> One of the key risks identified at the time was the effect on the company banking arrangements should Mark's marriage run into difficulties.

[143] There was therefore ample evidence to support the finding to this effect in the Courts below. We are not prepared to overturn their concurrent findings.

Should there be any order under s 44(2)?

[144] Once the court is satisfied that a disposition has been made to defeat the interests of a claimant, the court has wide powers under s 44(2) to make orders for the purpose of compensating the person whose claim or rights have been defeated by the disposition. As the court is expressly empowered to make "any order" of the orders listed in s 44(2) and "such further order as it thinks fit", the orders are not mutually exclusive and may be combined to provide a just outcome.[124]

[145] The Courts below were therefore authorised to make the orders that

---

[123] Above at [129].

[124] *May v Close* (1989) 5 FRNZ 233 (HC) at 236; Atkin, above n 121, at [9.47].

Mrs Clayton was entitled to half of the net equity in the properties owned by the two trusts as at 31 March 2011.

[146] We assume that Mr Carruthers' reference to the factors listed in s 44(6) should have been to the factors in s 44(4). We are not satisfied, however, that there was evidence to support Mr Clayton's claim that Mrs Clayton should be denied relief in whole or in part under this provision.

The answers to the questions

[147] Accordingly, we answer the two questions as follows:

(a) Was there any disposition of property by Mr Clayton to the trustees of either of the SCET and the ACET Trust so as to support orders made under s 44 of the PRA?

Answer: Yes.

(b) If there were dispositions made for the purpose of land acquired by the SCET and the ACET with the intention of defeating Mrs Clayton's claim, does s 44(2) of the PRA authorise the court to order that Mrs Clayton is entitled to half the net equity of the SCET and the ACET?

Answer: Yes.

Claymark Trust

The settlement of the Claymark Trust

[148] Mr Clayton settled the Claymark Trust on 10 May 1994, during the marriage. The first trustees were Mr Clayton; an accountant and a solicitor. Mr and Mrs Clayton are discretionary beneficiaries and their two daughters are the final beneficiaries.

[149] After the Trust was established it acquired two properties in Katikati adjoining the sawmill there. It also owns shares in Kaimai Developments Ltd which

has an avocado orchard on the adjacent land.

[150] Mr Clayton made three gifts of $27,000 to this Trust between 1995 and 1998. He also made advances to the Trust. As at 31 March 2011, he was owed $5,093.

The trust assets

[151] The trust assets as at 31 March 2011 are the two Katikati properties and the shares, as well as, most significantly, current accounts and loans to each of the VRPT and Kaimai Developments Ltd. The current account for the VRPT is recorded as $1,416,390 and the loan as $367,309. For Kaimai Developments Ltd, the current account value is $90,509 and the loan is $449,345. The net asset position is $1,342,307.

Mrs Clayton's claim

[152] Mrs Clayton claims compensation in relation to dispositions made to the Claymark Trust. Her claim is based on s 44C of the PRA and s 182 of the Family Proceedings Act 1980 (the FPA). It is convenient to address the two claims separately.

(a) Claim under s 44C of the PRA

[153] Section 44C of the PRA 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 one 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 one 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 one 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 one 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.

The Family Court findings

[154] In the Family Court Judge Munro's relevant findings arise where she rejected Mrs Clayton's claim for compensation under s 44 in relation to dispositions made to

the Claymark Trust.[125] She found that the Trust had operated as a bona fide business trust.[126] She accepted evidence that it was set up for business purposes which included acquiring the properties around the sawmill, with the aim of forestalling any nuisance complaints from neighbouring lifestyle properties (including by planting the avocado orchard) and reducing difficulties obtaining resource consents during the expansion of the sawmill. As Rodney Hansen J said in the High Court, the Judge did not deal directly with a claim based on s 44C.[127]

The High Court findings

[155] In the High Court Rodney Hansen J upheld the Family Court decision in respect of this trust.[128] The Judge said:[129]

> [145] In *Nation v Nation* the Court of Appeal summarised the requirements for a successful claim under s 44C. The disposition must be:
>
> (a) to a trust;
>
> (b) of relationship property;
>
> (c) made since the relationship began;
>
> (d) made by either or both of the partners;
>
> (e) one to which s 44 does not apply; and
>
> (f) one that has the effect of defeating the claim or rights of one of the partners.
>
> [146] The gifts totalling $81,000 and the loans of $60,365 were dispositions to a trust made by Mr Clayton since the relationship began. The transfer of funds is a disposition even if it is made by way of an interest-free loan – *Nation v Nation; Rabson v Gallagher.* They could have had the effect of defeating Mrs Clayton's claim or rights in the sense discussed in those cases.
>
> [147] Ms Hunter submitted that in terms of the *Rabson v Gallagher* paradigm, the Judge ought to have taken into account the ability of the Trust to utilise the gifts and advances to expand its asset base and to fund the activities of entities such as Kaimai Development.
>
> [148] In response, Mr Carruthers pointed to the Judge's finding that:

125 Family Court judgment, above n 1, at [70]–[71].
126 At [71].
127 High Court judgment, above n 1, at [144].
128 At [149].
129 Footnotes omitted.

> [70] ... There is no evidence of relationship property having been disposed of to this Trust. In terms of s 44, whilst there has been a disposition of $81,000 by Mr Clayton to this Trust by way of gifting, I do not find that there was any intention to defeat Mrs Clayton's interest. She is a discretionary beneficiary.

> Mr Carruthers also pointed out that there is no power in s 44C to compensate out of the capital of a trust and argued that, in any event, the Court ought to exercise its discretion against making an order having regard to the factors in s 44C(4).
>
> [149] Section 44C can be invoked only if there has been a disposition of relationship property. Judge Munro's finding that there is no evidence of relationship property having been disposed of is fatal to the claim under s 44C.

The appeal

[156] Mrs Clayton appeals against the findings of the Courts below in respect of her claim under s 44C of the PRA.

[157] In respect of the claim under s 44C, Lady Chambers submits:

(a) The evidence establishes that there were two separate dispositions of relationship property to the Claymark Trust:

- Interest free loans by Mr Clayton to the trustees; and
- Distributions from the VRPT.

(b) If the finding that the VRPT is illusory and not a trust at all, but in fact property owned by Mr Clayton, is upheld, then the distributions from the VRPT were in fact dispositions of relationship property to the trustees of the Claymark Trust.

(c) The dispositions had the effect of defeating Mrs Clayton's relationship property rights because but for the disposition she would have shared in a larger pool of relationship property and, because of the disposition, Mrs Clayton's rights are detrimentally affected as compared to Mr Clayton's. Mr Clayton remains in control of the

Claymark Trust and continues to benefit from the disposition of relationship property.

(d) An appropriate order in this case is to compensate Mrs Clayton from Mr Clayton's share of relationship property for an amount equivalent to half of the net equity of the Claymark Trust.

[158] In respect of the s 44C claim Mr Carruthers submits that there are concurrent findings that there was no disposition of relationship property, but in any event the Court ought to exercise its discretion against making an order considering the factors listed in s 44C(4).

[159] The first question relating to the Trust is whether Mrs Clayton is entitled to a compensation order under s 44C of the PRA in relation to dispositions made to the Claymark Trust.

Discussion

[160] Like s 44, a successful claim under s 44C requires a "disposition", but, unlike s 44, under s 44C the disposition to the trust must also be of "relationship property" and have "the effect of defeating" the claim of one of the spouses. This Court has recently granted leave to appeal questions of whether relief can be granted under both ss 44 and 44C and if relief can be granted under s 44C where s 44(1) applies.[130]

[161] Here there are two different dispositions to the Claymark Trust to consider:

(a) the three gifts or distributions from the VRPT totalling $81,000; and

(b) the personal interest free loans made by Mr Clayton totalling $60,365.

[162] We do not accept Lady Chambers' submission that the distributions from the VRPT were dispositions of relationship property. We have already held that the VRPT was a valid trust. Its assets were therefore not relationship property. Our

---

[130] *Simon v Wright* [2014] NZCA 199 at [29]. See also *R v G [Lottery winnings]* [2011] NZCA 459, [2011] NZFLR 1040; and Jessica Palmer and Nicola Peart "Trust principles overlooked" [2011] NZLJ 423 at 426.

decision that Mr Clayton's right to exercise his general power of appointment under cl 7.1 of the VRPT deed was "relationship property" does not have the effect of setting aside the trust or making its assets relationship property. It is the value of Mr Clayton's property right under cl 7.1 which, as a result of the extended definition of "property" under the PRA, is within the "relationship property" pool.[131]

[163] While we accept that the interest free loans made by Mr Clayton to the trust during the marriage were probably made from relationship property, they remain as assets in his hands and divisible as relationship property. We therefore do not consider that the loans warrant an order for compensation under s 44C.

[164] For these reasons we do not accept Lady Chambers' submission that the High Court erred in declining to make an order for compensation under s 44C.

(b) Claim under s 182 of the FPA

[165] Section 182 of the FPA provides:

> **182 Court may make orders as to settled property, etc**
>
> (1) On, or within a reasonable time after, the making of an order under Part 4 of this Act or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963, a Family Court may inquire into the existence of any agreement between the parties to the marriage or civil union for the payment of maintenance or relating to the property of the parties or either of them, or any ante-nuptial or post-nuptial settlement made on the parties, and may make such orders with reference to the application of the whole or any part of any property settled or the variation of the terms of any such agreement or settlement, either for the benefit of the children of the marriage or civil union or of the parties to the marriage or civil union or either of them, as the court thinks fit.
>
> (2) Where an order under Part 4 of this Act, or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963, has been made and the parties have entered into an agreement for the payment of maintenance, a Family Court may at any time, on the application of either party or of the personal representative of the party liable for the payments under the agreement, cancel or vary the agreement or remit any arrears due under the agreement.
>
> (3) In the exercise of its discretion under this section, the court may take into account the circumstances of the parties and any change in those

131 Above at [114].

circumstances since the date of the agreement or settlement and any other matters which the court considers relevant.

(4) The court may exercise the powers conferred by this section, notwithstanding that there are no children of the marriage or civil union.

(5) An order made under this section may from time to time be reviewed by the court on the application of either party to the marriage or civil union or of either party's personal representative.

(6) Notwithstanding subsections (1) to (5), the court shall not exercise its powers under this section so as to defeat or vary any agreement, entered into under Part 6 of the Property (Relationships) Act 1976, between the parties to the marriage or civil union unless it is of the opinion that the interests of any child of the marriage or civil union so require.

The Family Court findings

[166] In the Family Court Judge Munro rejected Mrs Clayton's claim for provision from the assets of the Trust or a variation of that Trust under s 182 of the FPA.[132] She said the Trust was not set up to provide for Mr and Mrs Clayton in the future; indeed, at the time it was established the parties were well aware there was an ante-nuptial agreement in place which specifically excluded Mrs Clayton from sharing in any of Mr Clayton's business interests. The Judge found Mrs Clayton could not, therefore, have had a reasonable expectation of a share in the property purchased by the Claymark Trust. She found that Mrs Clayton's claim in relation to the Claymark Trust was limited to a share in any debt owed by the Claymark Trust to Mr Clayton or to any entities which comprised property in the hands of Mr Clayton.[133]

The High Court findings

[167] In the High Court Rodney Hansen J upheld the Family Court decision.[134] The Judge first noted:[135]

> [138] The scope and purpose of s 182 was discussed [by the Supreme Court] in *Ward v Ward*. In tracing the legislative history of the section the Court noted that ante and post-nuptial settlements envisaged and were premised on the continuance of the marriage. If that premise ceased to apply, a fundamental change in circumstances came about which it was

---

132 Family Court judgment, above n 1, at [68]–[71].
133 At [71].
134 High Court judgment, above n 1, at [137]–[143].
135 Footnotes omitted.

recognised could give rise to an injustice. Section 182 sought to remedy such injustice by giving the Court the power to review the settlement on dissolution of the marriage. The Court went on to say:

> ... As already mentioned, a nuptial settlement, whether it be ante or post-nuptial, is premised on the continuation of the marriage. When the Court is addressing an application under s 182, it must assess whether an order is necessary and, if so, in what terms, to reflect the fact that this fundamental premise no longer applies. The expectations of the parties when the settlement was made may often have been defeated, at least in part, by the dissolution of their marriage. One of the purposes of s 182 is to prevent one party from benefitting unfairly from the settlement at the expense of the other in the changed circumstances. In that situation the order should be directed at eliminating the unfair benefit. In *Chrystall*, Judge Inglis, who had considerable expertise in this field, placed substantial emphasis on the role of reasonable expectations in the s 182 assessment.

[168] The Judge then noted that the judgment in *Ward v Ward* offered guidance on the approach to be taken under s 182 in the following passage:[136]

> [25] Based on the foregoing discussion we consider the proper way to address whether an order should be made under s 182 is to identify all relevant expectations which the parties, and in particular the applicant party, had of the settlement at the time it was made. Those expectations should then be compared with the expectations which the parties, and in particular the applicant party, have of the settlement in the changed circumstances brought about by the dissolution. The court's task is to assess how best in the changed circumstances the reasonable expectations the applicant had of the settlement should now be fulfilled. If the dissolution has not affected the implementation of the applicant's previous expectations, there will be no call for an order.
>
> [26] Section 182(3) makes this point by directing the court's attention to the circumstances of the parties. By its reference to change of circumstances the subsection envisages that the parties' circumstances, both as regards the settlement, and generally, are to be compared with their circumstances at the date of the settlement. The court is also empowered by subs (3) to take into account any other matters it considers relevant. Among those matters it may, as here, be significant who established the settlement trust and, subject to subs (6), the source and character of the assets which have been vested in the trust. Obviously the terms of the settlement will be relevant, as will how the trustees are exercising, or are likely to exercise, their powers in the changed circumstances. Also relevant, of course, are the interests of any children or other beneficiaries involved. It is neither necessary nor desirable to attempt any comprehensive list of relevant circumstances because each case will require individual consideration. No formulaic or presumptive approach should be taken.

[136] High Court judgment, above n 1, at [139]; *Ward v Ward*, above n 88.

> [27] It can therefore be seen that s 182 applies if the applicant's expectations of the ante or post-nuptial settlement have been wholly or partially defeated by the dissolution of the marriage. The relief to which the applicant is entitled in those circumstances is an order in terms of the section, in whatever form is best suited to the circumstances, restoring those defeated expectations. The parties should be restored to an appropriate way to the position they were in, as regards the settlement, immediately after it was made, not immediately before it was made.

[169] The Judge then considered the submissions for Mrs Clayton:

> [140] Ms Hunter said that in deciding that s 182 did not apply, the Judge focused too heavily on the business operation of the Trust. She said the purpose of the Trust from "an operational point of view" became a dominant consideration when the key consideration was the duty of the Trust to meet the expectations of the settlement and beneficiaries. She said the purpose of the Trust itself is to be distinguished from the purpose of its acquisitions. Ms Hunter submitted that, in any event, the Judge's finding that the purpose of the Trust was to create a buffer was not strictly correct as that land was not purchased until 2000. She acknowledged that the fact that the Trust was primarily established for business purposes should not affect the exercise of the s 182 jurisdiction although it may affect quantum. If the Judge's approach were correct, she said, it would mean that only settlements of domestic assets would qualify for consideration under s 182.
>
> [141] Ms Hunter was also concerned that the Judge appeared to have been influenced by Mrs Clayton's lack of knowledge of the Trust. She said that introduced a subjective element whereas the test is an objective one, directed to the expectation of the beneficiaries.

[170] The Judge concluded:

> [142] It is clear from the discussion in *Ward*, however, that all aspects of the expectations of the parties at the time of settlement must be considered. They will not be confined to expectations which may be gleaned from the terms of the settlement itself. All relevant circumstances, including the knowledge and intentions of the parties, should be considered.
>
> [143] Having regard to such circumstances, I see no reason to differ from the Judge's assessment of the expectations of the parties at the time the Trust was set up. It was undoubtedly formed for business purposes, the primary objective at the time, as Mr Cheshire put it, being to keep "assets out of the circle of bank guarantees". It achieved the secondary purpose of providing a buffer zone for resource consent purposes. It had all the hallmarks of a conventional family trust. There is nothing to indicate that it was perceived as a means by which Mrs Clayton would acquire an interest or expectation in business assets. On the contrary, as the Judge pointed out, the ante-nuptial agreement, entered into a relatively short time before, excluded her from any claim to business assets. There is no basis for a finding that the dissolution of the marriage affected Mrs Clayton's expectations when the Trust was formed.

The appeal

[171] Mrs Clayton appeals against the findings of the Courts below in respect of her claim under s 182 of the FPA.

[172] Lady Chambers submits first that the Claymark Trust was a "nuptial settlement" within the meaning of s 182, engaging the court's discretion because: [137]

(a) It was settled during the marriage.

(b) It made continuing provision for at least one of the parties to the marriage in the capacity as spouses (in fact both) as is shown by the descriptions of Mrs Clayton in the trust deed as (depending on future circumstances) "the wife of the settlor" and "any former wife of the settlor" and "the widow of the settlor".

(c) The Trust also existed for the benefit of the children and grandchildren of the parties.

(d) There is no authority that the nature of the assets owned by a trust has any bearing on whether a settlement is nuptial or not (that is, a settlement may be a nuptial one even if it establishes a "business trust" if it benefits one or both of the spouses). Adopting that approach would mean s 182 would be limited to domestic assets and that cannot have been intended by Parliament. A finding that the Trust was a nuptial settlement is consistent with the purpose of s 182 of enabling resort by the courts to trust assets or to modify a trust in response to the changed circumstances of a divorce.

(e) In any event the Family Court and High Court were wrong to conclude that the Trust was settled for a business purpose on the evidence. It was not set up to purchase the properties bordering the

---

137 Citing *Ward v Ward*, above n 88; *Kidd v van den Brink* [2010] NZCA 169; *Kennon v Spry*, above n 108; *Brooks v Brooks* [1996] AC 375 (HL) at 391; and *Lort-Williams v Lort-Williams* [1951] P 395 (CA) at 403 per Denning LJ.

sawmill as is evidenced by the fact that these were not purchased until 2000, six years after the trust was settled. Further, it has owned trust assets, including Mrs Clayton's personal vehicle, the parties' first home and an apartment in Auckland used by the parties, for personal enjoyment as well as for business.

(f) There was no suggestion or evidence in the lower Courts as to what persons, if not Mr and Mrs Clayton and their children, the Trust was set up to benefit.

(g) There is no valid conceptual distinction between productive or business assets owned personally or by other means, or by a trust. In any case, the choice of vehicle should not mean that the assets should not be treated as having been subject to a nuptial settlement if the settlement was intended to provide ongoing benefit to one of the spouses. As the High Court noted, the Trust "had all the hallmarks of a conventional family trust".[138]

(h) Arguably, rather than detracting from the nuptial character of the business settlement the accepted evidence of Mr Cheshire and Mr Clayton that the Trust was formed to "keep 'assets out of the circle of bank guarantees'" in order to protect the beneficiaries, including Mrs Clayton, rather than to disenfranchise her.[139]

[173] Lady Chambers then submits that the discretion under s 182 should be exercised in the present case because:

(a) The purpose of the provision is to empower courts to make good the applicant's reasonable expectations if those differ from the parties' changed expectations in light of all the relevant circumstances since the date of settlement.[140]

---

138 At [143].
139 At [143].
140 *Ward v Ward*, above n 88, at [25].

(b) The unchallenged evidence of Mrs Clayton at the time the Trust was set up was that she expected to remain married to Mr Clayton and to "benefit equally from the accumulated wealth".

(c) It does not follow that because Mr Clayton excluded Mrs Clayton from control of the Trust, in accordance with a general attitude that he wanted to be in control of financial and family, that he intended to exclude Mrs Clayton from benefitting from the assets.

(d) The existence of the ante-nuptial agreement does not mean Mr Clayton did not settle a trust for his wife's benefit five years later when he settled the Trust and expected she would benefit. There was no contemporaneous evidence that Mr Clayton intended Mrs Clayton not to benefit as a result of the ante-nuptial agreement. To the contrary, he included her as a beneficiary, indicating she would acquire an interest or expectation in the business assets.

(e) Any relevance of the ante-nuptial agreement was in any event lessened because it was silent as to property not (beneficially) owned by Mr and Mrs Clayton personally.

(f) Any distribution post-dissolution in Mrs Clayton's favour was unlikely.

(g) The Trust was settled by Mr Clayton on himself, his wife and his family for their benefit using assets derived from the joint efforts of the parties in the Claymark business. Mrs Clayton made the efforts she did on the understanding that she expected to benefit as wife through the future.

[174] Finally, Lady Chambers submitted it was appropriate that Mrs Clayton be put in the position she was initially after settlement. This should be done by vesting half of the Trust's assets in Mrs Clayton on trust for herself, the parties' children and grandchildren.

[175] In respect of the s 182 claim Mr Carruthers submits:

(a) The Claymark Trust is not a family trust. It is not directed primarily towards providing for the Clayton family unit. It was not settled on the premise that the marriage would continue.

(b) The property acquired by the Trust consists of commercial assets acquired by third parties in arm's length transactions, funded by mortgage advances and from the VRPT which was the only trust with a bank facility. Mrs Clayton did not contribute to the Trust.

(c) Mr and Mrs Clayton were not "principal beneficiaries" of the Trust, since they were not the final beneficiaries.

(d) The PRA's principles of equal division of relationship property do not underpin s 182. Its purpose is to restore the reasonable expectations of an applicant whose reasonable expectations to benefit from a settlement cease because of the dissolution of a marriage.

(e) The onus is on the applicant to show why the settlement should be departed from, and it should be departed from only to the extent shown to be necessary.

(f) The existence of beneficiaries other than Mr and Mrs Clayton tends to support that the settlement was not a "nuptial settlement".

(g) The ante-nuptial agreement is in any event determinative that Mrs Clayton could not have an expectation to benefit from the Trust.

Discussion

[176] The summary of the relevant law in the High Court judgment was not challenged. A successful claim under s 182 requires that "any agreement" or "any ante-nuptial or post-nuptial settlement" relating to the property must be shown to exist between the former spouses. The court is empowered to make any order it

thinks fit for the benefit of the parties or their children. In exercising that power the court will have regard to any change in the circumstances of the parties since the date of the agreement or settlement and any other matters which the court considers relevant. This general power has been subject to several decisions explaining its application, most notably by the Supreme Court in *Ward v Ward*.[141]

[177] We do not accept Lady Chambers' submissions that the Courts below erred in deciding that the Claymark Trust was not a "nuptial settlement" and that therefore no order for provision should be made or for variation of the Trust under s 182. Again our reasons may be stated shortly:

(a) As the Supreme Court held in *Ward v Ward*, the focus under s 182 is on the expectations of the parties, especially the applicant, at the time of the settlement.[142] Those expectations are to be ascertained from all relevant evidence, not just the terms of the settlement itself.

(b) Here both Courts below found that the expectations of Mr and Mrs Clayton when the Trust was established were that it was formed for business purposes and not as a means by which Mrs Clayton would acquire an interest or expectation in business assets. The problem for Mrs Clayton is not the characterisation of the trust, but that there are concurrent findings of fact that Mr and Mrs Clayton did not have the necessary expectations.

(c) Both Courts below also held that there was no basis for finding that the dissolution of the marriage affected Mrs Clayton's expectations.

(d) We were not persuaded by Lady Chambers that there was any good basis for us to depart from the findings in the Courts below on this issue. In particular, the fact that the properties bordering the sawmill were not purchased until some years after the Trust was settled does not mean that the parties' expectations were otherwise than as found

---

141 *Ward v Ward*, above n 88; see generally *Family Procedure* (online looseleaf ed, Thomson Reuters) at [FP182.01]–[FP182.08].

142 *Ward v Ward*, above n 88, at [25]–[27].

by the Courts below.

The answers to the questions

[178] Accordingly, we answer the two questions as follows:

(a) Is Mrs Clayton entitled to a compensation order under s 44C of the PRA in relation to dispositions made to the Claymark Trust?

Answer: No.

(b) Is Mrs Clayton entitled to provision from the assets of the Claymark Trust or to a variation of that trust, applying s 182 of the FPA?

Answer: No.

The Post-Separation Trusts

The four trusts

[179] The four trusts settled by Mr Clayton after he and Mrs Clayton separated were:

(a) The Denarau Resort Trust;

(b) The Sophia No 7 Trust;

(c) The Chelmsford Trust; and

(d) The Lighter Quay 5B Trust.

Mrs Clayton's claims

[180] Mrs Clayton claims that she is entitled to a half share in the current equity of the properties owned by the four trusts. Her claim is based on s 44 of the PRA which we have already set out and explained.[143] It will be recalled that under s 44 the Court must be satisfied that there has been a disposition of property made in order to

[143] Above at [126] and [133]–[134].

defeat the claim or rights of any person under the PRA. Unlike the position under s 44C, the property under s 44 need not be relationship property.[144]

A preliminary point

[181] Mrs Clayton's claims in respect of these post-separation trusts were not straightforward because of difficulties she encountered in obtaining the relevant information relating to the trusts and Mr Clayton's dispositions of relationship property to them. It was necessary for her to seek an order against Mr Clayton (under r 398 of the Family Courts Rules 2002) requiring him to disclose the relevant information by appearing for examination or filing an adequate narrative affidavit. Orders to that effect were made in the Family Court.[145] But difficulties were still encountered by Mrs Clayton in respect of the evidence for these claims.

[182] In light of these difficulties, Lady Chambers invited us to adopt the approach of the United Kingdom Supreme Court in *Prest v Petrodel Resources Ltd* where it was suggested that in relationship property proceedings of this nature courts should adopt a broader approach than usual to the drawing of inferences adverse to a party who fails to make full and frank disclosure of all relevant information.[146]

[183] Lord Sumption, delivering the leading judgment, put it this way:[147]

> … although technically a claimant, the wife is in reality dependent on the disclosure and evidence of the husband to ascertain the extent of her proper claim. The concept of the burden of proof, which has always been one of the main factors inhibiting the drawing of adverse inferences from the absence of evidence or disclosure, cannot be applied in the same way to proceedings of this kind as it is in ordinary litigation. These considerations are not a licence to engage in pure speculation. But judges exercising family jurisdiction are entitled to draw on their experience and to take notice of the inherent improbabilities when deciding what an uncommunicative husband is likely to be concealing.

[184] Baroness Hale and Lord Wilson in their joint judgment said:[148]

---

[144] Above at [160].

[145] *MAC v MAC* FC Rotorua FAM-2007-063-652, 2 July 2008, aff'd *C v C* [Costs] [2009] NZFLR 322 (HC), leave to appeal refused *C v C* HC Auckland CIV-2008-404-4864, 7 April 2009, aff'd [2009] NZCA 319.

[146] *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 467.

[147] At [45].

[148] At [85].

> There is a public interest in spouses making proper provision for one another, both during and after their marriage, in particular when there are children to be cared for and educated, but also for all the other reasons explored in cases such as *McFarlane v McFarlane* [[2006] UKHL 24] [2006] 2 AC 618. This means that the court's role is an inquisitorial one. It also means that the parties have a duty, not only to one another but also to the court, to make full and frank disclosure of all the material facts … . If they do not do so, the court is entitled to draw such inferences as can properly be drawn from all the available material, including what has been disclosed, judicial experience of what is likely to be being concealed and the inherent probabilities, in deciding what the facts are.

[185] Somewhat similar views about the need for parties in relationship property proceedings to make proper disclosure and the inappropriateness of adopting a strict approach to the question of onus of proof were expressed by Robertson J in this Court in *M v B*.[149]

[186] In our view, when the public interest considerations lying behind the purpose and principles of the PRA are taken into account, there is merit in an approach that recognises that:

(a) parties to relationship property proceedings are under an obligation to make full and frank disclosure of all relevant information in order to ensure that the court is in a position to make appropriate orders for the ascertainment and division of relationship property under the PRA;

(b) if a party who had or has relevant information available for that purpose fails to disclose it in the proceedings, the court may draw such inferences as it considers appropriate, including the adverse inference that the information would not have assisted that party if it had been disclosed;[150] and

(c) in drawing appropriate inferences for the purpose of making findings of fact, the court may rely on all the information that has been

149 *M v B*, above n 113, at [50].

150 Cf *Jones v Dunkel* (1959) 101 CLR 298 at 308, 312 and 320–321; *Ithaca (Custodians) Ltd v Perry Corp* [2004] 1 NZLR 731 (CA) at [153]–[154]; *Kuhl v Zurich Financial Services Australia Ltd* [2011] HCA 11, (2011) 243 CLR 361 at [63]–[64]; *Forivermor Ltd v ANZ Bank New Zealand Ltd* [2014] NZCA 129 at [15]; leave to appeal refused *Forivermor Ltd v ANZ Bank New Zealand Ltd* [2014] NZSC 89; and *Morgenstern v Jeffreys* [2014] NZCA 449 at [78]; leave to appeal refused *Morgenstern v Jeffreys* [2014] NZSC 176.

> disclosed, its experience in cases of this nature and the inherent probabilities from the non-disclosure of information.

[187] In the absence of any submissions to the contrary for Mr Clayton or the various trustees, we propose to follow this approach in this case.

(a) The Denarau Resort Trust

[188] The Denarau Resort Trust was established in 2007 for the purpose of holding an investment in two apartments in the Denarau Resort in Fiji. Mr Clayton agreed to purchase the apartments "off the plans" in 2005 before the parties separated. By the time the purchase was completed, they were apart.

[189] The trustee is McGloskey Nominees Ltd. The final beneficiaries are the children and grandchildren of the parties living at the date of distribution. Mr Clayton is a discretionary beneficiary. Mrs Clayton is not a beneficiary.

[190] According to Mr Giesbers, the accountant chairman of the Claymark group, the total cost of the apartments was $706,563 and the accounts showed advances to the Trust of $583,887 by the Colonial National Bank, Fiji and, by the VRPT, of $277,499, leaving negative equity of $154,823.

[191] The judgments below confirm that the purchase was funded in part by a loan from a Fiji bank and in part by what is described as "an advance from a former property trust".[151] Mr Clayton's evidence was that the balance of the deposit came from the proceeds of sale of the Lake Rotoiti property. He said the balance of the purchase price came from the bank loan.

The Family Court decision

[192] In the Family Court Judge Munro upheld Mrs Clayton's claim. The Judge said:

> [99] Property acquired after separation is prima facie separate property so that any interest that Mr Clayton has in the Denarau Resort Trust would be his

[151] Family Court judgment, above n 1, at [97]; High Court judgment, above n 1, at [105].

> separate property. However, s 44 includes any disposition of property during the marriage. Whilst the parties separated at the end of 2006, the marriage was not dissolved until 2009. Mr Clayton disposed of property to the Denarau Resort Trust by way of payment of a deposit and by way of the advance from the Vaughan Road Property Trust. This disposition has had the effect of defeating Mrs Clayton's interest, again, given that she has no beneficial interest in the Trust. Accordingly, Mrs Clayton is entitled to a half share in the equity in these apartments.

The High Court decision

[193] In the High Court Rodney Hansen J allowed the appeal by Mr Clayton. The Judge said:

> [109] I find it impossible on the basis of the Judge's decision, the submissions of counsel and the evidence to which I have referred, to obtain a clear picture of how the purchase was funded. No accounts for the Trust were produced. As far as I am aware, there is no evidence of the amount of the deposit paid from the proceeds of sale of the Rotoiti property (or what those proceeds amounted to and how the balance of them was disposed of). Furthermore, on the information available, the borrowings of the Trust exceed the value of assets. The order made by the Judge that Mrs Clayton share equally in the net assets of the Trust may not be an effective remedy. The better course may have been to order under s 44(2)(b) that the Trust pay to Mrs Clayton one half of the amount contributed to the purchase from the proceeds of sale of the Rotoiti property.
>
> [110] I am left in doubt whether there are grounds for an order under s 44 and, if there are, that the order made is the right remedy. In the circumstances, I propose to allow the appeal against this aspect of the judgment and to refer the issue back to the Family Court for further evidence to be adduced and the question of remedy reconsidered.

The appeal

[194] Mrs Clayton seeks to have the judgment of the Family Court reinstated in respect of the Denarau Resort Trust. Lady Chambers submits that the evidence of Mr Clayton clearly established that he entered into the agreement for sale and purchase of the apartments in Fiji before the parties separated, he lent the Trust $200,000 for the deposit and the purchase was funded by part of the net proceeds of the sale of the Lake Rotoiti property and a loan from the Colonial National Bank. On the basis of this evidence, Lady Chambers submits that, as the Family Court Judge held, the payment of the deposit was a disposition caught by s 44 because Mrs Clayton was not a beneficiary of the Trust.

[195] The trustees now accept that the agreement for sale and purchase was entered into before the parties separated and the issue should be referred back to the High Court.

Discussion

[196] We agree with the Family Court Judge that Mrs Clayton's claim under s 44 is made out in respect of this Trust, especially in light of Mr Clayton's evidence that he lent the Trust $200,000 for the deposit. The High Court Judge's suggestion that there was no evidence about the amount of the deposit is not correct.

[197] We note that the Family Court Judge appears to refer to the effect of the disposition rather than it being made in order to defeat Mrs Clayton's claim as is required under s 44. However, in the absence of evidence that the deposit came from separate property and given that Mrs Clayton is not a beneficiary of the Trust, the inference is available that s 44 applies.

[198] Mr Clayton's suggestion that there was a subsequent agreement relating to the purchase of the apartments was not supported by any evidence. Bearing in mind the obligation on Mr Clayton to disclose all the relevant evidence relating to the purchase of the apartments, we are not prepared to accept this suggestion in the absence of any evidence to support it. For the reasons already given, we are prepared to draw the inference that no such evidence was available.[152]

[199] We therefore uphold the outcome of the Family Court decision.

(b) The Sophia No 7 Trust

[200] The Sophia No 7 Trust was established on 2 September 2008 to hold a property in Rotorua. The settlor was Mr Perry, a solicitor. The sole trustee is Deborah Vaughan, Mr Clayton's sister. The beneficiaries are Deborah Vaughan, her children and any relative of hers, including Mr Clayton.

---

152 Above at [181]–[187].

[201] Mr Clayton was the successful bidder at an auction of the trust property, which is a residential property in Rotorua. He signed the sale and purchase agreement and paid the deposit. A deed of nomination was then executed contemporaneously with the signing of the Sophia No 7 Trust deed nominating the trustee to purchase the property.

[202] Ms Vaughan said she did not recall signing any documents in relation to the Trust, although she conceded that she may have. She became aware that she was a trustee only when she received the rates demand for the property. She regards her brother as the owner of the property. She knows nothing about the way in which the property was purchased and has made no decisions in relation to the property or the Trust. Mr Clayton was unable to explain why the Trust was set up for the benefit of his sister and her children.

The Family Court decision

[203] In the Family Court Judge Munro found the purchase price of the property was $277,000.[153] She noted Mr Clayton's evidence that $140,000 of the purchase price was advanced from the VRPT. On the basis that the deed of nomination amounted to a disposition in terms of *Re Polkinghorne Trust* she held that the deed of nomination was a clear attempt to defeat Mrs Clayton's interest in the funds used to purchase the property.[154] She concluded that Mrs Clayton was entitled to a one half share in the equity in the property.

The High Court decision

[204] In the High Court Rodney Hansen J said:

> [115] Some of the documents to which I was referred shed a little more light on the way in which the purchase of the property was funded. According to the schedule prepared by Mr Geisber [sic], the property was bought for $320,000 and funded as to $142,615 by an advance from the Vaughan Road Property Trust with Mr Clayton personally advancing $137,000. The equity in the Trust is accordingly $40,385. The advance by the Vaughan Road Properties Trust is confirmed by enquiries made by a chartered accountant, Bruce Warden, who said that $140,000 with the reference "BNZ Term Loan" was deposited into the Vaughan Road

[153] At [105].

[154] At [105]; *Re Polkinghorne Trust*, above n 121.

> Properties Trust on 2 September 2008 and transferred out on the same day. The payment was debited to the Denarau Trust but Mr Warden says that appears to be a mistake as the payment was made on the day on which the purchase of the Sophia Street property settled.
>
> [116] Mr Carruthers submitted that the Family Court erred in finding that the deed of nomination was an attempt to defeat Mrs Clayton's interest in the funds used to purchase the property. However, in the absence of an explanation by Mr Clayton, the purchase of the property by a trust ostensibly set up to benefit his sister and her family but in reality having no connection with them, clearly appears to have had the purpose of putting property beyond the reach of Mrs Clayton.
>
> [117] I see no reason to disturb the Judge's finding in that regard though, once again, I have reservations about the remedy she adopted. I consider that further enquiry is required to establish the purchase price and the way in which it was funded before determining the value of property which was disposed of and in which Mrs Clayton may be entitled to claim an interest. I propose to remit this aspect of the case back to the Family Court for reconsideration.

The appeal

[205] It appears Mr Carruthers submits that no order should be made against the trustees because the source of Mr Clayton's contribution is not money or assets which would otherwise be relationship property. In particular he submits that there is no evidence of a deposit having been paid from the sale of the Lake Rotoiti property.

[206] Mr Carruthers does not challenge, however, the finding in the Family Court that Mr Clayton intended to defeat Mrs Clayton's interest in any relationship property.

[207] Mrs Clayton's position in respect of the Sophia No 7 Trust as well as the Chelmsford Trust and Lighter Quay 5B Trust is that in the context where assets are acquired in the period shortly following a separation and there is no clear positive evidence that separate property was applied to acquire the property, as in this case, courts can, and this Court in this case should, draw the inference that the property was acquired using relationship property. She submits this inference is reinforced by Mr Clayton's reluctant, even obstructive attitude to his disclosure obligations in the Family Court.

[208] Lady Chambers submits it is improbable Mr Clayton would have been able to fund the purchase of the properties from his income of $280,000 which, on his own evidence, is substantially spent on maintaining Mrs Clayton and the children.

Discussion

[209] We agree with Lady Chambers that the obligation was on Mr Clayton to make full disclosure of the relevant information relating to the purchase of the property. His failure to do so means that an inference may be drawn that if the relevant information had been disclosed it would not have supported his case. It is therefore not open to Mr Clayton to rely on the absence of the relevant evidence to avoid an order being made against him under s 44.

[210] In our view it was open to the Family Court Judge to reach the conclusion she did.

[211] We also agree with the High Court Judge that in the absence of an explanation from Mr Clayton the purchase of the property clearly appears to have had the purpose of putting property beyond the reach of Mrs Clayton, thereby defeating her rights in terms of s 44. Again, for the reasons already given, we are prepared to draw the inference adverse to Mr Clayton.[155]

[212] We add that our review of the evidence of Ms Vaughan, Mr Giesbers and Mr Clayton reveals nothing to displace this finding.

[213] We therefore uphold the decision of the Family Court, but (as the parties agree is necessary) remit the case to the High Court to calculate the quantum of Mrs Clayton's interest.

(c) The Chelmsford Trust

[214] The Chelmsford Trust was established on 2 June 2009. The trustee is Chelmsford Holdings Ltd. Mr Clayton is the sole beneficiary of the trust and has the power to appoint or remove trustees. The Trust purchased properties at Oasis Place

---

155 Above at [181]–[187].

and Gwendoline Street, Rotorua in 2009. The trustee purchased the Oasis Place property pursuant to a deed of nomination which included the following provision:[156]

> **COVENANTS:**
>
> 1 DECLARATION OF TRUST
>
> 1.1 Trustee holds property. The Trustee declares that it will hold the Trust Property in trust for the Beneficiary.
>
> 1.2 Trustee will transfer property. At the request and cost of the Beneficiary, the Trustee will transfer the Trust Property, or the benefit of the Trust Property, to the Beneficiary as and when the Beneficiary requires.
>
> 1.3 Trustee will deal with property at request of beneficiary. Until the Trust Property is transferred to the Beneficiary the Trustee will deal with the Trust Property as the Beneficiary requires.

[215] The Oasis Place property is adjacent to the sawmill operation in Rotorua. It was a strategic acquisition for business purposes. The Gwendoline Street property is adjacent to the home of Mr Clayton's mother. Mr Clayton told the Court that he thought it would be beneficial to acquire the property so that his mother would be able to control who lived next door.

[216] The Oasis Place property was purchased for a little over $1,000,000 and the Gwendoline Street property for about $400,000. These figures are taken from the accounts of the Trust as at 31 March 2011. The Family Court Judge found that the purchases were funded by a contribution of $40,000 by Mr Clayton, an advance of $370,000 from the VRPT and a loan from the BNZ of $1,106,000.[157] As Rodney Hansen J said, this exceeds the cost of the properties by some $100,000 and may not be entirely accurate.[158]

[217] The accounts of the Chelmsford Trust as at 31 March 2011 include the following liabilities:

(a) Mr Clayton $129,750.

---

156 High Court judgment, above n 1, at [118].
157 Family Court judgment, above n 1, at [111].
158 At [120].

(b) The VRPT $222,516.

(c) Two BNZ mortgages $1,094,500.

[218] The accounts of the VRPT as at 31 March 2011 include as an asset a loan to the Chelmsford Trust of $222,516.

The Family Court decision

[219] Judge Munro said:

> [111] Both of these properties were purchased following the sale of a property referred to as Panahome, which was owned by the Vaughan Road Property Trust, on 31 July 2008. This property was sold for $6,350,000. Mr Clayton paid $40,000 toward the purchases, the Vaughan Road Property Trust advanced $370,000 and Bank of New Zealand loaned $1,106,000. Mrs Clayton had registered a s 42 notice in relation to that property and agreed to remove that notice to allow the sale to proceed on the giving of an assurance by Mr Clayton that the nett [sic] proceeds of the sale would be used to reduce debt only, and that no further monies would be drawn down other than in the ordinary course of business. Mr Clayton in fact drew funds down from the BNZ to assist in the purchase of Oasis Place and Gwendoline Street, contrary to his assurance. He accepts that the purchase of Gwendoline Street could not be considered to be in the ordinary course of business, but in relation to the Oasis Place purchase, it is his position that this was an opportunity which was important to take advantage of and would be of significant benefit to the business. It could not be said, however, that this purchase was "in the ordinary course of business". The effect of the purchase of these two properties through the trust again has been to place funds held by Mr Clayton and in the Vaughan Road Property Trust beyond the reach of Mrs Clayton. The reality of this trust is that Mr Clayton has settled the trust with advances by himself and the Vaughan Road Property Trust, to the trustee to hold for Mr Clayton at his behest. The effect has been to disenfranchise Mrs Clayton from any entitlement to those funds. I find that Mr Clayton was well aware of this effect. I find that s 44 applies. Mrs Clayton is entitled to a one half share in the equity of both properties held by this Trust.

The High Court decision

[220] Rodney Hansen J said:

> [122] For Mr Clayton, it is said that the Judge has not identified any relationship property having been disposed of to fund the acquisition of the Chelmsford Trust properties. It has not therefore been shown that there was a disposition for the purpose of defeating a claim by Mrs Clayton. As I have already said, a disposition for the purpose of s 44 may be of any property.

> The key issue is not the status of the property but whether the disposition was made in order to defeat the claim of Mrs Clayton.
>
> [123] The most reliable guide to the purpose of a course of action is its likely or achieved outcome. The Judge found the effect of the transaction was to deny Mrs Clayton a claim to the funds disposed of: as the Judge said, "to disenfranchise" her. However, it is by no means clear that this was the likely or intended consequence. There is nothing to show where the $40,000 came from and that Mrs Clayton would have any right to a claim. At the time Mr Clayton would not have regarded Mrs Clayton as having rights to claim against the assets of the Vaughan Road Property Trust.
>
> [124] On the present state of the evidence, I do not believe an order under s 44 is justified. If it is, I doubt that the order made is an effective remedy. If it is not, the application of s 44C will need to be considered. Further evidence may be filed as required by the findings I have made and for the issues to be reconsidered.

The appeal

[221] Mrs Clayton seeks to have the judgment of the Family Court reinstated in respect of the Chelmsford Trust. Lady Chambers submits that s 44 is applicable because:

(a) the properties which are the assets of the trust were acquired from Mr Clayton's property, namely advances from the VRPT and Mr Clayton himself;[159]

(b) as he is the sole beneficiary of the Trust, the dispositions were made with the intention to defeat Mrs Clayton's claim to that property; and

(c) Mr Clayton adduced no evidence to establish that the properties were acquired after the separation from his separate property.

[222] For the trustee, Mr Carruthers submits that the High Court decision was correct because no property was disposed of to the Chelmsford Trust. The purchases of the two properties were paid for by $40,000 from Mr Clayton personally, a loan of $1,090,000 from the BNZ, and $370,000 from the BNZ through the VRPT.[160]

---

[159] Lady Chambers QC points out that the Trust's financial statements of, for example, 31 March 2010 reflect a loan to Mr Clayton of $149,250.

[160] These figures reflect those in the submissions.

Discussion

[223] We do not agree with Mr Carruthers that there was no disposition of property in terms of s 44. A loan may constitute a disposition of property.[161] The loans were therefore capable of being classified as dispositions of property under s 44. The critical question is whether the loans were made in order to defeat Mrs Clayton's rights under the PRA.

[224] Clearly the BNZ loan of $1,106,000 was not made by the BNZ with that intention. It was made to the Chelmsford Trust for the purpose of assisting with the purchase of the two properties and was secured by way of mortgage.

[225] In respect of Mr Clayton's personal loan of $40,000 we accept that it was open to the Family Court Judge to find that s 44 applied not so much because the "effect" of the loan was to "disenfranchise" Mrs Clayton (the language of s 44C) but because it was made by Mr Clayton with the intention of defeating her rights under the PRA.[162] We do not accept the approach of the High Court Judge that it was for Mrs Clayton to establish where the personal advance from Mr Clayton came from. For the reasons already set out, given the absence of any further relevant information relating to the source of the funds from Mr Clayton, adverse inferences may be drawn in respect of the source and the intention or purpose of the disposition. We add that, in our view, nothing in the evidence of Mr Cheshire or Mr Giesbers would serve to alter this result.

[226] In respect of the loan of $370,000 from the BNZ through the VRPT there were in fact two loans: the first from the BNZ to the VRPT, which was secured by way of mortgage over properties owned by the VRPT, and the second by the VRPT to the Chelmsford Trust, which was unsecured. As with the BNZ loan direct to the Chelmsford Trust, the first loan was not made by the BNZ with the proscribed intention.

---

[161] Atkin, above n 121, at [9.43].
[162] *SM v ASB Bank Ltd*, above n 122, at [52]–[53].

[227] We agree with the High Court Judge that at the time Mr Clayton, as trustee of the VRPT, arranged for the loans of the funds received from the BNZ to be advanced to the Chelmsford Trust, he did not intend to defeat Mrs Clayton's rights under the PRA in respect of the VRPT. Our reasons are:

(a) At the time of the loan, Mr Clayton would not have regarded Mrs Clayton as having rights to claim against the assets of the VRPT. She was only a discretionary beneficiary of the VRPT with no legal or equitable interest or right in the property of the trust which could be defeated by the advance.[163]

(b) The advance from the VRPT to the Chelmsford Trust did not defeat Mrs Clayton's rights because it was (and remains) an asset of the VRPT which will be taken into account in calculating Mrs Clayton's claim to an equal share in the net equity of the value of the assets of the VRPT.[164]

[228] We therefore uphold the decision of the Family Court in respect of Mr Clayton's personal loan only and remit the case to the High Court for:

(a) further submissions to be received in respect of the appropriate order to be made under s 44 in light of this judgment; and

(b) in accordance with the agreement of the parties, the quantum of Mrs Clayton's entitlement to be calculated.

(d) The Lighter Quay 5B Trust

[229] This Trust was established on 1 September 2009. Mr Cheshire is the settlor and New Zealand Trustee Services Ltd is the trustee. Mr Cheshire holds the power of appointment and is one of the discretionary beneficiaries, together with any trust of which he is a discretionary beneficiary and any charitable organisation. Neither Mr nor Mrs Clayton are beneficiaries.

---

163 Above at [52]–[54].
164 Above at [113].

[230] The Trust was formed to hold an apartment in Auckland, financed by an advance of $100,000 from the VRPT and a loan from the BNZ of $1,090,000.[165] The apartment was sold before the hearing and the proceeds of sale held pending orders in the Family Court.

[231] The accounts of the Trust as at 31 March 2011 include the following liabilities:

(a) The VRPT $233,210

(b) The BNZ Nil

[232] The accounts of the VRPT as at 31 March 2011 include as an asset a loan to the Lighter Quay 5B Trust of $233,210.

The Family Court decision

[233] Judge Munro said it was clear that Mr Cheshire held the property for Mr Clayton.[166] That finding is not in dispute. The Judge concluded that s 44 applied by virtue of the advance from the VRPT which defeated Mrs Clayton's interest in those funds. She held that Mrs Clayton was entitled to one half of the net sale proceeds.

The High Court decision

[234] Rodney Hansen J said:

> [128] As with the Chelmsford Trust, I have doubts whether a finding of intent to defeat under s 44 is available or that the order made is effective if it is. Again, I consider the best course is for the Family Court to reconsider the issue after receiving any further evidence necessitated by the finding in this judgment.

---

165 High Court judgment, above n 1, at [126].
166 Family Court judgment, above n 1, at [113].

The appeal

[235] As with the previous trusts, Mrs Clayton seeks to have the judgment of the Family Court reinstated in respect of the Lighter Quay 5B Trust. Lady Chambers submits that s 44 is applicable because:

(a) the apartment, which was the sole asset of the Trust, was acquired from Mr Clayton's property, namely an advance of $233,210 from the VRPT;[167]

(b) the evidence established that Mr Cheshire had become the sole trustee and held the property for Mr Clayton; and

(c) Mr Clayton adduced no evidence to establish that the apartment had been acquired after the separation from his separate property.

[236] For Mr Clayton, Mr Carruthers submits that the High Court decision was correct because no property was disposed of by Mr Clayton to the Lighter Quay 5B Trust. The apartment was paid for by a loan from the BNZ of $1,090,000 and $100,000 from the BNZ through the VRPT.

Discussion

[237] For reasons similar to those given in respect of Mrs Clayton's claim to the property of the Chelmsford Trust,[168] none of the loans to the Lighter Quay 5B Trust was made with the intention of defeating Mrs Clayton's rights under the PRA.

[238] Mrs Clayton's claim under s 44 in respect of this trust therefore fails and the decisions of the Courts below are overturned.

The answer to the question

[239] Accordingly, we answer the question as follows:

---

[167] As with the Chelmsford Trust, Lady Chambers takes this figure from the Trust's financial statements as at 31 March 2011.

[168] Above at [227].

> Can the Court be satisfied in terms of s 44 of the PRA that there has been a disposition of property to any of the Trustees of the Denarau Resort Trust, Sophia No 7 Trust, Chelmsford Trust and the Lighter Quay 5B Trust by Mr Clayton in order to defeat Mrs Clayton's claim under the Act where those Trusts have been settled after the date of separation and where s 9(4) of the PRA applies?
>
> Answer: Yes in respect of the Denarau Resort Trust and the Sophia No 7 Trust. Yes in respect of Mr Clayton's personal loan to the Chelmsford Trust. No in respect of the VRPT's loan to the Chelmsford Trust. No in respect of the Lighter Quay No 5 Trust.

Valuation of business interests

[240] For convenience, we set out the question for determination:

> Did the Courts below err in finding that, for the purpose of calculating the value of business interests, an EBITDA of $6.75 million[169] and a multiple of 6.25 per cent should be adopted?

[241] In the Family Court, three expert witnesses gave evidence about the share value of the Clayton group of companies. The business comprised operations in both New Zealand and the United States. The New Zealand business interests were owned and controlled by Mr Clayton through Clayton Holdings Ltd. There were also sales made overseas, a substantial part of which comprised sales to the United States. The sales to the United States were made through a partnership, a 50 per cent share in which was ultimately owned by the Claymark International Trust. The trustee of the Claymark International Trust is Clayton International Trustee Ltd in which Mr Clayton owns 100 per cent of the shares. Mrs Clayton is not a beneficiary of that trust.

[242] It was common ground between the experts that the market value of shares in the Claymark group should be based on a capitalisation of earnings. That required ascertaining future maintainable earnings and applying a multiple to achieve an enterprise value from which debt is deducted. The figure for future maintainable earnings was expressed as EBITDA.[170]

---

169 The correct figure is $6.75 million, not $6.7 million as originally submitted for consideration.

170 Earnings before interest, tax, depreciation and amortisation.

[243] The High Court Judge summarised the differing approaches of the three valuers and the Family Court Judge's conclusions in these terms:

> [46] The valuer called by Mrs Clayton, Mr Brendan Lyne, used a figure for earnings before interest, tax, depreciation and amortisation (EBITDA) of $7m and a multiple of 6.25. Mr Clayton called two valuers, Mr James Dent and Mr John Hagen. Mr Dent and Mr Hagen respectively adopted EBITDAs of $6.75m and $5.54m and multiples of 5.2 and 4.75. These led to radically different valuations. On Mr Hagen's approach, Claymark New Zealand has a negative value after deduction of debt.
>
> [47] Mr Lyne valued the property pool at $28,831,000, of which he attributed $17,569,000 to Claymark New Zealand and $695,000 to the value of the United States operation. Mr Dent valued the property pool at $11.5m excluding, however, the two education trusts, although he said that, in the case of a distressed sale, realisable value could be much less. On Mr Hagen's approach, after deduction of debt of $31m, Clayton Holdings Limited has a negative value.
>
> [48] Judge Munro adopted Mr Dent's EBITDA of $6.75m and the multiple of 6.25 advocated by Mr Lyne. Subject to modifying the EBITDA to $6.75m and to other adjustments which are not relevant for present purposes, she accepted the evidence of Mr Lyne as to the value of the Claymark Group. Mr Clayton says that the Judge erred in her findings on both elements.

[244] For Mr Clayton Mrs Harley submitted both in the High Court and before us that the Family Court Judge:

(a) should not have adopted EBITDA of $6.75 million because no value for the United States operation should have been included in the calculation; and

(b) should not have adopted the multiple of 6.25 per cent advocated by Mr Lyne because he incorrectly applied a 25 per cent control premium.

[245] Mrs Harley submitted that the Family Court Judge should have adopted EBITDA of $5.2 million and a multiple of 5.2 per cent.

The EBITDA figure

[246] The Family Court Judge recorded that Mr Lyne had adopted EBITDA of $7 million based on the EBITDA actually achieved by Clayton Holdings Ltd for the

five years prior to the hearing; monthly compliance certificates provided by the Claymark group to the ASB bank which indicated an increasing EBITDA for the 2011 year from $6.04 million at the start of the year to $6.882 million as at 31 March 2011; and forecasts prepared for the Claymark group indicating an anticipated EBITDA of $9 million over the next two years (as presented in the form of a Strategic Plan to the ASB in October 2010).[171] She noted that Mr Dent had adopted similar EBITDA of $6.7 million but, unlike Mr Lyne, he had excluded any revenue from the pending installation of a finger jointer (a machine we understand to be designed to add value to finished timber).[172] Both Mr Lyne and Mr Dent had taken into account a continuing unfavourable exchange rate and difficult trading conditions in the timber industry. The Family Court Judge discounted Mr Hagen's estimate of EBITDA because it related only to Clayton Holdings Ltd.[173]

[247] The Family Court Judge went on to deal in some detail with the evidence relating to the finger jointer.[174] A deposit had been paid but the machine had not been installed at the date of hearing. She accepted Mr Lyne's approach that, on the basis the machine would be installed late in 2011, some allowance should be made for the likelihood of the finger jointer coming into production. She noted Mr Lyne had not included in his valuation the full anticipated increase in income of some $800,000 from that source.

[248] Despite these findings, the Judge adopted Mr Dent's lower figure for EBITDA of $6.75 million taking into account particularly the uncertainties in predicting the future exchange rate, the negative impact this would have on profitability if it worsened significantly and general uncertainty in the international economy.[175]

[249] In the High Court, Rodney Hansen J upheld the finding by the Family Court Judge. He rejected Mrs Harley's contention that the Family Court Judge had erred in adopting EBITDA of $6.75 million because it resulted in a value being put on the

---

171 Family Court judgment, above n 1, at [120].
172 At [122].
173 At [123].
174 At [124]–[126].
175 At [127]–[133].

United States business interests. He found this submission was not supported by Mr Dent's evidence.[176] Before us, Mrs Harley challenged the Judge's finding in this respect.

[250] A curious feature of the judgments in both the Family Court and the High Court is that neither refer to a second valuation provided by Mr Dent in which he assessed EBITDA for Clayton Holdings Ltd at a mid-point of $5.75 million. The mid-point figure was based on the company's actual results for the 2009–2011 financial years plus that projected for 2012. This excluded any earnings from the US business.

[251] Mrs Harley submitted that it was appropriate to exclude the earnings from the United States business because the Family Court Judge had found that the Claymark International Trust had no assets that could be the subject of a claim by Mrs Clayton. It had acted as a conduit for funds from the United States sales to be channelled to the New Zealand entities in the Claymark group.[177] According to the evidence of a chartered accountant associated with the group (Mr Giesbers), the United States operation accounted for some 15 per cent of the total EBITDA for the New Zealand and United States business.

[252] We are not persuaded that there was any material error by the Family Court in adopting Mr Dent's first EBITDA assessment of $6.75 million prepared in 2010. At that time Mr Dent found that the Clayton Group had "normalised" EBITDA over the period 2006–2010 in the range of $6.088 million to $6.6 million. He described the group as having had a consistent level of performance over the last five years despite significant fluctuations in production volumes, sales mix and economic conditions. Adjusted for inflation, the EBITDA averaged $6.5 million and ranged from $5.6 million to $7 million. Mr Dent concluded that EBITDA should be assessed at $6.5 million to $7 million at that time with a mid-point of $6.75 million.

[253] As the High Court Judge found, Mr Dent did not in his first affidavit specifically attribute a value to the United States business or to the advances made

---

[176] High Court judgment, above n 1, at [49]–[54].
[177] Family Court judgment, above n 1, at [96].

by Claymark to that business. He gave detailed reasons why he considered there was minimal net value in the assets of the United States business and concluded that "my approach of not allowing for additional value in the United States operations is reasonable".[178]

[254] He also attached to his first affidavit a valuation he had prepared dated 9 June 2010. This referred to pro forma accounts prepared by Clayton management consolidating the New Zealand and United States business operations for the year to 31 March 2009. In this valuation, Mr Dent concluded it was apparent that the actual operating performance and financial position of the business was not materially altered by the consolidation of the United States operation.[179] On this footing, Mr Dent's first valuation of EBITDA at $6.75 million did not attribute any material earnings to the United States operation.

[255] In a second affidavit Mr Dent revised his EBITDA assessment. He gave his opinion that:[180]

> … a reasonable, estimate of maintainable EBITDA … would be in the vicinity of $5.25–$6.25 million, with a mid-point of $5.75 million …

[256] These figures were for Clayton Holdings Ltd excluding any earnings from the United States business. He based his high point on the company's actual results for the 2006–2010 years, draft results for 2011 and a forecast for 2012. The mid-point was based as the average of the three years, 2009–2011.

[257] Mr Dent was challenged in cross-examination on his reduced assessment of EBITDA.[181] In particular, there had been a significant drop in EBITDA for Clayton Holdings Ltd from the audited result in the 2010 year ($7.088 million) to the draft results for 2011 ($4.16 million). Mr Dent agreed that over the same two year period, the EBITDA for Clayton International had increased from $88,000 to

---

178 Mr Dent's first affidavit, sworn on 19 May 2011, at [62] and [63].
179 Mr Dent's first affidavit, sworn on 19 May 2011, Appendix II, at [63]–[65].
180 Mr Dent's second affidavit, sworn on 19 May 2011, at [13].
181 Family Court Notes of Evidence taken before Judge Munro, 6 July 2011, starting at 442.

$2.66 million.[182] It is apparent that any reduction in earnings from New Zealand sales had been offset substantially by attributing earnings to the US operation.

[258] The Family Court Judge accepted that it was not appropriate to exclude the earnings of the United States business in the EBITDA assessment. She accepted Mr Lyne's assessment of the value of the Claymark group, including the United States business, but with certain adjustments.[183] These included adopting Mr Dent's initial assessment of EBITDA at the mid-point figure of $6.75 million rather than Mr Lyne's figure of $7 million. As earlier noted, the main reasons for this were adverse changes in the exchange rates between New Zealand and the United States and uncertainty in the international economic outlook.

[259] The Judge was entitled to include the earnings from the United States business in the EBITDA assessment. In view of the conclusions she reached about Mr Clayton's intention to defeat the interests of Mrs Clayton in the Claymark International Trust, it was appropriate to treat the United States earnings as part of the overall earnings of the Claymark group. We accept Lady Chambers' submission that the finding in the Family Court that the Claymark International Trust had no assets which could be the subject of a claim under the Act does not preclude the earnings from the United States business being included in the EBITDA assessment.

[260] We record that we sought further submissions on this issue which have been considered. We are grateful to Ms McCartney QC for her submissions[184] on behalf of Mr Clayton but they do not cause us to alter our view. A fresh point raised by Ms McCartney was that the valuations were to be undertaken at the date of hearing.[185] There is nothing in this point since the assessment of all the experts was based on future maintainable earnings taking into account the historic performance of the business and the likely future outlook. The actual date of the assessment (as between 2010 and 2011) was not material in this context.

---

182 We were referred to other figures suggesting that the EBITDA for the US business was as low as $6,000 in the 2010 year.

183 Family Court judgment, above n 1, at [133].

184 In place of the late Mrs Harley who passed away subsequent to the hearing.

185 This was agreed to be at the end of the 2011 financial year; see Family Court judgment, above n 1, at [119].

[261] The assessment of the value of the Clayton group was very much a matter upon which the Family Court Judge was required to exercise her discretion. Like the High Court Judge, we see no reason to interfere with the conclusion of the Family Court Judge on this issue.

The calculation of the multiple

[262] The only point relied upon by Mrs Harley under this heading is that the Judge erred in adopting Mr Lyne's multiple of 6.25 per cent. She did not dispute that a control premium of 25 per cent could be applied. Rather, she submitted that Mr Lyne's calculation was in error because he applied the control premium to the EBITDA multiple which is used to value the enterprise as a whole whereas, as Mr Dent explained, the control premium is applied to the equity of the business, that is the enterprise value less debt. Mrs Harley presented a calculation of the premium which she said should have led to a corrected multiple of 5.31 per cent.[186]

[263] The Family Court Judge observed that Mr Lyne's multiple of 6.25 was based on multiples adopted by a range of other companies which he detailed in his evidence: a multiple of 7.0 adopted by Tenon Ltd, a timber processing export company of a similar character to Claymark;[187] and a multiple of 6.84 utilised in the course of negotiations undertaken in late 2010 between Claymark and Carter Holt Harvey for the purchase of Carter Holt Harvey's Profiles business.[188]

[264] The Family Court Judge noted that Mr Dent was less specific as to the basis of his choice of multiple. He had taken into account statistics provided by Biz Stats (which the Judge said provided statistics for very much smaller companies) and also his experience and knowledge from his involvement with primary industries.

[265] The Family Court Judge observed that the major difference between the multiple adopted by Mr Lyne (6.25) and Mr Dent (5.2) was Mr Lyne's inclusion of

---

[186] We note this differs slightly from the submission that the multiple should have been 5.2 per cent but that is not material for present purposes.

[187] The Family Court Judge accepted that there were differences between Claymark and Tenon in that Tenon was a listed company and was significantly larger than Claymark. However, there was agreement between the valuers that, while there was no directly comparable company, Tenon was the closest.

[188] A transaction that did not in the end proceed.

the control premium. Mr Dent had not adopted a control premium in his valuation. However, both had allowed for a marketability discount of 20 per cent. This is intended to reflect the difficulties sometimes associated with the disposal of 100 per cent of the shares in a business enterprise. The Family Court Judge noted that if Mr Lyne's choice of multiple did not include a control premium, the multiple would have been 5.6.

[266] She found it was appropriate to include a control premium as well as a marketability discount. She accepted Mr Lyne's opinion that it was appropriate to include a control premium where 100 per cent of the shares in the company were for sale. She noted Mr Hagen's evidence that it was appropriate to include a control premium where the owner could influence cash flows. She found there was no evidence to support the proposition that this should not apply to the Clayton group business.

[267] Mr Lyne explained that in adopting a mid-point earnings multiple of 6.25, he had obtained various multiples as reported on the capital IQ database.[189] He set these figures out in a table[190] and then observed:[191]

> The median EBITDA multiple for historic and prospective earnings are 7.9 and 8.2. The similar multiples for Tenon are 7.0 and 7.4. To arrive at a multiple for Claymark I assume say a control premium for Tenon of 25% and a marketing discount of 20%, would result in a comparable multiple of 7.0 (i.e. 7.0 x (1+25%) x (1-20%) = 7.0 which is higher than my mid-point multiple of 6.25. If instead I use the median multiple of 8.2 this results in a mid-point multiple applicable to Clayton of 8.2.

[268] The High Court Judge was not persuaded that Mr Lyne's evidence was in error on this issue. He concluded that Mr Lyne did not apply the control premium of 25 per cent to his preferred multiple. Rather, he used it and the 20 per cent marketing discount in fixing a comparable multiple for Tenon. Mr Hagen agreed that was how Mr Lyne had approached the matter.[192] The Judge noted that the marketing discount effectively cancelled out the control premium.

---

189 Mr Lyne's affidavit, sworn on 21 June 201, at [33] and [34].
190 At [33], Table 6.
191 At [34].
192 Family Court Notes of Evidence taken before Judge Munro, 6 July 2011, at 391.

[269] The High Court Judge went on to observe that Mr Dent's evidence as to the application of the control premium was not put in any adequate way to Mr Lyne in evidence. On this issue the Judge said:

> [60] … He [Mr Lyne] was asked in cross-examination how the control premium affected his choice of multiple. After being quizzed about the quantum of the premium, and rejecting a suggestion that 25 per cent was at the "high end", he was asked:
>
> > Q. Well, let's just take the control[led] (sic) premium out all together for the moment. Do you agree that you get a multiple of 5.6 without that control[led] (sic) premium being taken into account?
>
> To which he replied:
>
> > A. Yes, mathematically you would, yeah.
>
> [61] The questioner (Mr Carruthers QC) then went on to another topic. Mr Lyne was not asked to explain how omission of the control premium reduced the multiple from 6.25 to 5.6. The evidence of Mr Dent on the issue was never put to him. What is clear, however, is that for the purpose of the Claymark multiple, the premium was much less than 25 per cent (11 per cent actually), indicating that Mr Lyne was alive to the need to apply a reduced premium for the purpose of valuing the equity of the business.

[270] We would add that the "correct" calculation of the multiple produced by Mrs Harley arriving at a multiple of 5.31 was relied upon in the High Court in submissions and again before us but was not put to Mr Lyne in evidence.

[271] Mrs Harley referred us to a textbook on business valuation.[193] This was put to Mr Hagen by counsel for Mrs Clayton in evidence in the Family Court. Mr Hagen agreed that it referred to control premiums of 30 to 35 per cent in takeover situations. But Mr Hagen said the author was discussing price earnings ratios for shares. Multiples in that context were quite different and not comparable to multiples applying to EBITDA. Mr Hagen agreed that Mr Lyne's control premium was significantly lower than the percentages referred to in Mr Lonergan's text. Although the text also referred to difficulties arising if a control premium were added to a price earnings ratio, we do not view this as relevant to the issues we have to consider given Mr Hagen's evidence about the difference in context.

---

[193] Wayne Lonergan *The Valuation of Business, Shares and Other Equity* (4th ed, Allen & Unwin, Frenchs Forest (NSW), 2003) at 55–56.

[272] The final conclusion of the High Court Judge on this issue was expressed in these terms:

> [64] It is clear that the Judge fully appreciated the arguments for and against including a control premium. Her decision to prefer the evidence of Mr Lyne is clearly and persuasively articulated. There is nothing to indicate error in the way the control premium was factored into the multiple advocated by Mr Lyne which was well within the available range and supported by, amongst other things, the Tenon multiple and the multiple adopted for the purpose of the Carter Holt Harvey negotiations referred to by the Judge.

[273] We entirely agree with the analysis of the High Court Judge for the reasons he gave. We would add that all the experts agreed that assessing the value of a business enterprise involves a combination of art and science. Both Mr Dent and Mr Hagen emphasised the need to arrive at a reasonable result overall. Inevitably, the assessment of the value of the Clayton business interests was a discretionary exercise. We are not persuaded that the Family Court erred in any respect in reaching its conclusions on this issue.

The answer to the question

[274] Accordingly, we answer the question as follows:

> Did the Courts below err in finding that, for the purpose of calculating the value of business interests, an EBITDA of $6,750,000 and a multiple of 6.25 per cent should be adopted?
>
> Answer: No.

Result

[275] For the reasons given:

(a) We formally grant leave for question (c) relating to the VRPT to be considered.

(b) The questions for which leave was granted are answered as set out in this judgment at [116], [147], [178], [239] and [274].

(c) The issue of the appropriate order to be made under s 44 of the PRA in respect of the Chelmsford Trust is remitted to the High Court for determination in light of this judgment.

(d) Issues of quantum are remitted to the High Court for determination in light of this judgment.

(e) By consent, order D in the sealed High Court judgment (relating to the value of Claymark International Trust's business interests) is quashed.

Costs

[276] Costs should follow the event. As Mrs Clayton has been largely successful in CA473/2013 and CA474/2013, but unsuccessful in CA438/2013, we consider she is entitled to an order that the appellants in the appeals where she was largely successful should pay her 75 per cent of the costs in respect of all the appeals for a complex appeal on a Band B basis with usual disbursements. We certify for second counsel.

[277] We do not consider that Mrs Clayton is entitled to an uplift for timetable failures. Mr Clayton has not contributed unnecessarily to the time or expense of the appeal through his timetable failures such as to activate our jurisdiction under r 53E(2) of the Court of Appeal (Civil) Rules 2005.[194]

Solicitors:
Phillips Hosking, Rotorua for Appellant in CA438/2013, Respondent in CA473/2013 and Respondent in CA474/2013
Quigg Partners, Wellington for Respondents in CA438/2013 and Appellants in CA473/2013 and CA474/2013

194 Cf *May v Min Shan Holdings Ltd* [2010] NZCA 325 at [69]–[72].