IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA266/2018
[2019] NZCA 372

BETWEEN	ROSS RONAYNE REID Appellant
AND	BARRY ROSS LAURENCE CASTLETON-REID Respondent

Hearing:	2 July 2019
Court:	Courtney, Venning and Dunningham JJ
Counsel:	S L Abdale for Appellant M J Matthew for Respondent
Judgment:	20 August 2019 at 10 am
Reissued:	24 September 2019
Effective date of Judgment:	20 August 2019

JUDGMENT OF THE COURT

A The appeal is allowed and the judgment and costs order in Mr Castleton-Reid's favour is set aside.

B The case is remitted to the High Court for a hearing to determine the parties' respective interests in the balance of the money from the Trading Account and for determination of Mr Castleton-Reid's affirmative defences.

C The respondent is to pay costs for a standard appeal on a Band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Venning J)

[1] The appellant, Ross Ronayne Reid, and the respondent, Barry Ross Laurence Castleton-Reid, are father and son.

[2] In 2009 Mr Reid deposited $1,700,000 into a share trading account in Mr Castleton-Reid's name. Mr Reid then traded the account until May 2010 when Mr Castleton-Reid closed it and terminated his access to it.

[3] Mr Reid brought proceedings in the High Court seeking to recover the money from the share trading account.

[4] In a judgment delivered on 24 April 2018 Gordon J dismissed his claim.[1] The Judge held that Mr Reid had gifted the $1,700,000 to Mr Castleton-Reid.

Background

[5] Mr Reid is now 97 years old. He has had mixed success in his financial endeavours over the course of his life. He and his brother Emslie established a successful building business, Reidbuilt Homes Ltd, which they sold to Fletchers in 1984 for $1 million.

[6] Mr Reid's business ventures since then have not been as successful. More recently he has been bankrupted twice, in August 1999 and May 2003. He says that he now has no assets. His sole income is his superannuation and he has two substantial debts: the balance of a Customs fine of approximately $25,000 and a credit card debt.

[7] Following the sale of the building business Mr Reid and his brother established a family trust, the Hallmark Trust in 1986. The beneficiaries were the brothers' wives,

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1 *Reid v Castleton-Reid* [2018] NZHC 782.

children and grandchildren. Mr Reid was neither a trustee nor a beneficiary of the Hallmark Trust.

[8] In June 2007 a capital distribution of $1,806,039 was made to Mr Reid's wife, Esme, from the Trust.[2] The money ultimately found its way into a succession of joint accounts in Mr and Mrs Reid's names. Mr and Mrs Reid spent the money jointly and in ways for the benefit of each of them. At the time of Mrs Reid's death on 22 November 2018, there was $1,750,000 on term deposit with Kiwibank in their joint names. On Mrs Reid's death, the money in the account became Mr Reid's by right of survivorship. None of it formed part of Mrs Reid's estate.[3]

[9] At the time of Mrs Reid's death, she and Mr Reid lived in a property at 47 Verbena Road, Birkdale, known as "the Castle". The Castle was held in Mrs Reid's name.

[10] Mr Castleton-Reid was the principal beneficiary under his mother's, Mrs Reid's, will and codicil. Mr Reid was named as executor of her will, but was not a beneficiary. Mr Castleton-Reid's sister, Dee-Ann Castleton-Reid, received furniture, books, jewellery and other chattels, as well as the right to live in the Castle with Mr Castleton-Reid. In the event Dee-Ann did not wish to live in the Castle, it was to be conveyed to Mr Castleton-Reid.

[11] Mr Castleton-Reid was also left another property at 21/55 Verbena Road and two vehicles, (one a classic car), a bequest of $50,000, and the residue of Mrs Reid's estate. The residue comprised shares in Air New Zealand (Air NZ) and Auckland Airport.

[12] Dee-Ann did not wish to live in the Castle as she had her own home. After Mrs Reid's death, Mr Reid remained in the property and asked Mr Castleton-Reid and his wife Lisa to come and live with him in it.

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2 At [59].
3 At [66].

[13] While they were living together in the Castle, Mr Reid and his son had a conversation in March 2009 which gave rise to these proceedings. We return to their differing accounts of the conversation shortly.

[14] Following the conversation, on 12 March 2009, Mr Castleton-Reid went to Craigs Investment Partners Limited (Craigs) in Takapuna to open a share trading account with them (the Trading Account). He opened the Trading Account in his name but signed the necessary documentation to give his father management rights. Those rights enabled Mr Reid to carry out share trading through the Trading Account. Mr Castleton-Reid and his father went back to Craigs on 17 March 2009 to sign another document which made it clear that Mr Castleton-Reid would not be relying on Craigs for advice. This was primarily because of Mr Reid's proposed investment strategy.

[15] On 2 April 2009, Mr Reid transferred $1,700,000 into the Trading Account in Mr Castleton-Reid's name. The source of the funds was the term deposit of $1,750,000 with Kiwibank which had been held in the joint names of Mr Reid and Mrs Reid at the date of her death. As noted, it was Mr Reid's money.

[16] Mr Reid then subsequently proceeded to buy and sell shares through the Trading Account. Mr Reid's evidence was that profits of around $1,135,000 were directed back into the Trading Account. Mr Castleton-Reid accepts a profit was made but disputes the amount claimed by his father.

[17] Probate of Mrs Reid's will was not granted to Mr Reid until 30 June 2009.

[18] Shortly after, on 8 July 2009, Mr Reid sold the Air NZ and Auckland Airport shares held in Mrs Reid's name, and transferred the proceeds of sale of $477,267.34 into the Trading Account.

[19] On 25 September 2009, Mr Reid transferred $800,000 out of the Trading Account into Mr Castleton-Reid's ASB cheque account. The purpose as agreed with Mr Castleton-Reid was to enable Mr Castleton-Reid to make a payment of that same sum to his sister, Dee-Ann, who was dissatisfied with what she had received under

the terms of her mother's will. Mr Castleton-Reid then made that payment to Dee-Ann.

[20] While he was operating the Trading Account, Mr Reid also withdrew a number of amounts totalling approximately $578,667 for his own use. He used the money to purchase two apartments in an apartment block in Townsville, Queensland. Mr Reid also transferred $333,914 to Mr Castleton-Reid's personal account to enable him to complete the purchase of an apartment in the 'Eclipse' development in Vincent Street, Auckland. Mr Castleton-Reid had committed to that purchase prior to his mother's death.

[21] On or about 5 May 2010, Mr Castleton-Reid directed Craigs to sell approximately half the shares. He transferred the proceeds of $781,224 into an account with his solicitors. On 10 May, the balance of the shares were sold and the proceeds, namely $775,832, were also put into his solicitor's account. Mr Reid's access to the Trading Account ceased at that time.

[22] Apparently, the catalyst for Mr Castleton-Reid closing the account and terminating Mr Reid's access was his discovery, in late April 2010, that a mortgage had been registered against the title to the Castle to support a bond issued in favour of Mr Reid. Mr and Mrs Reid had themselves also previously agreed to buy two apartments in the 'Eclipse' development. After Ms Reid's death, Mr Reid varied the agreements and arranged for a bond to cover the deposits from New Zealand Home Bonds Ltd (Home Bonds). Home Bonds registered a mortgage against the title to the Castle before it was transferred to Mr Castleton-Reid. Mr Reid then defaulted on the purchase of the apartments. The vendor cancelled one of the agreements and initiated proceedings against Mr Reid in relation to the other. Ultimately, Mr Castleton-Reid resolved the issue by purchasing the apartment for $358,338.40 which included penalty interest of $39,843.80.

[23] Mr Castleton-Reid took the view his father had been dealing with the property from his mother's estate (which Mr Castleton-Reid was entitled to as beneficiary), as if it was own. He had taken dividends earned in the shareholding account and had used the Castle as security for his personal debts when he was only registered on

the title as an executor. For those reasons he says he lost trust in his father and closed the Trading Account.

Proceedings

[24] Mr Reid subsequently issued proceedings alleging breach of fiduciary duty, and breach of trust. He also pursued a claim for restitution. Mr Castleton-Reid's response was that Mr Reid had gifted the $1,700,000 to him.

The March 2009 discussion

[25] We record the parties' respective positions as to the agreement which led to Mr Reid depositing $1,700,000 in Mr Castleton-Reid's name from the summary in the judgment.

[26] Mr Reid said when they were living together in the Castle, he made a proposal to his son in the following terms. Mr Reid would purchase shares with most of his cash assets and put those in Mr Castleton-Reid's name as nominal owner to facilitate the signing of share transfers during Mr Reid's long absences in Australia. The shares, share proceeds and any profits were to be held by Mr Castleton-Reid on behalf of Mr Reid.

[27] In recognition of this service, Mr Reid promised Mr Castleton-Reid upon his death that, as the shares and proceeds of the Trading Account would already be in Mr Castleton-Reid's name, they would become his. Mr Reid says his son agreed to participate in the arrangement and undertook to act as his nominee.

[28] Mr Castleton-Reid, on the other hand, described the discussion with his father in March 2009 differently. He says his father called him into his bedroom upstairs and told him that he had an "inheritance". Mr Reid indicated it was a large amount of money and that he had a proposal for his son. Mr Reid said he would like to put Mr Castleton-Reid's inheritance into shares and he would manage it for his son. Mr Reid intimated the purpose of the fund would be to obtain medium to longer term dividends. Mr Reid said he would only sell to prevent market losses.

[29] Mr Castleton-Reid said that Mr Reid said to him, "All I ask is that you let me borrow some money to buy an apartment in Australia". Mr Reid explained that he wanted to buy two apartments, one to live in, and one to rent out. He said he could get a mortgage on the second one and the rent would cover it. Mr Reid also asked his son if he could use some of the money for his personal bills. Mr Castleton-Reid said, from memory, the figure stated was $2,000–$3,000 and he agreed to this. Mr Castleton-Reid said that at the time he had no idea what his mother's will said or what his father's own personal financial situation was.

[30] Mr Castleton-Reid says that when he spoke to his wife immediately after the conversation she queried his decision. He told her he thought his father was bored and share trading would give him something to become involved in. As neither he nor his wife had any need for the money at the time, they both just accepted the situation.

Credibility findings

[31] Gordon J preferred the evidence of Mr Castleton-Reid to that of Mr Reid. Mr Reid was not able to satisfy her he had made an agreement with Mr Castleton-Reid that he would purchase shares in Mr Castleton-Reid's name as nominee, nor was there an agreement that Mr Castleton-Reid would hold the shares and profits from Mr Reid's share trading as Mr Reid's nominee.

[32] The Judge held that Mr Reid had gifted the $1,700,000 to Mr Castleton-Reid. That finding effectively disposed of each of Mr Reid's causes of action.

Issues

[33] The principal issue on the appeal is whether the Judge was wrong in law and fact in determining that Mr Reid had gifted the $1,700,000 to Mr Castleton-Reid.

[34] The focus of the case before Gordon J was on the contest between Mr Reid's argument that he and Mr Castleton-Reid had made an agreement whereby Mr Castleton-Reid would hold the money in the Craigs' account as "nominee" or whether, as Mr Castleton-Reid claimed, Mr Reid had gifted the $1,700,000 to him.

[35] We accept the advantage Gordon J had in seeing and assessing the witnesses. The Judge was entitled to make the adverse credibility findings she made against Mr Reid. The real issue, however, is not whether Mr Reid could establish the parties had made some sort of nominee agreement, but rather whether Mr Castleton-Reid's evidence, in the context of the surrounding background facts, disclosed a sufficient expression of intention by Mr Reid to gift $1,700,000 of his money to his son at the time he paid the money into the Trading Account in his name. Absent a gift or application of the presumption of advancement Mr Castleton-Reid would have held the money on resulting trust for Mr Reid.

Resulting trust

[36] The source of the funds, the $1,700,000 that was paid into the Trading Account in Mr Castleton-Reid's name was the joint account held by Mr Reid and his wife with Kiwibank. As Gordon J held, on Mrs Reid's death her interest in the money passed to Mr Reid by survivorship.

[37] The starting point then is that a resulting trust would arise in Mr Reid's favour in relation to the money he transferred into the Trading Account in Mr Castleton-Reid's name. In the absence of a contrary intention, equity presumes that a party who has paid for property intends to retain beneficial ownership in that property. As Eyre CB said in *Dyer v Dyer*:[4]

> The clear result of all the cases, without a single exception, is, that the trust of a legal estate … whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or *successive*, results to the man who advances the purchase-money. This is a general proposition supported by all the cases, and there is nothing to contradict it … It is the established doctrine of a Court of equity, that this resulting trust may be rebutted by circumstances in evidence.
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> (Emphasis original.)

[38] The presumption of a resulting trust can be displaced by evidence of a contrary intention, such as evidence of a gift, or by the counter presumption of advancement.

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[4] *Dyer v Dyer* (1788) 2 Cox Eq Cas 92, 30 ER 4 (ExCh) at 43.

[39] In determining whether the resulting trust is defeated by a gift, the circumstances surrounding the transaction will be important. In *Fowkes v Pascoe* Mellish LJ discussed circumstances which would require the Court to consider the surrounding facts:[5]

> Now, the presumption must, beyond all question, bear very different weight in different cases. In some cases it would be very strong indeed. If, for instance, a man invested a sum of stock in the name of himself and his solicitor, the inference would be very strong indeed that it was intended solely for the purpose of a trust, and the Court would require very strong evidence on the part of the solicitor to prove that it was intended as a gift; and certainly his own evidence would not be sufficient. On the other hand, a man may make an investment of stock in the name of himself and some other person, although not a child or wife, yet in such a position to him as to make it extremely probable that the investment was intended as a gift. In such a case, although the rule of law, if there was no evidence at all, would compel the Court to say that the presumption of trust must prevail, even if the Court might not believe the fact was in accordance with the presumption, yet, if there is evidence to rebut this presumption, then, in my opinion the Court must go into the actual facts.

[40] An example of the application of the principles in the New Zealand context is *Hall v Guardian, Trust & Executors Co of New Zealand Ltd*.[6] Mr Hall purchased properties in his son's name. The son lived in one (rent free). The father collected the rent in the others and accounted for the tax on the rental income. The Court of Appeal held that, at least until the son later signed a document which acknowledged he held the properties on trust for his father, the presumption of advancement applied, and the father had made a gift of the properties to the son.

[41] A further example dealing specifically with investment accounts is *In Re Muller*.[7] A testatrix had deposited money with a company for investment, some eight years prior to her death. She opened two accounts in the names of a niece and nephew. They were both children living with their parents. They had no knowledge of the deposits. The testatrix used the interest earned on the deposits for her own purposes. There was no evidence of any intention to benefit the children.[8] Northcroft J held that there was a presumption of a resulting trust in favour of the

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[5] *Fowkes v Pascoe* (1875) LR 10 Ch App 343 (Ch) at 352–353.

[6] *Hall v Guardian, Trust & Executors Co of New Zealand Ltd* [1938] NZLR 922 (CA) at 948 and 953.

[7] *In Re Muller* [1953] NZLR 879 (SC).

[8] At 882.

deceased, and that there was no evidence to rebut that presumption.[9] The company held the money for the personal representatives of the deceased. In the course of the decision Northcroft J recognised that even a transfer to the transferor's own child may not avoid a resulting trust if other factors negatived an intention to benefit the child.[10]

Was the $1,700,000 a gift?

[42] Ms Matthew submitted that Mr Castleton-Reid did not need to rely on the presumption of advancement as there was no nominee agreement and the evidence of gift in this case was overwhelming.

[43] A gift inter vivos is a gratuitous transfer of property of any kind to another by a living donor, not making it in contemplation of, and conditionally upon, the donor's death. It is a voluntary transfer from the owner to another made with the intention that the subject matter is not to revert to the donor.[11]

[44] The three essential elements of a valid inter vivos gift of chattels (such as money) are:[12]

(a) an expression of intention by the donor to make the gift;

(b) the assent of the donee to the gift; and

(c) actual or constructive delivery of the chattel to the donee.

[45] The last requirement, the actual constructive delivery of the chattel, (the money in this case), is not in issue given Mr Reid transferred the $1,700,000 to an account in Mr Castleton-Reid's name.

[46] Ms Abdale questioned whether Mr Castleton-Reid had assented to the gift. She referred to a family meeting on 12 December 2010 which was held in an attempt

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9 At 883.
10 At 882.
11 Tim Blennerhassett *Laws of New Zealand* Gifts (online ed) at [1].
12 *Williams v Williams* [1956] NZLR 970 (SC) at 972; *N v N [Relationship Property: loan]* [2010] NZFLR 161 (HC) at [44]; and *Stockco Ltd v Gibson* [2012] NZCA 330, (2012) NZCLC 98-010 at [121].

to resolve the dispute that had arisen between father and son and also to address Dee-Ann's concerns about the lack of provision for her in her mother's will.

[47] The record of the meeting is entirely consistent with it being an attempt to resolve the issues then dividing the family. The concessions made in the proposals to resolve the family issues were not an admission of gifting by Mr Reid, and nor were they admissions by Mr Castleton-Reid that the money was not a gift. The family meeting in December 2010 is of limited assistance in determining the intent of the parties at the time of the transaction said to confirm the gift.

[48] Ms Abdale also submitted that Mr Castleton-Reid's grant of authority to Mr Reid to operate the share account and to carry out trades was inconsistent with his "assent" to receiving the money as a gift. We agree that the authority is a relevant consideration when determining the parties' intention in relation to the transaction but do not see it as necessarily negating Mr Castleton-Reid's assent to receipt of the gift, if the $1,700,000 was otherwise intended by Mr Reid to be a gift.

[49] This aspect of the appeal turns on whether there was a sufficient expression of intention by Mr Reid to make the deposit of $1,700,000 into the Trading Account in Mr Castleton-Reid's name a gift. It is necessary to examine the evidence relied on by the Judge to find a gift. As we accept the Judge was entitled to prefer the evidence of Mr Castleton-Reid to that of Mr Reid, we focus on Mr Castleton-Reid's evidence to determine whether, in the absence of Mr Reid's evidence about the meeting, Mr Castleton-Reid's evidence and the known surrounding circumstances support the conclusion that Mr Reid intended to gift the $1,700,000 to his son.

[50] The rules of evidence relating to declarations against interest apply.[13] Acts or declarations by the donor subsequent to the transfer unless so connected so as to be reasonably contemporaneous, are not admissible in favour of the donor to rebut the presumption.[14]

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[13] *Warren v Gurney* [1944] 2 All ER 472 (CA); and *Hall v Guardian, Trust & Executors Co of New Zealand Ltd,* above n 6, at 948.

[14] *N v N [Relationship Property: loan]*, above n 12, at [47].

[51] Mr Castleton-Reid's evidence about the March discussion in which he says his father agreed to gift him an indeterminate amount of money (which later turned out to be $1,700,000), was as follows. First, in an affidavit sworn in support of an application for security for costs dated 19 February 2016 he said:

> 3. My mother, Esme Castleton-Reid ("my mother"), passed away on 22 November 2008, leaving behind her husband, my father, Ross Ronayne Reid ("my father"), and his children, Dee-Ann Castleton-Reid ("Dee-Ann") and I.
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> 4. Shortly after her death my father turned up at my home and asked if my wife and I would move up to "the Castle" with him (This was a "castle" at 47 Verbena [Road], Birkdale, Auckland which he had lived in with my mother until her death). He indicated he was lonely. Although we weren't keen on moving, because my wife, Lisa was pregnant with our second child, he persuaded us to move in with him. In early 2009 we moved into "the Castle" with my father.
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> 5. Not long after we have moved in, my father called me into his bedroom upstairs. He told me I had an "inheritance", he indicated it was a large amount of money, and that he had a proposal for me. He said he'd like me to put my inheritance into shares and he would manage it for me. He intimated that the purpose of my fund would be to obtain medium to longer term dividends. He did mention that he would only sell to prevent market loss. He said *"all I ask is that you let me borrow some money to buy an apartment in Australia"*. He added he wanted to buy two apartments, one to live in and one to rent out. He said he could get a mortgage on the second one and that the rent would cover it. He also asked me if he could use some of the funds for his personal bills – from memory, the figure stated was $2000-$3000. I agreed to this. I had no idea at this point in time what my mother's Will said, or what his own personal financial situation was.
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> 6. I went down to Lisa who was in the bedroom downstairs. I told her about my inheritance, and what my father had proposed. Lisa asked why we would put our money into shares. I told her that *"I think Dad is bored and it would give him something to get involved in."* Since she, nor I had any need for money at the time, we both just accepted the situation.
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> 7. Later on that day I approached Lisa again and told her about the apartments in Australia he would be purchasing. She agreed it was a good idea and since, in my father's words, *'it would all come back to us anyway'* there was no great drama.

[52] Mr Reid's evidence in his brief of evidence as it related to the March meeting at the Castle was:

> 39. In and around the end of March 2009, before probate was granted, and before my term investment with Kiwibank matured, I proposed

> the following agreement with Barry, the terms of which were as follows:
>
> (i) I would purchase shares with most of my cash assets and put these shares in Barry's name, as nominal owner.
>
> (ii) These shares and share proceeds and profits were to be held by Barry on my behalf.
>
> (iii) A share trading account with Craigs Investment Partners would be opened through which I would trade the shares and have access to the share trading account.
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> (iv) In recognition for this service, I promised Barry that upon my death, as the shares and proceeds of the share trading account were already in his name, they would become his.
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> 40. The motivation for this agreement was my worry about gift duty and the possible re-introduction of death duties, and not wanting to burden the beneficiaries of my will with taxes. Barry agreed with the proposed agreement and undertook to act for me as my nominee.

[53] Mr Castleton-Reid responded in his brief of evidence dated 26 October 2017:

> 42. 39 – My father did not propose any sort of "agreement" with me as alleged here. He told me that the money was mine, and that he would manage the shareholding account for me. I note that here he has forgotten to mention his recent change of story – that he allegedly originally told me that half would be mine.
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> 43. 40 – My father's claim to be worried about tax makes no sense. He claims that he gave $800000 to Dee Ann and $376,000 to me, and gift duty would be payable on these amounts if they were intended as a gift.

[54] In the course of his cross-examination by Ms Abdale, Mr Castleton-Reid confirmed that the specific sum was not discussed at the March meeting and that he was unaware of the amount he said had been gifted to him.

[55] Taking Mr Castleton-Reid's evidence on its own and putting to one side Mr Reid's evidence about a nominee agreement, the evidence concerning Mr Reid's intention to gift the $1,700,000 is, rather than overwhelming as Mr Matthew submitted, ambiguous at best. A number of factors tell against the $1,700,000 being a gift.

[56] There is no mention of it being a gift. Mr Castleton-Reid does not suggest his father said he was going to gift the $1,700,000 to him. Rather, at its highest, he refers

to an inheritance. An inheritance is something that Mr Castleton-Reid could expect to receive in due course, on Mr Reid's death. An inheritance is not an inter vivos gift.

[57] Mr Castleton-Reid's evidence of the conversation and the wording he attributes to Mr Reid to establish the gift ("an inheritance", "my inheritance") is more consistent with Mr Reid speaking of property (the $1,700,000), beneficially owned by Mr Reid, which ultimately would become Mr Castleton-Reid's inheritance, that is on the death of Mr Reid, rather than a present intention to gift the money.

[58] Another explanation for the reference to inheritance might be that Mr Reid believed at least half (or more) of the funds from the joint account were Mr Castleton-Reid's inheritance as belonging to Mrs Reid's estate. It seems that for some time Mr Reid believed that the funds in the joint Kiwibank account were at least partly his wife's and that he held one half for her estate. We acknowledge that Mr Reid's evidence about this was somewhat contradictory during the hearing and was also inconsistent with his subsequent "acknowledgement" it was all estate money. But the fact remains, it was not estate money, it was Mr Reid's own money.

[59] There is a related point. When a donor intends to make a gift, they intend to part with property that he or she believes belongs to them. If Mr Reid believed the money did belong to Mrs Reid's estate, and not to him, then he could not have intended to gift it to Mr Castleton-Reid.

[60] The contemporaneous documentation does not support a finding that the $1,700,000 was a gift. The opening of the Trading Account in Mr Castleton-Reid's name is not sufficient. It says nothing about the parties' intention. The unrestricted authority given to Mr Reid to trade shares, to withdraw moneys from the Trading Account and also Mr Lock's evidence of his dealings with Mr Reid regarding the Trading Account's establishment are consistent with Mr Reid retaining control of the funds. Mr Reid controlled all the investments through the Trading Account. He instructed Craigs to use the $1,700,000 to purchase Australian Macquarie shares. That was against Mr Lock's advice. Mr Castleton-Reid permitted his father sole control over the investments and withdrawals from the Trading Account. He never involved himself with decisions regarding the investments. Mr Castleton-Reid's only

actions in relation to the Trading Account were to open it, and then, in May 2010, to close it.

[61] Mr Castleton-Reid's suggestion that he agreed to allow his father to trade through the Trading Account because his father might otherwise be bored is difficult to understand. His acknowledgement he was not relying on Craigs' advice and was permitting his father to solely control the share trading is also at odds with his own note on the account authorisation form that he was a conservative investor. A conservative investor dealing with his own money would be unlikely to have allowed Mr Reid to trade against the broker's advice, particularly as Mr Castleton-Reid would have been aware of Mr Reid's recent bankruptcies.

[62] A related point is that Mr Castleton-Reid did not know what the amount of the gift was. Mr Castleton-Reid never asked how much Mr Reid was giving him. The amount was not discussed. Again, surely if Mr Castleton-Reid was receiving a gift as he says, he would have been interested to know the amount.

[63] Next, no satisfactory explanation has been advanced why Mr Reid would gift his son all his assets. The $1,700,000 represented the only money available to Mr Reid. He was not a beneficiary under his wife's will. He had signed an acknowledgement on 1 April 2009 that he would not pursue a claim against her estate. Why would he gift his son $1,700,000 and at the same time ask to borrow money from his son to buy two apartments and, more curiously, to pay his outstanding accounts? It simply does not make any sense.

[64] Mr Castleton-Reid's personal circumstances were such that he did not need the money. The property at 21/55 Verbena Road had a rating valuation of $1,040,000. The Castle had a valuation of $1,775,000. Mr Castleton-Reid also received a classic car under the will and the shares in Air NZ and Auckland Airport valued at over $477,000, quite apart from his own assets. Mr Castleton-Reid also owned had his own home and a rental property his mother had given him before she died.

[65] Next, Mr Castleton-Reid received copies of the statements for the Trading Account which disclosed that Mr Reid had withdrawn approximately $578,667 from

the account between April 2009 until May 2010. The moneys withdrawn were of various different amounts:

Particulars Date	Currency	Amount
12/05/09	NZD	$1,000.00
19/05/09	AUSD	$20,000.00
10/06/09	NZD	$6,000.00
10/06/09	AUSD	$10,000.00
17/07/09	AUSD	$110,714.36
21/08/09	NZD	$1,000.00
24/08/09	AUSD	$1,400.00
02/09/09	AUSD	$210,909.23
25/09/09	AUSD	$20,000.00
29/09/09	NZD	$1,000.00
05/10/09	AUSD	$20,000.00
27/10/09	NZD	$10,000.00
02/11/09	AUSD	$2,958.82
23/11/09	AUSD	$2,989.40
18/12/90	NZD	$20,387.26
02/03/10	NZD	$3,194.11
05/03/10	NZD	$26,722.64
19/03/10	AUSD	$1,599.94
26/04/10	AUSD	$6,120.00
TOTAL	AUSD	$406,691.75
TOTAL	NZD	$69,304.01[15]
TOTAL	NZD	$578,667

[66] Mr Castleton-Reid apparently took no issue with the substantial deductions from the account that Mr Reid had applied to his own purposes. His answer to the Judge's question about this issue, that he thought the withdrawals were consistent with his father's proposal he would buy two apartments and pay normal expenses is unconvincing. The accounts disclose that Mr Reid's withdrawals were irregular in amount but regular over time.

[67] When challenged during cross-examination why if, as he said the funds were his, he would expect Mr Reid to seek his permission to withdraw large amounts in excess of $100,000 he said:

> A. When we originally came up with the idea of setting up the share trading account, that was the understanding that I had no problem with taking

[15] We note that this figure was accepted by both counsel, so we have not amended it, but by our calculation the total contains an extra NZD1,000.

> some money out to get an apartment and his normal day-to-day expenses, things like that. So that was basically derived from that.

[68] As noted, Mr Reid withdrew funds from the Trading Account on several occasions without Mr Castleton-Reid taking any objection.

[69] Against that, there are some factors that support the finding the $1,700,000 was gifted. A substantial sum was withdrawn from the Trading Account to enable Mr Castleton-Reid to settle the purchase of the first Eclipse apartment. But that is not inconsistent with an intention that, on Mr Reid's death, the investments and proceeds in the account would form part of Mr Castleton-Reid's inheritance in any event. Nor is it inconsistent with Mr Reid retaining the beneficial ownership of the funds and making a specific gift from that amount for Mr Castleton-Reid's benefit. After all, it was Mr Reid, not Mr Castleton-Reid, who authorised the payment as the operator of the account.

[70] Mr Reid also paid the proceeds of the Air NZ and Auckland Airport shares (which he knew to be Mr Castleton-Reid's entitlement) into the Trading Account. However, again, that is not inconsistent with an intention that, ultimately, (on his death), the money in the account would all be Mr Castleton-Reid's anyway.

[71] Ms Matthew made the point that despite the numerous email exchanges between the parties Mr Reid had never asserted in writing there was an agreement that Mr Castleton-Reid would hold the funds on trust for him. Mr Reid never referred to a nominee agreement.

[72] She also referred to a discussion via email between Mr Reid to Mr Castleton-Reid after the Trading Account had been closed. She says in that discussion Mr Reid assured Mr Castleton-Reid the money was his inheritance from his mother's estate and expressly admitted to having told Mr Castleton-Reid that the money was his.

[73] We do not agree the emails referred to are as conclusive as suggested. Mr Reid's email was in response to an email from Mr Castleton-Reid on 3 May 2010 in which he said:

> Dad, I think we will not get anywhere if you are not going to admit what you originally said.
>
> You said, to me and then to Lisa – the money is yours, I will manage it for you, you can use it as you see fit (or as Lisa told me "use it as you please"). I interpreted this as the money is mine and should I ever, for good reason, need to draw from it I could do so. You also said you would use it for your own expenses which was completely reasonable. Did you or did you not say this to Lisa and I.
>
> …

[74] Mr Reid replied the next day:

> Subject: What i said.
>
> Barry
>
> You've asked me to confirm what you now say you both understood me to have said *at the time* of setting up the share trading.
>
> When I converted the *entire* estate assets into M.A.P. shareholding in your name it was on the clear understanding that I manage the account.
>
> Yes, I did say that they would be yours, or are to be yours, or words to that effect to both of you.
>
> No, I did not say *when* this was to be – there was still too much to be done at the time. I had yet to negotiate probate.
>
> …
>
> (Emphasis original.)

[75] The references to "would be yours" or "are to be yours" are future focused and not consistent with an immediate gift.

[76] Mr Castleton-Reid also relies on the evidence of the acknowledgements of debt Mr Reid signed to support his case that Mr Reid gifted the money to him. However, both Dee-Ann and Mr Reid executed such documents. There was no basis for Dee-Ann to have signed such a document regarding the $800,000 settlement she received unless it was for the purposes that Mr Reid said, namely to address Mr Castleton-Reid's taxation concerns. Mr Castleton-Reid accepted as much in cross-examination. He accepted the deed of acknowledgement of debt with Dee-Ann was to "ameliorate the taxation liability".

[77] In summary, while we agree with the Judge that Mr Reid's evidence does not support a finding of an express agreement Mr Castleton-Reid would hold the funds as Mr Reid's nominee, we do not accept that the evidence supported the finding Mr Reid intended to make a present gift of the $1,700,000 to Mr Castleton-Reid. Subject to the presumption of advancement, a resulting trust in Mr Reid's favour would arise in relation to the money as it was his originally.

Does the presumption of advancement apply?

[78] Ms Matthew submitted that if Mr Castleton-Reid had to rely on it, the presumption of advancement applied and had not been displaced in this case.

[79] The presumption of advancement was originally limited to a father's provision for his children.[16] The presumption was extended to provision made by a mother and now extends to provision made by anyone in loco parentis. It has been applied by this Court in New Zealand.[17] However, in a number of other jurisdictions the presumption has recently been rejected or abolished, at least in part.

[80] In Canada the presumption of advancement has been abolished in relation to adult children, whether the adult children are dependent or not.[18] In *Pecore v Pecore* the Supreme Court of Canada held that the presumption of advancement was limited in its application to gratuitous transfers made by parents to minor children. The Court held that, given the principal justification for the presumption of advance is parental obligation to support dependent children, the presumption does not apply in respect of independent adult children.[19] Further, since it is common for aging parents to transfer assets into joint accounts with their adult children in order to have the child assist them in managing their financial affairs, there should be a rebuttable presumption the adult child is holding the property in trust for the aging parent to facilitate the free and efficient management of that parent's affairs.[20] The presumption should also not be applicable to dependent adult children because it is impossible to list the wide variety of circumstances that would make someone dependent for the purpose of applying

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16 *Dyer v Dyer*, above n 4.
17 *Hall v Guardian, Trust & Executors Co of New Zealand Ltd*, above n 6.
18 *Pecore v Pecore* 2007 SCC 17, [2007] 1 SCR 795.
19 At [36].
20 At [36].

the presumption.[21] Rather, evidence as to the degree of dependency of an adult transferee may provide strong evidence to rebut the presumption of a resulting trust.[22]

[81] In *Dullow v Dullow* the Court of Appeal of NSW noted that the obligation basis for the presumption of advancement has been challenged and at times it has been said to be more properly based upon the mere relationship between the parties.[23] Hope J noted:[24]

> Whatever the correct principle is, it might be thought that any obligation to advance and any relationship, and the nature of that relationship, ought more properly to be matters of evidence to be taken into account, along with all other relevant evidence, to determine what the intention of the person arranging the transaction was, and not something which gives rise to a presumption.

[82] However, while observing that reform seemed overdue, the Court considered it was a matter for the legislature other than the Courts.[25]

[83] In the United Kingdom the House of Lords discussed the presumption and how it relates to the contrary presumption of resulting trust in the 21st century in *Stack v Dowden*.[26] Baroness Hale there said:

> [60] The presumption of resulting trust is not a rule of law. According to Lord Diplock in *Pettitt v Pettitt* [1969] 2 All ER 385 at 424, [1970] AC 777 at 823, the equitable presumptions of intention are 'no more than a consensus of judicial opinion disclosed by reported cases as to the most likely inference of fact to be drawn in the absence of any evidence to the contrary'. Equity, being concerned with commercial realities, presumed against gifts and other windfalls (such as survivorship). But even equity was prepared to presume a gift where the recipient was the provider's wife or child. These days, the importance to be attached to who paid for what in a domestic context may be very different from its importance in other contexts or long ago. As Gray and Gray *Elements of Land Law* (4th edn, 2005) point out (p 864 (para 10.21)):
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>> 'In recent decades a new pragmatism has become apparent in the law of trusts. English courts have eventually conceded that the classical theory of resulting trusts, with its fixation on intentions presumed to have been formulated contemporaneously with the acquisition of title, has substantially broken down . . . Simultaneously the balance of emphasis in the law of trusts has

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21 At [40].
22 At [41].
23 *Dullow v Dullow* (1985) 3 NSWLR 531 (NSWCA).
24 At 536.
25 At 536, referring to *Calverley v Green* (1984) 59 ALJR 111 at 112–113 and 120.
26 *Stack v Dowden* [2007] 2 WLR 831 (HL).

> transferred from crude factors of money contribution (which are pre-eminent in the resulting trust) towards more subtle factors of intentional bargain (which are the foundational premise of the constructive trust) . . . But the undoubted consequence is that the doctrine of resulting trust has conceded much of its field of application to the constructive trust, which is nowadays fast becoming the primary phenomenon in the area of implied trusts.'

> There is no need for me to rehearse all the developments in the case law since *Pettitt v Pettitt* and *Gissing v Gissing*, discussed over more than 70 pages following the quoted passage, by Chadwick LJ in *Oxley v Hiscock* [2004] EWCA Civ 546, [2004] 3 All ER 703, [2005] Fam 211, and most importantly by my noble and learned friend, Lord Walker … in his opinion, which make good that proposition. The law has indeed moved on in response to changing social and economic conditions. The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it.

[84] In New Zealand, the presumption has been abolished, at least as it operates between spouses, by s 4 of the Property (Relationships) Act 1976.

[85] It is difficult to see any rationale for the operation of the presumption of advancement where an adult child is well established in life, as Mr Castleton-Reid was in March 2009. The presumption is based on the concept of a parental obligation to support children. How could Mr Reid have an obligation, at his age (in his late 80's at the time) to apply the entirety of his assets to his 42 year old son, who owned several properties and described himself in the Craig's authority as of independent means?

[86] The presumption of advancement is just that, a presumption as to the most likely inference of fact in the absence of evidence to the contrary. Given the facts of this case discussed above, we consider the contrary evidence, particularly of Mr Castleton-Reid's personal financial position, and Mr Reid's age and personal financial position, count strongly against a presumption that Mr Reid intended to gift the $1,700,000 to Mr Castleton-Reid outright.

Summary

[87] In our judgment the evidence before the Court is insufficient to support the finding Mr Reid intended to gift $1,700,000 to Mr Castleton-Reid. Mr Reid did not intend to immediately vest the $1,700,000 to the benefit of Mr Castleton-Reid.

Taken overall the evidence does not support the application of the presumption of advancement either.

[88] Rather, the evidence supports a conclusion that, at most, Mr Reid may have intended Mr Castleton-Reid to inherit the balance of the money in the Trading Account on his death.

[89] In *Dullow v Dullow* a mother had provided the funds to purchase various properties in the names of her two sons.[27] Hope JA observed that the mother's evidence was confused and that different parts of it could be used to support almost every variety of the possible legal situations that could arise in such a case.[28] Nevertheless, he was satisfied that whatever the plaintiff's intention was as to the position during her life, she intended her sons should have the beneficial interest in the properties after her death, not by reason of any will she might make, but by the reason of her intention at the time she purchased the properties.[29]

[90] The case has some similarities to the present. While the evidence is confused, it does not support the conclusion that Mr Reid intended to make an absolute inter vivos gift of the $1,700,000 to Mr Castleton-Reid. Nor do the circumstances of the case support the application of the presumption of advancement. It may well be that Mr Reid intended that on his death, Mr Castleton-Reid would inherit the $1,700,000 (or the then proceeds of the Trading Account), however, with one exception, the money was Mr Reid's and Mr Castleton-Reid held the moneys in the Trading Account on trust for his father.

[91] The exception is the proceeds of the sales of the Auckland Airport and Air NZ shares. They were Mr Castleton-Reid's property.

[92] There is a further complicating factor. It is not clear from the current evidence how the $800,000 transferred to Mr Castleton-Reid's account to resolve Dee-Ann's claim is to be allocated between the parties. There is also the additional withdrawal

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27 *Dullow v Dullow,* above n 23.
28 At 537.
29 At 541.

of the $333,914 that Mr Castleton-Reid applied to the purchase of the Eclipse apartment.

[93] There will need to be a further hearing to determine the share in which the proceeds of $1,557,056 (and interest thereon) from the Trading Account are held between the parties.[30]

Result

[94] The appeal is allowed and the judgment and costs order in Mr Castleton-Reid's favour is set aside.

[95] The case is remitted to the High Court for a hearing to determine the parties' respective interests in the balance of the money from the Trading Account and for determination of Mr Castleton-Reid's affirmative defences.

[96] The respondent is to pay costs for a standard appeal on a Band A basis with usual disbursements.

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30 $1,557,056 being the total of the two sums Mr Castleton-Reid deposited to his solicitor's trust account when he closed the Trading Account.