NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA513/2022
[2023] NZCA 566

BETWEEN	CRAIG BRYAN JOHNSON Appellant
AND	MARIA BERNADETTE JOHNSON Respondent

Hearing:	2 May 2023 (further submissions received 13 June 2023)
Court:	Brown, Moore and Fitzgerald JJ
Counsel:	C M Stevens, T Mijatov and C M McCracken for Appellant P F Dalkie and D A Watson for Respondent
Judgment:	15 November 2023 at 10.30 am

JUDGMENT OF THE COURT

A **The application for leave to adduce further evidence on appeal is granted.**

B **The appeal is allowed in part, to the extent stated in [70] and [98].**

C **The cross-appeal is dismissed.**

D **In respect of both the appeal and cross-appeal, the respondent must pay the appellant 60 per cent of costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.**

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REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] During his marriage to Maria Johnson, Craig Johnson was the recipient of several advances from the Abel Trust (the Trust). In proceedings brought by Maria under the Property (Relationships) Act 1976 (PRA), Gwyn J ruled that, although the advances were loans and hence repayable, a number of them were not relationship debts as defined in s 20 of the PRA.[1] Craig appeals the finding that certain advances

[1] *Johnson v Johnson* [2022] NZHC 2202 [Judgment under appeal].

were not relationship debts. Maria cross-appeals in respect of the finding that the advances were loans.

Relevant background

Maria and Craig

[2] Maria and Craig were married in 1992. For most of their marriage they lived in a family home which was the subject of substantial alterations and additions, first in the mid-1990s and again in 2004–2005.

[3] On 9 May 2002 Craig incorporated Johnson Investment Management Ltd (JIML), a fund management company. JIML managed a hedge fund called Carpe Diem Absolute Return Fund (Carpe Diem) and Craig acted as the fund manager of Carpe Diem on behalf of JIML. In 2002 Craig made a $400,000 investment in Carpe Diem units. Craig said that he redeemed the units for a substantial profit in 2011 and the proceeds were used for family purposes including the acquisition of a boat.

[4] In May 2004 Maria and Craig agreed to purchase a leasehold interest in an apartment in Fiji "off the plans". Craig used his credit card to pay an initial holding deposit of $5,000 towards a total cost of $500,000.[2] A full deposit of $50,000 was paid in October 2004 which was funded by an advance from the Trust. Arrangements concerning the funding of the Fiji apartment were formalised in 2007 in the circumstances traversed below.

[5] According to Craig, he and Maria invested, through JIML, in shares in Global Horticulture New Zealand (Global Hort). Craig joined the boards of both Global Hort and Global Horticulture Xian (GHXL). The latter had a kiwifruit farm in Shaanxi which over the years expanded to include large-scale orchards, pollen factories, cool stores, packhouses and a large juicing facility.[3] Maria was not a director of Global Hort but regularly accompanied Craig on business trips to China between 2008 and 2014.

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2 There was conflicting evidence as to whether the purchase price was $500,000 or $550,000: see below at n 16 and n 88.

3 Judgment under appeal, above n 1, at [127].

[6] Maria and Craig separated in 2014 and their marriage was dissolved on 21 January 2017. Following the resolution by consent orders of a number of proceedings arising out of their separation, the issue remaining for determination by the High Court was whether advances by the Trust to Craig between 2002 and 2010 totalling some $3.6 million constituted relationship debts.

The Abel Trust

[7] The Trust was established by a deed of settlement dated 31 August 1983. Bryan Johnson, Craig's father, was one of three trustees. The Trust had substantial assets derived from Bryan's business activities. The High Court judgment records that Bryan was at relevant times in de facto control of the Trust's decision-making process.[4]

[8] Craig and his two sisters, A and N, are the final beneficiaries of the Trust and will share in its assets on the vesting day. Over time the trustees have made various advances of approximately equal amounts to each of the siblings. The respective payments or credits were recorded from year to year in an "advance account" for each of the three siblings.

Advances by the Trust to Craig

[9] The $3.6 million figure was said to comprise the following advances:[5]

(a) The opening balance in Craig's advance account as at 1 April 2002 of $701,508.55, which he contended comprised: (i) the cost of renovation work on the family home in the mid-1990s and (ii) funding of $400,000 for the acquisition of the Carpe Diem units in 2002.

(b) Additional renovation work on the family home between 2004 and 2005, including the installation of a swimming pool, which cost approximately $250,000.

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4 At [39].

5 The total advances exceeded $3.6 million but Craig accepted that the relationship debt was capped at that amount.

(c) Payment of Maria's and Craig's taxes totalling $37,628.96 between 2003 and 2005.

(d) The $50,000 deposit in 2004 towards the purchase of the interest in the Fiji apartment.

(e) Advance of $50,000 in February 2005 for the purchase of Global Hort shares.

(f) Advance of $50,000 to JIML on 17 May 2005 for Craig's personal trading.[6]

(g) Advance of $791,000 in 2006 applied towards the reduction of debt of Johnson Preschool Ltd (JPL), a company incorporated by Maria and Craig in 2002.

(h) Advance of $254,000 in 2007 for the purchase of Global Hort shares.

(i) Advance of $546,000 in 2007 for the purchase of the interest in the Fiji apartment from the Trust.

(j) Advance of $800,000 in 2009 in relation to the acquisition of a holiday property in New Zealand.[7]

(k) Advance of $300,000 in 2010 for the purchase of Global Hort shares.

[10] Craig's case was that the advances from the Trust were loans repayable on demand and that the total sum of $3.6 million was a relationship debt within the terms of the PRA. He submitted that all of those advances fell within the definition of relationship debt in s 20(1)(c) of the PRA, with the exception of item (g) which was said to come within s 20(1)(b). Maria contended that the advances were not loans as

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6 It was common ground on appeal that the advance to JIML for Craig's personal trading was not a relationship debt.

7 The property, which was owned by the Trust, was allocated to Craig and his family in 2009. However the property remained in the name of the Trust until it was transferred into Craig's name in December 2020.

there was no expectation of repayment. She contended the advances were always intended as a "pre-payment" of part of Craig's eventual inheritance and were never regarded as genuine debts. In the alternative she submitted that any debt identified was not a relationship debt.

Relevant law

[11] The value of the relationship property that may be divided between spouses under the PRA is calculated by deducting any "relationship debts" owed by either or both spouses from the total value of the relationship property.[8] Section 20(1) of the PRA defines "relationship debt" as follows:

> **relationship debt** means a debt that has been incurred, or to the extent it has been incurred,—
>
> (a) by the spouses or partners jointly; or
>
> (b) in the course of a common enterprise carried on by the spouses or partners, whether alone or together with another person; or
>
> (c) for the purpose of acquiring, improving, or maintaining relationship property; or
>
> (d) for the benefit of both spouses or partners in the course of managing the affairs of the household; or
>
> (e) for the purpose of bringing up any child of the marriage, civil union, or de facto relationship.

The High Court judgment

[12] The Judge rejected Maria's contention that the several advances were not properly characterised as debts, explaining:

> [78] Overall, however, I am satisfied that Craig had a clearer, more complete and more accurate recollection of events than Maria. Having regard to the evidence and to the legal form of the advances, I do not accept the general submission that the nature of the Trust and the identity of the parties means the advances cannot be classified as "debts" for the purpose of this proceeding. I accept that the advances from the Trust, or any one of them, may constitute a genuine debt owing. The question then is whether each transaction falls within any of the five categories in s 20 of the PRA and is a relationship debt.

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8 Property (Relationships) Act 1976, s 20D.

That finding is the subject of Maria's cross-appeal.

[13] The Judge concluded that advances (c), (g) and (j)[9] were relationship debts.[10] There is no challenge to those findings.

[14] The Judge also concluded that there was a relationship debt in respect of the advances for the acquisition of the Fiji apartment but found that the amount of that relationship debt was $500,000, not the total of $546,000 recorded in Craig's advance account.[11] Craig argues the deduction of $46,000 was an error.

[15] The Judge considered that there was insufficient evidence on which she could conclude that the amount of the opening balance,[12] or part of it, was spent on the mid-1990s house renovations and was thus a relationship debt.[13] Nor was the Judge satisfied that interest-free loans from the Trust of $94,000 in 2004 and $114,000 in 2005 were used for renovations of the family home so as to constitute a relationship debt.[14]

[16] With reference to the advances used to acquire the Carpe Diem units and the Global Hort investment, it appears that the Judge considered that those investments were made via JIML. Hence the Judge concluded they related to Craig's business, which did not involve Maria. For that reason the advances were found not to be relationship debts.[15]

[17] Thus the judgment concluded that advances (c), (g), (i) (to the extent of $500,000)[16] and (j) were relationship debts but (a), (b), (e), (h) and (k) were not.

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9 Listed at [9] above.
10 Judgment under appeal, above n 1, at [97], [112] and [123].
11 At [105] and [108].
12 $701,508.55 less the $400,000 attributed to the Carpe Diem funding.
13 Judgment under appeal, above n 1, at [86] and [90].
14 At [87] and [90].
15 At [88]–[90] and [133]–[134].
16 There was no specific finding in relation to advance (d) being the deposit for the Fiji acquisition.

Issues on appeal

[18] Whereas the appeal is confined to four sets of advances,[17] as well as the computation of the debt in relation to the Fiji apartment, the cross-appeal extends to all the advances made by the Trust to Craig. Subsequent to the hearing we requested further submissions concerning both the units acquired by Craig in the Carpe Diem fund and the investment in Global Hort — including the issue whether either investment was separate property, drawing attention to s 10 of the PRA.

[19] We consider the following issues fall for determination:

(i) Were the several advances to Craig loans and hence repayable to the Trust?

(ii) Was $301,508.55 of the opening balance of Craig's advance account a relationship debt?

(iii) Were the advances in 2004 and 2005 relationship debts?

(iv) Was the advance of $400,000 in 2002 (used to purchase Carpe Diem units) a relationship debt?

(v) Were the advances which were used to acquire shares in Global Hort relationship debts?

(vi) What amount was payable to the Trust in respect of the Fiji apartment?

[20] Before addressing those issues, it is convenient to provide an overview of the evidence relating to the advances in issue.

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[17] Being (a)(i), the advance for the mid-1990s renovations; (a)(ii), the advance for purchasing the Carpe Diem units; (b), the advance for the 2004/2005 renovations; and (e), (h) and (k), the advances for purchasing Global Hort shares.

Evidence relating to the advances

[21] A useful starting point is found in Craig's answers to interrogatories dated 17 December 2020:

> The advances were made between 2002 and 2010 so my answers are based on my own recollection of events plus a review of the following documents provided to Maria's previous lawyers in June 2018 and to Maria's current lawyer in November 2018:
>
> - Acknowledgement of debt dated 25 May 2006;
> - Acknowledgement of debt dated 20 March 2007;
> - Memorandum dated 22 March 2007 from Bryan Johnson to Fin Scott (my father's accountant, now retired);
> - Memorandum dated 14 July 2009 from Bryan Johnson to me;
> - Email to me signed by the trustees of the Abel Trust dated 13 February 2013; and
> - Abel Trust transaction schedule provided by my father, Bryan Johnson, to my lawyer in 2018.
>
> The five listed documents were in my personal possession in 2018 however I have only reviewed the Abel Trust transaction schedule since receiving Maria's Notice to Answer Interrogatories.
>
> As at the date of this affidavit, I have no other documents in my possession which relate to advances made by the Abel Trust.

Craig stated that all advances were interest free and repayable on demand.

The acknowledgements of debt

[22] The first acknowledgement of debt dated 25 May 2006 recorded:

> I, Craig Bryan Johnson acknowledge interest free loans from the Abel Trust as documented below for the financial years ending:
>
> | | |
> |---|---|
> | 2002 | 567,000 |
> | 2003 | 134,000 |
> | 2004 | 94,000 |
> | 2005 | 114,000 |
> | 2006 | 791,000 |
> | | **$1,700,000** |

Unfortunately this document did not provide any indication as to the circumstances of the advances or the use to which they were put. This was a significant factor in the dispute concerning issues (ii), (iii) and (iv).

[23] The second acknowledgement dated 20 March 2007 simply stated:

> I acknowledge interest free loans from the Abel Trust for $800,000 in 2007 making a total of $2,500,000.

[24] It was apparent from the third document referred to in Craig's answers to interrogatories (the memorandum of 22 March 2007) that the $800,000 figure comprised $546,000 in respect of the Fiji apartment and $254,000 in respect of the cost of acquisition of shares in Global Hort. That memorandum from Bryan to Mr Scott stated:

> The Trustees recognise the need to tidy up books and accounts directly for the funding of Craig & Abel Trust's Fiji and China ventures.
>
> **Fiji Venture**
>
> Fiji Hilton units in books is at $503,000. The Trustees have agreed to sell these units to Craig for $546,000 (capital profit of $43,000).
>
> Debit CBJ advance $546,000.
>
> **China Kiwi Fruit Venture**
>
> Investment of $280,000. The Trustees have agreed to sell majority of these shares to Craig for $254,000 with Abel retaining $26,000 worth. (10% of Global Hort).
>
> Debit Craig's advance $254,000. Therefore CBJ Abel advance will be $2,500,000. When funds become available need to increase/transfer $800,000 each to [A] and [N]'s advance accounts so all three are the same.

The transaction schedule

[25] In his affirmation of 30 July 2021 Craig acknowledged the difficulty in recalling the circumstances surrounding the various advances made so long ago. He explained it was for that reason he had asked Bryan to give evidence, as Bryan was

better able to describe the entries in the transaction schedule (which was the sixth document referred to in Craig's answers to interrogatories).[18]

[26] The Judge described the schedule in this way:[19]

> [28] The transaction schedule is headed "Abel Trust Transactions by Account". It records advances made by the Trust in the periods covered to each of Craig and his two sisters. Some advances are shown as being interest-bearing and others not. In relation to Craig, each transaction is coded according to whether it was a commercial advance, for the benefit of JPL, Craig and Maria's business, or a personal advance. The first entry in the schedule is as at 1 April 2002, at which point the balance shown as owing by Craig for personal advances was $701,508.55. The last entry in relation to Craig is 24 July 2010. The transaction schedule does not cover the whole of the intervening period. Bryan's evidence in cross-examination was that the documents were all of the documents he could find, rather than being a selection made by him.

[27] The transaction schedule recorded the following opening and closing balances for Craig's advance account 40.0046 for the four years between 2003 and 2006 (year ending 31 March):

Year ending 31/03/2003	Opening balance	701508.55
	Closing balance	313949.55
Year ending 31/03/2004	Opening balance	313949.55
	Closing balance	294736.05
Year ending 31/03/2005	Opening balance	294736.05
	Closing balance	409230.03
Year ending 31/03/2006	Opening balance	409230.03
	Closing balance	1700000.00

[28] The reduction in the balance for the year ending 31 March 2003 was the consequence of two credits shown as follows:

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18 See [21] above.

19 Judgment under appeal, above n 1.

40.0046	Advance C B Johnson	Opening Balance	[Debit]	[Credit]	701508.55
26/07/02		Tfr.to int.bearing adv.		325000.00	376508.55
20/02/03		CB Johnson funds tfr.		95000.00	281508.55
31/03/03		Tfr.ex BEJ advs.CBJ	32441.00		313949.55
		Closing balance			313949.55

Neither Craig nor Bryan could explain what the credit entries represented.

[29] In respect of the first credit, there was a corresponding debit in another advance account for Craig, namely 40.0042:

40.0042	Int.bearing adv.CB Johnson 6%	Opening balance	[Debit]	[Credit]	0.00
26/07/02		CB Johnson	175000.00		175000.00
26/07/02		Tfr.ex int.free adv.	325000.00		500000.00
		Closing balance			500000.00

[30] The transaction schedule contained entries which clearly identified the advances described in items (d), (e), (f), (h), (i), (j) and (k) at [9] above. However, there were no entries which corresponded to any of the five amounts totalling $1,700,000 in the first acknowledgement of debt. Bryan was not aware what the opening balance of $701,508.55 comprised. Craig's evidence was that it comprised the cost of the 1995–1996 renovations to the family home and the investment in Carpe Diem units in July 2002.

[31] The absence of any specific correlation between the amounts in the first acknowledgement of debt and the transaction schedule was a significant focus in Maria's case at trial. In this Court Mr Dalkie, counsel for Maria, submitted that Craig "stepped away from the ledger altogether", drawing attention to the following exchange in Craig's cross-examination:

> Q. … is your claim that Maria owes a debt for half or owes an obligation to, effectively pay half of $3.6 million, a matter for which you've kept [no] proper records whatsoever?

A. I disagree about proper records, because I didn't keep the intermittent details of every transaction. I agree with that, but I have kept the loan documentation acknowledging the debt.

Q. So, you didn't keep a running total, you didn't keep any record of what these individual transactions were for, and now you rely totally, for the detail, on such information as your father has been able to scrape up from the accountant at Jarden's?

A. I'm not relying on this schedule at all, this is not my document, I'm relying on the loan documents I signed with Abel Trust.

Q. Which don't contain any meaningful information about what the loans were for, is that correct?

A. That's your opinion, yes, I don't agree.

[32] The loan documents to which Craig referred were primarily the two letters acknowledging his indebtedness to the Trust.[20] However, as earlier noted,[21] the first acknowledgement was opaque as to the application of the funds advanced. We do not accept the proposition in Craig's final answer to the effect that the first acknowledgement contained meaningful information about what the loans were used for.

Bryan's further evidence

[33] With reference to Bryan's evidence, the Judge noted:[22]

> [30] Bryan also produced in evidence the notes to the financial statements for the Trust for each of the years ended 31 March 2008, 31 March 2009, 31 March 2010 and 31 March 2012. In each of these, under the heading "Investments – Advances and Deposits" there is recorded "CB Johnson advance". For 2008 and 2009, the amount under this heading is $2,500,000; for 2010 and 2012, it is recorded as $3,600,000.
>
> [31] The Trust balance sheets as at 31 March [2010] and 31 March 2013 were also put in evidence. Under the heading "Current Assets" each of them records: "Advance CB Johnson 3600000.00".
>
> …
>
> [53] Bryan's evidence is that the advances made by the Trust to Craig and his sisters were interest-free and repayable on demand if the trustees so required. Over the years, the same amount was advanced to each of the three

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20 See [22]–[23] above.
21 At [22] above.
22 Judgment under appeal, above n 1.

siblings. On occasion, monies were advanced to Craig and Maria in order to equalise payments made between the three. Bryan says:

> There was a distinct advantage in having interest-free money for them to develop their family, increase their assets and education for the children and that was the main reason [for equalising the amounts], if the numbers were different then each family would have been treated differently.

[34] The application of the equalisation policy was apparent in the entries in Craig's advance account 40.0046 for the year ended 31 March 2006:

40.0046	Advance C B Johnson	Opening Balance	[Debit]	[Credit]	409230.03
01/04/05		Adj.inv's chgd.to CBJ's adv.		150000.00	259230.03
05/04/05		IRD 2004 term tax CBJ	7319.48		266549.51
27/04/05		IRD penalty refund Maria		50.00	266499.51
17/05/05		Johnson Inv.Mgt.Ltd.	50000.00		316499.51
23/06/05		CBJ chq.a/c.	100000.00		416499.51
06/07/05		IRD 1st.prov.CBJ	4067.00		420566.51
06/07/05		IRD 1st.prov.Maria Johnson	972.00		421538.51
07/07/05		Adv.equalisation Craig	428461.49		850000.00
07/07/05		Adv.equalisation adj.Craig	500000.00		1350000.00
28/07/05		CB Johnson	150000.00		1500000.00
21/10/05		ANZ dep.trans 21/10/05	200000.00		1700000.00
		Closing Balance			1700000.00

[35] Craig was questioned about the two entries described as "Adv.equalisation":

Q. Can you tell us what those two figures represent?

A. They're money that was used to equalise the lending between my two sisters and myself.

Q. Where you say *money* those are debits in your advance account?

A. Yes, that's right.

Q. Correct?

A. They are debits against the Abel Trust loan advance account, correct.

[36] Craig went on to explain that he believed that in this period one of his sisters was building a house and the advances to him in his advance account were used to equalise the lending among the three siblings. The relevant sheet of the transaction schedule recorded closing balances for both of Craig's sisters at the same level of $1,700,000. The operation of the equalisation policy can also be seen in the final line of the 22 March 2007 memorandum.[23]

Were the advances to Craig loans and hence repayable to the Trust?

The contentions in the High Court

[37] Maria challenged Craig's contention that the various advances were repayable. Her overarching submission was that, given the very nature of the Trust and the relationship of the trustees and beneficiaries, the various advances to Craig were not properly characterised as loans.[24] She submitted that the advance accounts comprised interest-free advances with no recorded date or arrangement for loan repayment. There were no trustee resolutions to explain the purpose or status of the advances and the author of the transaction schedule was not produced as a witness.[25]

[38] Maria argued that the term "advance" was ambiguous: did it mean a loan or an advance on entitlement?[26] In support of her submission she contended that:

(a) since the total figure in Craig's advance account had remained unchanged for over 11 years, the logical inference was that a significant

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23 See [24] above.
24 Judgment under appeal, above n 1, at [39].
25 At [41].
26 At [42].

or dominant reason for the interest-free account being structured as an advance account was to avoid the payment of gift duty;[27]

(b) the equalisation of the siblings' three advance accounts from time to time made little sense if the accumulated totals in the accounts were independent, genuine, legally enforceable debts;[28] and

(c) once Craig and Maria's marriage was in difficulty the arrangement was repurposed to Maria's disadvantage.[29]

From those factors and all the surrounding correspondence and circumstances, Maria submitted that the Court could infer that the advances were always intended to be a "pre-payment" of part of Craig's eventual inheritance and were never regarded as genuine debts.[30]

The Judge's conclusion

[39] After discussing legal commentary on the PRA[31] and several authorities,[32] the Judge reasoned:[33]

> [66] While it is possible, perhaps even likely, that Craig may never be required by the trustees to repay the advances to the Trust, as in the authorities discussed … above, the Court's focus should be on the form of the legal arrangements in question. There was no evidence before me on which I could reasonably conclude that the arrangements between the Trust and Craig were a sham.

[40] The Judge recognised the shortcomings in the available evidence:[34]

> [76] It is certainly the case that there are gaps in the evidence of all three of the principal witnesses, Craig, Maria and Bryan. That is not unexpected

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27 At [43]. Until October 2011 a distribution to beneficiaries could have been classified as a gift on which gift duty would have been payable under the Estate and Gift Duties Act 1968.

28 At [44].

29 At [45].

30 At [50].

31 Robert Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [15.3]–[15.6].

32 *Mills v Dowdall* [1983] NZLR 154 (CA); *Hobson v Hobson* [1999] NZFLR 22 (HC); *Young v Young* [2000] NZFLR 128 (FC); *N v N [Relationship property: loan]* [2010] NZFLR 161 (HC); and *Penn v McQueen* [2019] NZHC 2192, [2019] NZFLR 241.

33 Judgment under appeal, above n 1.

34 Footnote omitted.

> given the significant passage of time since these events. Mr Illingworth [counsel for Maria] attempted a detailed, line by line analysis of the transaction schedule and a reconciliation of the schedule with the acknowledgments of debt and financial statements and balance sheets for the Trust. The evidence is not susceptible to that kind of analysis. It is incomplete and not sequential; these were in the nature of family transactions and therefore not as carefully documented as would be expected for arms-length commercial transactions. Further, such an approach would lead to an outcome that did not balance "the benefits and burdens" of the relationship.

[41] After noting that there is no onus of proof in PRA cases,[35] the Judge concluded that the advances from the Trust "may constitute a genuine debt owing".[36]

Submissions on appeal

[42] The thrust of Mr Dalkie's argument was that the Judge failed to determine, both as a threshold question and as a matter of fact, whether the payments in issue were loans to Craig and Maria and therefore debts owed by them. Observing that the limitations of affidavits and witness statements as vehicles for conveying an accurate account of past events are well known,[37] he submitted that the witness statements and documents which came into existence a long time after the payments were made by the Trust did not assist in determining the true character of the payments. He described those documents as reconstructions and, as such, not primary evidence.

[43] Mr Dalkie submitted that the correct approach was to consider the documents which were contemporaneous with the making of the payments, noting that there is wide judicial support for such an approach.[38] He contended that the Judge failed to apply the statutory principles to which she had referred and that the cases which she cited were no more than examples of particular sets of circumstances. He took issue with the proposition that Craig did not bear the onus of proof on the issue of whether the advances were loans. Focusing on the Judge's conclusion at [78],[39] he submitted that merely because the Judge formed the view that Craig had a better recollection of events than Maria did not mean that the payments were loans, a conclusion he described as a non sequitur.

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35 Judgment under appeal, above n 1, at [77].
36 At [78].
37 Citing *Thomas v SMP (International) Pty Ltd* [2010] NSWSC 822 at [23]–[28].
38 Citing *Onassis v Vergottis* [1968] 2 Lloyd's Rep 403 (HL) at 431.
39 Recited at [12] above.

[44] Mr Dalkie proceeded to undertake a close scrutiny of what he identified as the contemporaneous documents, namely documents one to five referred to in Craig's answers to interrogatories.[40] Emphasising that the words in those documents were chosen by Craig and Bryan, and not by Maria, Mr Dalkie focused on the use of the different terms "loan" and "advance", usage which he considered reflected a deliberate distinction.

[45] The point can be illustrated by the contrast Mr Dalkie drew between the second acknowledgement of debt of 20 March 2007[41] (which referred to "interest free loans" totalling $2,500,000) and Bryan's memorandum of 22 March 2007 (which referred to that amount as an "advance").[42] Mr Dalkie submitted:

> 45. On March 20, 2007 they described the position of the $2,500,000 as a loan; two days later the loan became an advance. [Bryan] does not tell the accountant who keeps the records it was a loan; instead he says it is an advance. Comparing the two documents and looking at the language written, the $2,500,000 was not a loan but an advance. [Bryan] has made that distinction. This is a contemporaneous document. It shows the $2,500,000 (as at March 22, 2007) was not a loan but an advance, where, to be trite, an advance is not a loan. If [it] was, then [Bryan] writing to Mr Scott would have said so. That is fatal to the claim.

[46] Mr Dalkie also drew attention to the terminology in the 13 February 2013 email from the trustees to Craig with reference to the Global Hort project, which materially stated:[43]

> To summarise for all three of you (Craig, [N] & [A]) you as beneficiaries have had non interest bearing advances of $3.6m. In addition, Johnson Little Schools has borrowed a further 3.730 million at an interest rate of 6% to fund Remuera, St Helliers and Churton which you will start to repay over the next little while particularly with the potential sale of the Remuera land (approx. 2m).
>
> In addition to the above we have advanced a further 1 mil to you to help the short term funding problem with Global Hort. As you know David [Wale] and I [Bryan] have also funded Global Hort. with 2mil each for the same reason.
>
> Following your discussion yesterday the Trustees (David and I) are prepared to advance you (or your entity) a further 5 mil NZ and if not repaid with

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40 See [21] above.
41 See [22] above.
42 See [24] above.
43 See Judgment under appeal, above n 1, at [40], where the Judge referred to this email in the course of considering the submission for Maria concerning the reference to Craig's "future entitlement".

> interest will become part of your future entitlement from the Abel Trust and will be deducted from your share of the Trust in the future. That is a total of $6m (1 + 5).
>
> …

[47] Mr Dalkie submitted that in that email a distinction was drawn in the trustees' description of outgoing payments:[44]

> 47. … If they are for a commercial purpose, they have an interest rate attached. Otherwise, between [Bryan] and Craig the language [Bryan] uses is consistently the same. The letter of February 13, 2013 from [Bryan] makes a clear distinction between "advances" which he refers to in the first sentence, and then in the second sentence he refers to money *"borrowed"* at an interest rate of *"6%"*. This is his language and his choice of words.

Discussion

[48] Although at one point in his argument Mr Dalkie appeared to suggest that there were potentially three categories of transaction, we agree with Mr Stevens, counsel for Craig, that advances from a parent to a child will either be gifts or loans. As Mr Stevens noted, while the courts generally acknowledge a presumption that advances from parents to children are gifts, the presumption can be rebutted by evidence showing that there was no intention to benefit the alleged donee by way of a gift.[45] The presumption has been held to be rebutted in a variety of situations where it has been concluded that there was no intention to gift.[46]

[49] As Richardson J explained in *Mills v Dowdall*:[47]

> The true nature of [the parties'] transaction can only be ascertained by careful consideration of the legal arrangements actually entered into and carried out. Not on an assessment of the broad substance of the transaction measured by the results intended and achieved; or of the overall economic consequences to the parties; or of the legal consequences which would follow from an alternative course which they could have adopted had they chosen to do so. The forms adopted cannot be dismissed as mere machinery for effecting the purposes of the parties. It is the legal character of the transaction that is

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44 Footnote omitted.

45 *N v N [Relationship property: loan]*, above n 32, at [46]–[47].

46 See for example *N v N [Relationship property: loan]*, above n 32, at [48]–[63]. In that case the parties signed what was described as an "irrevokeable document", stating that the advance was a loan and specifying conditions under which that loan was being granted. Since there was no proper basis for concluding this document was a sham, it had to be given its intended legal effect.

47 *Mills v Dowdall*, above n 32, at 159.

> actually entered into and the legal steps which are followed which are decisive.

[50] Consequently, in the absence of clear evidence of a sham, where a document in its terms manifests an intention to make a loan rather than a gift, that form is to be respected. We agree with the submission for Craig that, contrary to Mr Dalkie's criticism of the judgment, the Judge gave careful consideration to the contemporaneous documents, as reflected in her recognition of their shortcomings.[48] As noted above, the Judge considered there was no evidence upon which she could reasonably conclude that the arrangements between the Trust and Craig were a sham.[49]

[51] In assessing the nature of a financial arrangement the focus must be on the circumstances at the time the transaction was implemented. It is not unusual for a financial facility from a parent to their child to be structured as a loan at the outset but at a later time, sometimes through the medium of a will, for the debt represented by the loan to be forgiven. In this case both the letters of acknowledgement referred to the sums in question as "loans".

[52] In *Lincolnshire Sugar Co Ltd v Smart* (albeit in a different context) Lord Macmillan observed that, while the word "advances" is ambiguous and may either refer to pre-payments of what will become due in the future or may be a polite euphemism for loans, when advances are declared to be repayable (even though only conditionally) they certainly lean to the side of loans.[50] While, as Mr Stevens observed, the email of 13 February 2013 was not the subject of detailed discussion in the judgment, we consider that it clearly demonstrates that the term "advance" was being used there to refer to loans and not to gifts.[51] It envisaged that certain advances would be repaid with interest while others were described as "non interest bearing". Furthermore, in the sentence following the use of the latter expression there was reference to a "further" amount having been "borrowed".

[53] Maria was plainly discountenanced by both the fact and the quantum of the indebtedness. As the Judge noted, part of Maria's case was that she did not know of

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48 Judgment under appeal, above n 1, at [76] (see [40] above).
49 At [66] (see [39] above).
50 *Lincolnshire Sugar Co Ltd v Smart* [1937] AC 697 (HL) at 704.
51 See [46] above.

the advances by the Trust, nor was she ever asked to accept personal responsibility for the alleged debt to the Trust and she never agreed to do so.[52] However, the Judge observed correctly that a relationship debt may be incurred by one partner without the knowledge of the other in certain circumstances,[53] a principle which the Judge recorded Maria accepted.[54]

[54] The Judge also made reference to Bryan's evidence to the effect that, while he had no dealings directly with Maria in relation to the advances, the payments would have been made into Craig and Maria's joint bank account. The Judge recorded that this was not refuted by Maria. Nor did Maria say that Craig retained control of the account to her exclusion.[55]

[55] Consequently we conclude that, to the extent it is established that the advances in question were made by the Trust to Craig, they were properly characterised as loans. As such, in the absence of a forgiveness of debt, they were repayable to the Trust. We reiterate, however, that this conclusion relates only to the nature of certain financial accommodation by the Trust to Craig. Findings on whether specific loans were in fact made and, if so, are properly characterised as relationship debts for the purposes of s 20 of the PRA, are the subject of the further issues below.

Was $301,508.55 of the opening balance of Craig's advance account a relationship debt?

[56] Craig's submissions explained the derivation of the $301,508.55 amount in this way:[56]

> 50 The earliest documentary evidence for the debts to the Abel Trust was the Transaction Schedule. The Advance Account's opening balance as at 1 April 2002 was $701,508.55. Craig's evidence is that $400,000 of this was incurred to fund the purchase of units in the Carpe Diem fund. This sum was not challenged and is addressed further … below. This leaves a balance of $301,508.55.

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52 Judgment under appeal, above n 1, at [72].
53 At [73], citing *PGO v MAB [Relationship property]* [2010] NZHC 1652, [2011] NZFLR 232 at [29].
54 At [74].
55 At [72].
56 Footnote omitted.

Craig asserted that this amount was an advance used to pay for extensive renovations to the family home in 1995–1996.

[57] As the Judge noted, there was no recital or comment in relation to the opening balance of $701,508.55. Nor was there any record of the amounts of the prior advances or whether they were provided for particular purposes.[57]

[58] There was no dispute that the cost of the renovations was substantial. The Judge stated:

> [85] While there was some difference in Maria and Craig's evidence as to the magnitude of the renovations, it is clear that they were significant. Under cross-examination, Maria accepted it was possible the money for the renovation work in the mid-1990s came from the Trust but said that she ought to have been told about it.

[59] However, the Judge was understandably troubled as to the computation of the asserted advance. As she explained:

> [86] Not surprisingly, given the lapse of time, neither party produced any accounts or receipts in relation to the renovation work. It is clear that Craig and Maria did undertake extensive renovations on the family home and that, at least for the first round of renovations, there was no credible source of funding other than an advance or advances from the Trust. It is possible that the advance of $567,000 recorded in the acknowledgement of debt dated 25 May 2006, for the year ending 2002, encompassed some or all of the amount spent on the renovations. While on a "general balancing" approach the Court might conclude that some or all of the cost of the renovations was funded by advances from the Trust, the difficulty is that there is no record of the renovation payments (how much was paid and to whom) and no specific reference in the transaction schedule to any advances for that purpose. In fact, as already noted, there is no recital or comment about the opening balance. There is insufficient evidence on which the Court can conclude that the amount of the opening balance, or part of it, was spent on the renovations and was a relationship debt.

[60] On the appeal there were two notable developments. First Mr Dalkie advised that there was no challenge to the Judge's conclusion that in respect of the renovations in 1995–1996 there was no credible source of funding other than an advance or advances from the Trust. The Court was thus confronted with an unsatisfactory situation where, while it was common ground that substantial alterations were undertaken and the only source of that funding was the Trust, there was an absence of

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[57] Judgment under appeal, above n 1, at [82].

evidence to enable any evaluation of the amount which would otherwise have plainly been a relationship debt.

[61] It is against that background that we turn to consider the second development, namely an application by Craig for leave to adduce further evidence on appeal. The proposed further evidence is an album of photographs of the family home showing certain of the renovation works undertaken there in the 1990s. The photographs are said to show the house before, during and after the renovation works carried out in 1995–1996. The purpose of the application was plainly to fill, at least in part, the void of information so far as the renovation expenditure was concerned. There was no issue as to the genuineness of the photographs.

[62] This Court may grant leave for the admission of further evidence on appeal under r 45 of the Court of Appeal (Civil) Rules 2005. The evidence must be credible, cogent (which in practical terms means it could affect the outcome of the proceeding) and fresh (which means it could not reasonably have been obtained for the first instance hearing).[58] In *LRR v COL* this Court observed that it is exceptional for further evidence that is not fresh to be admitted.[59] The threshold for the admission of such evidence has been described as "very strict".[60]

[63] In opposing the application Maria contended that the photographic evidence failed to satisfy each of the tripartite criteria. She submitted that the photographs were not cogent because they added nothing to the Judge's findings that the renovation work was "significant" and "extensive".[61] Although in her affidavit in support of her opposition to the application Maria confirmed that she was the main contributor to cataloguing the photographs in the family albums, she contended that the evidence was not credible. Observing that the proposed evidence was no more than a series of photographs of work that was done, she posed the question how any court on appeal could be expected to view the photographs and somehow ascribe a value to the work done. Finally, she submitted that the evidence was not new. Craig had deposed that

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58 *LRR v COL* [2020] NZCA 209, [2020] 2 NZLR 610 at [123].
59 At [123].
60 *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 193.
61 Judgment under appeal, above n 1, at [85]–[86].

he was prevented by court orders from accessing the family home but that, once Maria vacated the property and Craig took possession in early 2022, he found the photograph album on the floor behind and under a piano. Maria disputed the imputation that she had endeavoured to hide the album.

[64] We accept that the evidence is not a new creation because it plainly existed well prior to the High Court hearing. However the simple reality is that Craig deposed that he did not recall the existence of the album prior to finding it in March 2022. Significantly, Maria likewise acknowledged that she had also forgotten about the photographs. We consider that the photographs can be fairly characterised as new evidence in the context where neither party had recalled their existence when making discovery or preparing for the High Court hearing.

[65] There is no dispute that the renovations shown in the photographs were undertaken: hence the photographs of that work (compiled by Maria) are credible. We acknowledge Maria's point that in themselves the photographs do not redress the absence of financial documentation which would enable the Court to fix a precise value on the work undertaken. However, there is considerable advantage in an image over a verbal description.

[66] In a conventional civil proceeding the party bearing the onus of proof must adduce evidence in support of that party's claim. If a tribunal is left in doubt on an issue, then the party who carries the burden of proof on that issue fails.[62] However it is well accepted that that approach does not apply in PRA proceedings. As this Court explained in *M v B*, once the Court has classified what is relationship property, it must attribute values.[63] The Court addressed the issue of an absence of evidence in this way:[64]

> [49] It is not a situation (such as in a conventional civil proceeding) where an absence of evidence means that an asserting party can be denied relief because there is uncertainty. Such an approach would be contrary to the scheme and legislative framework. The law relating to relationship property disputes requires total disclosure and cooperation between people who are

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62 *In re B (Children)* [2008] UKHL 35, [2009] AC 11 at [2].

63 *M v B* [2006] 3 NZLR 660 (CA) at [48]. See also *Hyde v Hyde* [2009] NZCA 125, [2010] 1 NZLR 224 at [45].

64 *M v B*, above n 64.

> parties in such litigation. Section 1N(d) of the Act provides that "questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice". The legislation means that, notwithstanding legal title, a party can have an entitlement to be compensated in respect of relevant property held by the other party. This principle will influence any assessment under the Act.

[67] In our view it is inappropriate to respond to the absence of hard evidence as to the cost of the renovations undertaken to the family home in this case either by ruling against Craig's claim in reliance on the burden of proof or by adopting the "don't know" option.[65] Neither party can be criticised for the absence of records as to the cost of renovations that took place nearly thirty years ago. We consider the Court must do its best to attribute a value to the renovations. In our view the photographs of the work that was done assist, albeit to a limited extent, in that endeavour.

[68] Consequently we grant the application to admit the photographs into evidence. The photographs show tradespeople undertaking significant earthworks, bricklaying and the construction of garden walls. So far as the second storey is concerned, the photographs do not record the actual construction, being limited to before and after images.

[69] A relationship debt was plainly incurred in relation to these works. Craig's position is that the works cost $301,508.55. But that is simply the result of deducting $400,000 (said to have been used to fund the purchase of the Carpe Diem units) from the opening balance of Craig's advance account as at 1 April 2002, rather than any independent assessment of what the works might have cost. As discussed further below,[66] we are not persuaded that $400,000 of the opening balance of Craig's advance account was used to fund the acquisition of the Carpe Diem units, which in turn calls into question the conclusion that the works in the mid-1990s must have utilised a balance of $301,508.55.

[70] Given the degree of uncertainty as to the quantum of the relationship debt that funded the 1990s renovations, and that both parties should share in that uncertainty, we have adopted the approach of reducing the claimed relationship debt by

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65 *Rhesa Shipping Co SA v Edmunds* [1984] 2 Lloyd's Rep 555 (CA) at 561.
66 See [84]–[94] below.

approximately 50 per cent. While we acknowledge this is somewhat arbitrary, in our view it is consistent with the broad-brush approach adopted by the Supreme Court in *Preston v Preston*.[67] We consider it is a fair approach in the context of the nature of these proceedings and the particular difficultly with this aspect of the claim given the passage of time. Consequently we find that the opening balance of Craig's advance account included a relationship debt of $150,000.

Were the advances in 2004 and 2005 relationship debts?

[71] Craig claimed that there were renovation works on the family home between 2004 and 2005, including the installation of a heated swimming pool, costing approximately $250,000. His submissions on appeal stated:[68]

> 63 Craig had signed an Acknowledgment of Debt on 25 May 2006 which included two interest free loans; one in 2004 for $94,000 and one in 2005 for $114,000. Craig says these advances totalling $208,000 were for the purpose of the renovations (and so are relationship debts pursuant to section 20(1)(c) of the PRA).

[72] The Judge treated this aspect of the claim in a similar fashion to the previous issue relating to the 1995–1996 renovations:[69]

> [87] A similar situation arises in relation to the further renovation work said to have been undertaken in 2004-2005. Craig says the "all in" cost of that work was about $250,000. Again, there is no evidence as to who was paid, how much or for what. The acknowledgement of debt signed by Craig on 25 May 2006, refers to interest free loans from the Trust in 2004 ($94,000) and 2005 ($114,000) but does not state the purpose of those advances. Nor are there any entries in the transaction schedule referring to specific advances for this purpose. I therefore cannot conclude that these advances were used for renovations of the family home and constituted a relationship debt.

[73] Craig challenged this conclusion, contending that there were no other funds available to fund the swimming pool installation and landscaping. Given the asserted lack of other means of funding it was said to be a reasonable inference that the work was paid for from money advanced by the Trust "contemporaneously".

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67 *Preston v Preston* [2021] NZSC 154, [2021] 1 NZLR 651 at [77].
68 Footnote omitted.
69 Judgment under appeal, above n 1.

[74] There are two significant points of difference in the circumstances concerning the 1995–1996 and 2004–2005 renovations. First, when giving evidence in relation to the renovation work in 1995–1996, Craig had emphasised that he was only 18 months into his career with the National Bank and had yet to start earning the bonuses which came later in his banking career. However his financial position was plainly different a decade later. In the course of cross-examination he said:

> … as I said, this is only 18 months into my career, I had yet to earn very good money at all, later on I would agree I earned good money, but 18 months into a career you are still a, junior, shall we say.

In contrast to her stance on the earlier works, so far as the later renovations were concerned there was no concession by Maria as to the absence of a credible source of funding other than an advance from the Trust.

[75] The second difference is the point made by the Judge, and emphasised by Mr Dalkie in his submissions, that there were no entries in the transaction schedule in 2004 and 2005 which correlated with the two figures in the first acknowledgement of debt,[70] upon which Craig's submission was founded.

[76] Consequently, we do not consider there is a sufficient evidential foundation to draw an inference that the 2004/2005 works must have been funded by advances from the Trust. For this reason, and notwithstanding the potential confusion arising from the judgment's description of the two different scenarios as similar, we are not satisfied that there was any error in the Judge's conclusion on this issue.

Was an advance of $400,000 in 2002 (used to purchase Carpe Diem units) a relationship debt?

[77] In his narrative affidavit of 23 March 2018, Craig deposed that the purchase of the Carpe Diem units was financed by a $500,000 interest-free loan from the Trust. He qualified that statement in his answers to interrogatories dated 17 December 2020, stating:

> (a) 2002 – The acknowledgement of debt dated 25 May 2007 records $567,000 was advanced. The name of the fund when I was working

[70] See [22] above.

> as a fund manager for Johnson Investment Management Ltd was Carpe Diem Absolute Return Fund. In para 6 of my narrative affidavit dated 23 March 2018 I mistakenly stated that my units in the fund were financed by a $500,000 interest free loan from the Abel Trust. This was incorrect. Carpe Diem banked with Westpac so I have made an enquiry with the bank and am advised that $400,000 was deposited in Carpe Diem's account on 31 July 2002. …

In Craig's closing submissions in the High Court it was stated that by 2002 the Trust had advanced $701,508.55, "which, it can be reasonably inferred from the evidence, was spent on the renovation work and funding Carpe Diem".

[78] After noting that it was Craig's evidence that the opening balance in the advance account included the $400,000 deposited in Carpe Diem's Westpac account on 31 July 2002,[71] the Judge concluded that those funds did not constitute a relationship debt. She reasoned as follows:[72]

> [88] As to Carpe Diem, during the course of cross-examination, Craig acknowledged that all the shares in JIML (which managed the Carpe Diem Fund) were owned by him personally, he ran the business himself and Maria was not involved in the business. He also acknowledged that JIML had its own Westpac bank account and that he was in control of the bank account. Funds advanced for the purpose of funding Craig's own business, which did not involve Maria, was not a common enterprise and does not come within s 20(b) of the PRA.
>
> [89] Nor does it readily fit within s 20(c). While "relationship property" for this purpose is no longer limited to the home and family chattels, as *Fisher* notes, a separate property business debt, even if incurred for the benefit of both parties, is unlikely to fall within para (c): "The 'purpose' referred to in the section means the immediate purpose of incurring the debt, not some indirect or potential benefit. In other words, a separate property business debt is unlikely to qualify because it is not likely to be immediately related to one of the required qualifying purposes, ie the acquisition etc of relationship property". In *Bell-Booth v Bell-Booth*, the Court of Appeal considered the interpretation of the words "for the purpose of" (in the then s 20(7)) and held that they referred to the "immediate purpose" of the incurring of the debt. In *Patel v Patel*, Andrews J held that the Court of Appeal's interpretation "applies with equal force" to the present s 20(1)(c).

[79] Craig challenged that conclusion, contending that the reasoning was "infected" by mistaken conflation of Craig's role in JIML with his capacity as an individual investor in units in the Carpe Diem fund. Attention was drawn to the following passage in Craig's cross-examination:

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71 Judgment under appeal, above n 1, at [83].

72 Footnotes omitted.

Q. And the experience that you had gained at the National Bank gave you a leg up into the business that you started back in about 2002 via JIML, which was the Carpe Diem fund?

A. Yes.

Q. And just so we have it absolutely clear, the start-up seed funding, if you like, for Carpe Diem, was borrowed from Abel Trust, you say?

A. Only my contribution.

Q. And just tell us again how much that was?

A. 400,000.

Q. And that went straight into Carpe Diem, your business, for the purpose of buying some units as an investment for JIML, correct?

A. Not for JIML, the units are under my name – sorry, obviously you're not understanding or I'm explaining it poorly. JIML was the fund manager, Craig Johnson owned the units in the Carpe Diem fund, Craig Johnson also happened to be working for JIML but JIML didn't own units in Carpe Diem, JIML managed Carpe Diem, Craig Johnson had 400,000 units just like, like Mr Jones had 500,000 units, Mrs Jones had 20 [units]. Craig Johnson had 400,000 in the Carpe Diem fund and JIML managed the Carpe Diem fund.

Q. So your father was assisting you to get going in business both as the manager of the fund and as an investor yourself, is that correct?

A. If you mean assisting by giving us an interest-free loan to purchase the units so that I could partake in the fund, that's correct, …

[80] The submission for Craig highlighted the distinction between JIML and Carpe Diem. Carpe Diem was an investment fund in which investors purchased units. Craig purchased 400,000 units. Those units were an investment in his name in a unit trust. JIML was an investment manager which managed Carpe Diem's investments. It did not own units in Carpe Diem.

[81] The submissions for Maria advanced two broad propositions. First, that Craig's different versions of events were not supported by entries in the Trust's transaction schedule and hence the evidence did not establish that there was an advance by the Trust for this investment. Second, if there was an advance, it was for Craig's own business purposes and was not a relationship debt.

[82] Maria supported the Judge's finding on the second issue, arguing that in [88] one can plainly discern that the Judge was drawing the distinction that Craig's work

for JIML, which managed the Carpe Diem investment he owned, was an activity that took place away from Maria and did not involve her. It was further submitted that "[i]n a way, any findings about JIML could be regarded as irrelevant" because this was a separate investment being managed by a company (JIML) of which Craig was a director and shareholder.

[83] We consider that Craig's challenge to the judgment on this issue is sound. At [88] the Judge focused first on the nature of Craig's association with JIML, correctly observing that he ran the management business and that Maria had no involvement in it. However the Judge then characterised funds used by Craig to acquire an investment in Carpe Diem units as being "for the purpose of funding Craig's own business, which did not involve Maria".[73] We accept the contention that that conclusion confused or, as Craig put it, conflated JIML and the Carpe Diem unit trust. We do not accept that the Judge's conclusion can be adequately explained by reference to the distinction which the submissions for Maria endeavoured to provide as the Judge's rationale.

[84] Because of the nature of her finding, the Judge did not proceed to engage with Maria's challenge to the evidential foundation for the advance said to be the source of the Carpe Diem investment. Before us Mr Dalkie mounted the further argument that the derivation of the funding for the Carpe Diem investment could not be identified in the documentation relied upon. He emphasised that such an advance in the relevant period could not be discerned in the transaction schedule. He made the point that the proposition that the loan was comprised within the opening balance of $701,508.55, carried forward on 1 April 2002, was inconsistent with Craig's statement in his answers to interrogatories that $400,000 was deposited in Carpe Diem's Westpac account some four months later, on 31 July 2002.

[85] With reference to Craig's alternative explanation, that the figure was comprised within the first amount of $567,000 in the first acknowledgement of debt,[74] Mr Dalkie submitted that could not be correct either because that amount likewise related to the year ended 31 March 2002, four months prior to the Westpac deposit.

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73 Judgment under appeal, above n 1, at [88].
74 See [22] above.

[86] While we recognise that the first and second acknowledgements of debt are significant documents to the extent that they specifically describe Craig's indebtedness as loans, they are not at all informative on the computation of that indebtedness. In our view the transaction schedule is both more informative and, with reference to most of the amounts in dispute in the High Court, reliable in its identification of those amounts. In those circumstances the apparent absence of any reference in the schedule to a specific amount reflecting the Carpe Diem loan is somewhat troubling. We do not find convincing Craig's suggestion that it must have been advanced at some point during the previous financial year and then held by him for some months before being deposited into the Carpe Diem account in late July 2002.

[87] Against that background we turn to consider the advances in mid-2002 via the separate interest-bearing account 40.0042.[75] They total $500,000 (the amount which Craig initially said was the advance for the Carpe Diem investment). They are both dated 26 July 2002, which was the Friday preceding the date on which Craig says the funds were paid into the Carpe Diem Westpac account.

[88] Craig was cross-examined in some detail concerning the 2002 and 2003 entries in the transaction schedule. The exchange concluded in this way:

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[75] See [29] above.

> Q. Now leaving aside the opening balance, we've got a set of transactions in 2002, 2003, which don't tell us anything about the purpose for which those transactions took place. Do you agree?
>
> A. Yes.
>
> Q. And are you able to tell us what the purpose of those transactions was, now?
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> A. I cannot talk to those transactions, you'll have to talk to the Abel Trust which will be my father tomorrow about those, but I would be guessing but I imagine that's deposits that were held at the ANZ for me and were credited but I can't talk to that.

[89] Later, in the course of cross-examination about the 2005 entries in the transaction schedule,[76] in particular the "equalisation" advances, Craig suggested that the funds available to him were used to pay off debt relating to properties acquired for his and Maria's preschool business. He said:

> … my evidence is that we had three – bought three properties for the benefit of Maria and I, 1 Station Road, 2 Ngaio Road, sorry, 4 Ngaio Road and 6 Ngaio Road. We had paid $450,000 in 2002 for 1 Station Road, we paid $800,000 for 4 and 6 Ngaio Road in 2004 and by 2005 we were interest free. We had no debt.

[90] He had previously addressed this issue in his answers to interrogatories:

> (c) 2006 – To the best of my recollection, without easy access to company records and/or bank statements, the advance of $791,000 recorded in the acknowledgement of debt dated 25 May 200[6] would have been used to reduce Johnson Preschool Ltd debt. Prior to 2006, the company owned one pre-school in Khandallah and in 2004 bought two properties in Ngaio Road, Kelburn. A third property was purchased in Ngaio Road in 2008 so I presume any moneys remaining from the advances made by Abel Trust would have been applied towards the purchase in order to reduce bank debt.

[91] There is a reasonably clear documentary record of advances by the Trust to JPL throughout the period between 2007 and 2013. It comprises entries in the notes to the Trust's financial statements for the financial years ended 2008 to 2013. The last recorded indebtedness of $3.73 million is consistent both with an entry in the final page of the transaction schedule and with a reference in the email sent by the trustees to Craig on 13 February 2013.[77] By contrast, there is a dearth of documentary evidence

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[76] See [34] above.
[77] See [46] above.

concerning the source of funds for the purchase of individual properties by JPL in the period prior to 2007 and the dates on which such properties were acquired. Clearly there was some utilisation of bank debt in this earlier period.

[92] From our review of the evidence it seems that the $500,000 advanced on 26 July 2002 could have been utilised for one of only two purposes: a contribution to the price of acquisition of a preschool property (1 Station Road) sometime in 2002, or the investment in the Carpe Diem units. The Judge recorded that the 2002 purchase of 1 Station Road was funded by way of lending from Westpac, secured against the family home.[78] As just discussed, Craig's evidence was that funds advanced to him by the Trust in 2005 were used to pay off that debt.[79] Given this, it seems very unlikely that the $500,000 was used to fund the acquisition of 1 Station Road.

[93] On that basis, and given the amount of the financial accommodation, the proximity of the date of the Carpe Diem investment to the date recorded in the transaction schedule in respect of the advances to the separate interest-bearing account (40.0042) and the absence of any record in the transaction schedule of another identifiable source of funds for that investment, it is certainly arguable that the 2002 advances recorded in the 40.0042 account were the source for Craig's Carpe Diem investment.

[94] However, the advance of $325,000 to the 40.0042 account on 26 July 2022 was simply a transfer from Craig's advance account;[80] in other words, the $325,000 amount did not represent "new" funds being advanced from the Trust to the 40.0042 account. Rather it appears to be a journal entry only, perhaps reflecting that $325,000 of the opening balance in Craig's advance account was more appropriately accounted for in the 40.0042 account.[81] The 40.0042 account was not an interest-free account. Interest was stated to be payable at a rate of 6 per cent per annum. Bryan's affidavits described the 40.0042 account as "commercial" advances for the benefit of JPL (rather than the

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78 Judgment under appeal, above n 1, at [15].

79 At [89] above.

80 See [28]–[29] above. As can be seen, there was a credit of $325,000 to the 40.0046 account on 26 July 2002, which was described as "Tfr.to int.bearing adv". On the same date there was a corresponding debit of $325,000 to the 40.0042 account, described as "Tfr.ex int.free adv".

81 However, as noted at [28] above, neither Craig nor Bryan could explain the 2002 credits in Craig's advance account.

"personal" advances in Craig's advance account). Hence even if the amount advanced to the 40.0042 account on 26 July 2002 was the source of the funds used to purchase the Carpe Diem units, that advance does not conform with the description given by both Craig and Bryan that all the advances comprising the alleged relationship debt were interest free.

[95] For these reasons we are not satisfied that funding provided by the Trust to Craig for use in the Carpe Diem investment is comprised within the interest-free advances which were claimed to constitute relationship debt. We make clear that this conclusion does not involve the imposition of a burden of proof on any party but is simply the product of our analysis of such contemporaneous documentary material as was available.

Were the advances which were used to acquire shares in Global Hort relationship debts?

[96] The Judge held that the advances (e), (h) and (k)[82] in respect of Global Hort were not a relationship debt, explaining:[83]

> [133] … As I have noted already, during the course of cross-examination, Craig acknowledged that all the shares in JIML were owned by him personally, he ran the business himself and Maria was not involved in the business. He also acknowledged that JIML had its own Westpac bank account and that he was in control of the bank account.
>
> [134] Given those circumstances, I conclude that the advances to Global Hort, through JIML, are not a relationship debt within the terms of s 20, for the reasons set out above.[84]

[97] Essentially the same challenge was made by Craig to this finding as in respect of the Carpe Diem investment. However, one difference between the disputed investment in Global Hort and the Carpe Diem units is that the Global Hort shares in question were held in JIML's name, rather than in Craig's own name (as the Carpe Diem units were). Despite this difference, however, the evidence was that the shares were held for Craig and/or Maria *through* JIML. This was also reflected in the

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82 Identified at [9] above.
83 Original footnote omitted.
84 The cross-reference to reasons above was to the analysis at [89] of the judgment, recited at [78] above.

consent orders, in which the parties agreed that all shares in Global Hort, whether held in their names or JIML's, were to be divided equally. Accordingly, our previous conclusion, namely that the Judge conflated Craig's role in JIML with the investments made by Craig in his personal capacity (or in this instance, investments made for Craig and/or Maria),[85] likewise applies to the Judge's finding in respect of the Global Hort investment.

[98] As with the Carpe Diem issue, the Judge did not proceed to address the evidential foundation for the advances utilised in making the Global Hort investments. However, as earlier noted,[86] the advances (e), (h) and (k) are clearly identified in the transaction schedule. Craig claimed those advances were for the purpose of the investment by Maria and himself, through JIML, in Global Hort shares.[87] As noted, at the time of the consent orders the Global Hort investment was treated as part of the relationship property. Maria and Craig agreed that the shares were of little or no value but were to be split equally between them.[88] For these reasons we are satisfied that advances (e), (h) and (k) are relationship debts.

What amount was payable to the Trust in respect of the acquisition of the Fiji apartment?

[99] The evidence concerning the identity of the original purchaser of the Fiji apartment is unsatisfactory. In his affirmation of 26 October 2021 Craig stated:

> 54 During a holiday in Fiji in 2004 Maria and I became interested in buying a villa as part of a development in Denarau. The deposit was only $5,000 so we decided to risk it and sort out financing on our return home. The deposit was made using my credit card and we both signed the Option to Purchase for $500,000 dated 25 May 2004.
>
> 55 Maria left me to sort everything out and we discussed how to fund the purchase over the next couple of days. I agreed to approach my father for a loan because there was no other way we could have afforded to buy it.
>
> 56 Aside from the Option to Purchase, I signed all the relevant sales documentation including the agreement with Denarau Investments Ltd dated 8 June 2004 granting a title lease to the villa (yet to be constructed), plus the fit-out. …

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85 At [83] above.
86 At [30] above.
87 See [5] above.
88 Judgment under appeal, above n 1, at [132].

He went on to simply "refer" to two records in the Abel Trust transaction schedule:

- Advance of $50,000 dated October 2004 annotated "CBJ chq.a/c/re Fiji inv".

- Advance of $546,000 dated 1 April 2007 annotated "Sale Fiji Hilton units to CBJ".

[100] In cross-examination Craig was asked about the latter entry:

> Q. To your knowledge, is that a correct description of what happened?
>
> A. That was for funding for the purchase of the Hilton, yes.
>
> Q. But it wasn't the sale from Abel Trust was it, it was a sale from the Hilton – a sale by the Hilton. In other words, it wasn't Abel Trust selling you the Hilton units, it was the Hilton selling you the Hilton units.
>
> A. To the best of my knowledge, the Abel Trust had already settled the Hilton and that was the transfer to us.
>
> Q. Well, are [you] sure about that?
>
> A. Yes.
>
> Q. Well why is the figure $546,000, when you've already paid $55,000 in deposit money when you've told us that you thought the sale was $550,000 in total?
>
> A. You'd have to – I can't answer that specifically because I don't know the logic of what the Abel Trust – why they allocated it at that price to us but that was the price that they allocated the loan against me for the Hilton.

[101] After a discussion about Craig and Maria having no funding ability at the relevant time, the issue of identity of the purchaser was revisited:

> Q. – You've told us that you paid the initial $5,000 deposit from your Visa card and it must've been a personal arrangement to purchase the property, so how does the Abel Trust get involved as the purchaser, it doesn't make sense?
>
> A. Because they have the funds, Maria and I did not have the funds.
>
> Q. But in terms of the contract to purchase the unit, that was – that had to be in your name because you'd organised and you'd paid the initial deposit.

A. Yes, it was in my name, but the Abel Trust funded it, they paid it.

Q. So why is the Abel Trust getting a – clipping the ticket for $51,000 over and above the purchase price?

A. That's a question you should pose to them.

[102] Bryan Johnson was duly questioned on this issue. The following exchange occurred:

Q. We've got a bit of a mystery here and you might be able to help us on this one a little bit more than with the others. It seems that the purchase price for the Hilton unit was $550,000 but Craig's account has been debited with the $50,000 deposit and a further $546,000. You'll remember we saw the $50,000 earlier and we've now got a debit of $546,000 which takes the total for Fiji to $596,000?

A. That is correct.

Q. And Craig has told us that there was a $5,000 holding deposit paid when they were in Fiji on his Visa card.

A. Well –

Q. So the question is, why is Craig being debited something like $51,000 more than the apparent purchase price?

A. That was a payment because it was a profit. The value of the apartment over the two years had increased, it hadn't been finished, it was completed there, the values I recall had gone up significantly, Fiji was a popular place to go and we discussed it and I said I need to get some return on that. So we agreed a 546 price which …

Q. Right, but if Craig had bought the property in his own name, and had paid the deposit as a result of an advance from the trust, why is the trust being treated as the owner of the property and getting the capital gain on it?

A. Because of the advance was, the deposit, the 50,000, the advance from the Abel Trust was for the balance of the property.

Q. Well, in other words, it's being treated as if the trust was the buyer rather than Craig being the buyer?

[103] At that point Bryan Johnson made reference to the memorandum he sent to Mr Scott on 22 March 2007 headed "Abel Trust Advances",[89] explaining that Mr Scott would have accounted in accordance with Bryan's advice in that memorandum.

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89 See [24] above.

[104] The cross-examination on this issue concluded in this way:

> Q. Right, so the arrangement between yourself, on behalf of the trust, and Craig was that the Hilton apartment would be purchased by the Abel Trust and then on sold to Craig, rather than being purchased by Craig initially, do I have that right?
>
> A. Well I'm not sure whether you do, because whether I, Abel Trust owned it or whether it was in Craig's name, the monetary sums were identical, they're the same, indirectly.
>
> Q. But the Abel Trust took a profit –
>
> A. Yes.
>
> Q. – of the amount that you've just explained?
>
> A. Yes.

[105] It is apparent that the Trust provided the funding that enabled the completion of the purchase commitment which Craig and Maria had made when visiting Fiji. A question arises as to whether it did so as a lender to Craig and Maria or as the actual purchaser of the apartment.

[106] The judgment does not directly address that issue when determining the quantum of the relationship debt:[90]

> [105] I do not accept as realistic that Maria believed she and Craig had paid for the apartment, at a time when their family home was already mortgaged in respect of the purchases of Station Road and Ngaio Road. I conclude that the total of $546,000 recorded in the advance account was the purchase price for the Fiji apartment. However, I accept that Maria would have understood that the cost to her and Craig was the $500,000 purchase price and did not include the $43,000 "return on value" to the Trust.

[107] There is no evidence, oral or documentary, which provides the basis for concluding that the Trust took an assignment of the purchase, or that Craig, Maria and the Trust entered into a novation of the purchase agreement — which would have been necessary in order for the Trust to acquire the Fiji apartment and to subsequently sell it to Craig and Maria.

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[90] Although the Judge referred to a purchase price of $500,000, the list of advances included both the $50,000 deposit and the figure of $543,000, listed as (d) and (i) above at [9].

[108] In our view, the most likely scenario is that the Trust advanced funds (either to Craig or directly to the developer) to enable the transaction to be completed but no formal arrangement was made at that time between the Trust, Craig and Maria. On the available evidence we cannot conclude that the Trust became the legal owner of the property.

[109] In our view the return which Bryan proposed of a "capital profit" of $43,000 is best characterised as capitalised interest on the undocumented financial accommodation. There being no evidence that Maria ever agreed to assume an obligation to pay interest in respect of the Fiji acquisition, we consider that the "capital profit" which Craig agreed to pay should not be treated as a relationship debt. Consequently, albeit by a somewhat different process of reasoning, we reach the same conclusion as the Judge.

Result

[110] The application for leave to adduce further evidence on appeal is granted.

[111] The appeal is allowed in part to the extent stated in [70] and [98].

[112] The cross-appeal is dismissed.

[113] Having succeeded only in part on his appeal, but having successfully resisted the cross-appeal, we consider that the appellant is entitled to costs less a 40 per cent reduction. Consequently, in respect of both the appeal and the cross-appeal, the respondent must pay the appellant 60 per cent of costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

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