IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2015-404-1043
[2018] NZHC 2191

BETWEEN	VIRGINIA WOOLF First Plaintiff
	VIRGINIA WOOLF as the Executor of the Estate of NOEL BERNARD WOOLF Second Plaintiff
AND	ALWYN BERNARD KAYE First Defendant
	MARK WILLIAM SYDNEY CLARK as Executor of the Estate of VIOLET ISABEL WOOLF Second Defendant

Hearing:	21-31 May, 1-7 June and 14-15 June 2018
Appearances:	G A Keene for the Plaintiffs A Gilchrist and C M Fry for First Defendant No appearance by or on behalf of the Second Defendant
Judgment:	24 August 2018

JUDGMENT OF GORDON J

This judgment was delivered by me
on 24 August 2018 at 3.30 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:	Foy Halse, Mt Eden Richard Wood, Auckland
Counsel:	G A Keene, Auckland A Gilchrist, Auckland

Introduction

[1] This is an unhappy case between a sister and brother both now in their 60s. In earlier years, they were on good terms.

[2] The first plaintiff, Ms Woolf,[1] has lived in a residential property at 14 Woodhall Road in Epsom, Auckland (the property) for 36 years. The sole registered proprietor is her brother, the first defendant, Alwyn Kaye, who has lived and worked in Canada since he left New Zealand at the end of July 1982, just over four months after the purchase of the property settled in March 1982.

[3] Ms Woolf contends that the property was purchased as a family project by all four members of her immediate family, namely her parents Violet and Noel Woolf (the parents), both now deceased, Mr Kaye and herself. Unbeknownst to the other three members of the family, at settlement, Mr Kaye arranged that only his name would be recorded on the title of the property as the registered proprietor.

[4] Ms Woolf brings claims for breach of resulting trust and breach of constructive trust.[2] She brings those claims in both her personal capacity and as executor of her father's estate, the second plaintiff. The second defendant, the executor of her mother's estate, has taken no part in the proceedings and abides the decision of the Court.

[5] Mr Kaye denies the claims. He also raises affirmative defences of limitation and laches, and makes counterclaims seeking payment from Ms Woolf for her occupation of the property.

Factual overview

[6] This factual overview is necessarily condensed, as it spans some 36 years.

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1 All references to Ms Woolf are intended to refer to Ms Woolf in her personal capacity, namely as the first plaintiff (unless otherwise indicated).

2 A claim for breach of contract was abandoned in closing submissions.

[7] When they were in their early 20s, Ms Woolf and Mr Kaye each moved to Auckland from their home town, Timaru. By late 1981, Ms Woolf had completed her university degree in Auckland and her post-graduate course at Teachers' Training College. She did not obtain full time work until 1982. Ms Woolf had no savings as at the end of 1981 and the beginning of 1982.

[8] Mr Kaye had studied engineering at Canterbury University and after moving to Auckland, he worked at an engineering firm where he had previously had holiday employment during his university course. He had part-time work as well. As a result of his holiday jobs from when he was at high school and continuing through university, and through his thrift and careful investment of money, he had managed to accumulate savings.

[9] By late 1981, Ms Woolf was aged 26 or 27 and Mr Kaye was aged 25. They were both living in separate rental accommodation in Auckland.

[10] In November 1981, Mr Kaye entered into an agreement to buy the property, a three-bedroom house, for $89,500. His was the sole name on the agreement for sale and purchase (SPA) as purchaser (although the words "or nominee" are also recorded after Mr Kaye's name as purchaser). Mr Kaye paid a deposit of $5,000. The SPA states that the balance of the purchase price was to be paid by a combination of a further cash amount and by the purchaser executing in favour of the vendor various mortgage securities totalling $14,070, which were identified by certificate numbers in the SPA.

[11] It is common ground that mortgage securities to the value of $10,570 were provided by Mr Kaye at settlement and that three of the mortgage securities identified in the SPA, to the total value of $3,500, were provided by his father, Noel Woolf, at settlement.

[12] The rest of the purchase price was made up of a first mortgage of $30,000 with Countrywide Building Society (Countrywide) in the name of Mr Kaye and a second mortgage of $15,000 with the Commercial Bank of Australia (CBA), later Westpac, also in the name of Mr Kaye, together with a cash amount.

[13] The cash portion at the time of settlement (over and above the amounts obtained by way of mortgage) was $25,430. There is a dispute as to who contributed to this cash portion. Mr Kaye said he contributed the entire amount. Ms Woolf, while accepting that Mr Kaye paid some of the cash amount, said that part of the cash portion was contributed by the parents so that in total the parents' contribution, including the $3,500 represented by the father's mortgage securities, was $14,000.

[14] Mr Kaye further says that the $3,500 represented by the mortgage securities was a gift rather than a contribution by his parents which would give them an interest in the property. Ms Woolf disputes that and says the payment of $14,000 by the parents gave them an interest in the property.

[15] It is agreed that Ms Woolf did not make any initial contribution to the purchase of the property. Her position is that she was to have been a joint applicant with her brother for the loan from the CBA. That did not eventuate, but instead she says that she signed a guarantee in relation to the second mortgage with the CBA. She said she did not understand at the time and still does not understand how and why that change came about. Mr Kaye's position is that it was not intended that Ms Woolf was to have been a joint applicant for the loan from the CBA and she did not sign a guarantee.

[16] Ms Woolf's position was that because she signed documents at the CBA, she thought she had an ownership interest in the property. I will return to whether in fact Ms Woolf did sign any documents at the CBA in the context of whether a resulting trust arises in the second cause of action.

[17] Mr Kaye was the one who dealt with lawyers over the purchase and he paid their account and associated costs.

[18] Following settlement, in early March 1982, Ms Woolf moved into the property with two others who have been variously called flatmates, tenants or boarders.[3] Ms Woolf and Mr Kaye were involved in interviewing the initial flatmates. Mr Kaye says he also interviewed a replacement flatmate when one of the initial two left.

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[3] I will refer to those persons as flatmates. There were different flatmates over time.

[19] The flatmates each paid $45 a week which was effectively a room charge and they also paid for their consumables.

[20] Ms Woolf contributed $55 a week. Ms Woolf's position is that her payments were her contribution towards her equity interest in the property. Mr Kaye's position was that she was a tenant, paying rent. Additionally, Mr Kaye says that although Ms Woolf initially paid $55 a week, there were many variations, lesser payments and missed payments.

[21] Mr Kaye had opened a personal bank account with Countrywide. It became the "house account" for the property. The mortgage payments to Countrywide were paid by automatic transfer from that account into Mr Kaye's loan account.

[22] Mr Kaye also set up an account with the CBA which was a joint account with Ms Woolf. His repayments on his loan from the CBA were funded from that account by automatic payment.

[23] Mr Kaye says that he set up the accounts to make it easy for the flatmates to pay in their rent and for payment of approved house expenses.

[24] The flatmates paid into one or other of the two accounts, as did Ms Woolf. Mr Kaye also contributed funds on an ongoing basis.

[25] After settlement, Mr Kaye continued to live elsewhere. Mr Kaye said the reason he did not occupy one of the rooms was because he was constantly working away from Auckland, so rather than having an empty unused room, it seemed more important to collect the rental income. There is disagreement between the parties as to whether Mr Kaye stayed in the property for a short period before he left New Zealand for Canada, but nothing turns on that.

[26] In late July 1982, Mr Kaye went to Canada where he obtained work as an engineer. He has continued to live and work there ever since.

[27] Before he left for Canada, Mr Kaye gave Ms Woolf signing authority on his Countrywide account from which the mortgage payments were drawn.

[28] The flatmates' payments of rent and Ms Woolf's payments were not sufficient to cover the monthly mortgage payments. When he left New Zealand, Mr Kaye's position was that he left very close to every last dollar of uncommitted funds in the "house accounts". As noted, he also remitted money from Canada on an ongoing basis. Mr Kaye's evidence that there was always ample money in the two accounts to meet the mortgage payments is supported by the evidence of Matthew Kemp, a forensic accountant called by Mr Kaye.

[29] Ms Woolf says that when her brother departed for Canada, he left a briefcase in the property which contained papers relating to the property. In 1983 or 1984, she discovered from those papers that Mr Kaye's was the only name on the title of the property. Her position is that she was shocked and concerned at this discovery, and she raised it with her mother.

[30] As a result, Ms Woolf spoke to Mr Bell-Booth of Mahony, Samuel, Becker & Co, the firm that had acted for Mr Kaye on the purchase of the property. Mr Bell-Booth wrote to Mr Kaye by letter dated 31 January 1985, suggesting a gifting of shares in the property to Ms Woolf and the mother. This was the first of a number of communications by various solicitors on behalf of Ms Woolf over the years in which she made changing claims in relation to the property on different bases. I will refer to these letters when I address the constructive trust claim in the third cause of action.

[31] On 6 November 1985, Mr Kaye wrote to Mr Quedley, who was the vendor of the property and who had built a new house on the other part of the cross-lease site on which the property was situated. In his letter, Mr Kaye raised issues in relation to Mr Quedley's use of the carport and the garage, as well as Mr Quedley's general failure to adhere to his obligations under the SPA (the Quedley matter). This letter was the start of correspondence and later, lengthy and expensive litigation (the Quedley litigation), aspects of which are relevant to this proceeding. I will refer to those aspects later in this judgment.

[32] In April 1986, Ms Woolf and the parents travelled to Canada for Mr Kaye's wedding on 17 May 1986 to a Canadian, Janice Nunweiler. At that time, relations amongst the four members of the family were apparently reasonably good.

[33] By February 1987, the second mortgage to the CBA, by then Westpac,[4] was paid off in full.

[34] On 16 November 1987, Mr Kaye wrote a letter to his mother in which he refers to paying off the remaining balance of the Countrywide mortgage. He did so in March 1988, making a final payment of $27,214.38 partly with his own funds and partly with money from Ms Nunweiler. This amount, together with sum of $510 from an account held by Mr Kaye and Ms Nunweiler with Allied Mortgage Guarantee Investment Co, was paid into Mr Kaye's loan account with Countrywide.

[35] Once the mortgages had been repaid, Ms Woolf stopped having flatmates in the property and she stopped making "rental" payments herself. Accordingly, Ms Woolf has lived in the property "rent free" for 30 years to the present date. However, her position is that she continued to make contributions towards the property. I will consider the issue of contributions in relation to the third cause of action, the claim that Mr Kaye holds the property on a constructive trust.

[36] Sometime in the early 1990s, Ms Woolf commenced a relationship with Bruce Feigler, who moved into the property and lived there for several years with Ms Woolf. Mr Feigler did not pay rent. For part of the time he lived there, Mr Feigler rented out his own property.

[37] By March 1995, Rod Thomas, then of Simpson Grierson, solicitors, had been instructed on the Quedley litigation. The involvement of (now) Associate Professor Thomas began with an initial telephone inquiry from Mr Feigler looking for somebody in New Zealand to act for his girlfriend's brother. Associate Professor Thomas'

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4 I will continue to refer to the mortgage as the CBA mortgage.

involvement in the Quedley litigation went on for some two years. During this time, all of Associate Professor Thomas' correspondence went to Mr Kaye. Some of the correspondence was copied to Ms Woolf with Mr Kaye's approval.

[38] All of the accounts were rendered to Mr Kaye who paid them. All up, the total cost of the Quedley litigation was just under $140,000. Mr Kaye met those costs with no contribution or offer of contribution from Ms Woolf.

[39] The Quedley litigation settled at a mediation shortly before the date of the High Court hearing. One outcome was that the boundary between the two properties was re-drawn and the cross-lease title was converted into a freehold estate. This added value to the property. There is no evidence as to the date that the Quedley litigation settled. However, the last invoice issued by Associate Professor Thomas which includes a reference to the obtaining of title is dated 30 August 1998.

[40] In 1998 and 1999, there was correspondence between Ms Woolf and Mr Kaye regarding a proposal, from Ms Woolf's perspective, that she, her mother and Mr Feigler buy out Mr Kaye's interest in the property. For his part, while Mr Kaye acknowledges the correspondence, he says there was only one share in the property and that was his share. He says the negotiation in 1998 and 1999 related to Ms Woolf, Mr Feigler and the mother acquiring his 100 per cent interest in the property.

[41] Those negotiations did not reach any sort of conclusion because around this time Ms Woolf was dismissed from her employment as a secondary school teacher. She brought a case before the Employment Relations Authority and her employer was deemed guilty of workplace bullying, and therefore the dismissal was found to be wrongful and unjustifiable. However, Ms Woolf suffered a significant mental and emotional breakdown, and was unable to work for a period of approximately two years. This had the effect of making it impossible for Ms Woolf to raise and service a mortgage.

[42] During the period that Ms Woolf was unable to work, the mother came to Auckland and stayed at the property with her for an extended period from approximately 2000 to 2002.

[43] On 15 May 2006, the mother died. Ms Woolf and Mr Kaye were the sole beneficiaries and they benefited equally under her will. Mr Kaye was the executor. Disagreements between Ms Woolf and Mr Kaye at the time led to a consent order of this Court in 2007 appointing an independent solicitor as executor. No claim was ever made by the mother, nor has a claim been made by her executor, in relation to any interest the mother might have in the property. Nor was there any mention of the property in her will.

[44] In August 2006, Ms Woolf lodged a caveat on the title of the property claiming a beneficial interest pursuant to a trust, and claiming that Mr Kaye held the title as a trustee.

[45] In September 2006, Ms Woolf went to the United Kingdom to teach there for a period of 18 months, returning in April 2008. She did not arrange for the property to be tenanted in her absence. Nor did she tell Mr Kaye that she was going overseas and that the property would be empty.

[46] On 29 August 2014, the father died. Ms Woolf was appointed executor under her father's will and she was the sole beneficiary under the will. During his lifetime, the father did not make any claim for an interest in the property. There is no mention of the property in the father's will. As executor, Ms Woolf did not call in the father's claimed interest in the property.

[47] On 11 March 2015, Mr Kaye took steps to lapse Ms Woolf's caveat. On 23 March 2015, Ms Woolf applied to the High Court to preserve the caveat. An order was made by consent that the caveat not lapse.

[48] On 8 May 2015, Ms Woolf filed the present proceeding.

The claims – in brief

First cause of action – breach of contract

[49] In his opening submissions, Mr Keene, for Ms Woolf, identified this cause of action as Ms Woolf's primary claim. The position changed significantly during the

evidence and the claim for breach of contract was abandoned in closing submissions. However, the reason I refer to the claim is to demonstrate how far short Ms Woolf's evidence fell when compared to her claim.

[50] Ms Woolf says that by late 1981, both she and Mr Kaye were finding accommodation in Auckland difficult and unsatisfactory. The second amended statement of claim pleads that after discussion with the parents, the four of them decided that they would work together to purchase a property in Auckland for the primary purpose of providing accommodation in Auckland for Ms Woolf and Mr Kaye (the family agreement).

[51] The second amended statement of claim pleads that in the course of reaching the family agreement, all four family members agreed orally that the purchase price would be made up of cash contributions by Mr Kaye and the parents, and by the obtaining of one or more mortgages. It was also agreed that while Ms Woolf would not be able to pay a cash amount towards the purchase price, she would have responsibility, along with Mr Kaye, to service the two mortgages that were expected to be necessary to enable the purchase to proceed. In that way, Ms Woolf would contribute to the purchase price of the property, which was to provide long-term accommodation not only for Ms Woolf and Mr Kaye in Auckland, but also accommodation for the parents when visiting Auckland.

[52] It was also agreed that all four family members would be co-owners of the property which would represent an investment for the benefit of all four family members.

[53] Ms Woolf pleaded a number of other terms of the oral family agreement and she also pleaded implied terms, including that the names of all four family members would be shown on the title to the property as co-owners.

[54] Despite giving evidence in chief (by way of prepared briefs) that supported the pleadings, under cross-examination Ms Woolf made significant concessions (with no real resistance) accepting, in effect, that there was no oral family agreement as pleaded.

I will refer to those concessions later as they provide a background, particularly to the second cause of action, breach of resulting trust.

[55] In my view, it was entirely appropriate for Ms Woolf to abandon the first cause of action.

Second cause of action – breach of resulting trust

[56] Ms Woolf alleges that having regard to the payment by the parents of $14,000 towards the purchase price of the property, it was intended that they would be registered as co-owners. She further says that the agreement that she contribute towards the repayment of mortgages, and her signing of the loan application and guarantee for the second mortgage with the CBA, intended to result in her also being registered as a co-owner of the property.

[57] The second amended statement of claim pleads that payments by Ms Woolf and the parents towards the servicing and repayment of the first and second mortgages constituted payments towards the purchase price. In his closing submissions, Mr Keene limited the claim for the parents to the contribution at the time of settlement.

[58] Accordingly, at the point where Mr Kaye arranged for his name alone to be shown as the registered proprietor of the property, a resulting trust arose in favour of Ms Woolf and the parents, whereby Mr Kaye held the title for the property on trust for himself, Ms Woolf and the parents.

[59] Ms Woolf seeks a declaration that Mr Kaye holds the title to the property as trustee for himself and the other parties to the proceeding, and she seeks an order that he transfer ownership in the property to a group of owners comprising himself and the other parties in shares to be fixed by the Court.

Third cause of action – breach of constructive trust

[60] In the alternative, Ms Woolf claims that in orally agreeing the various matters the subject of the family agreement, all four family members formed a common intention to contribute financially to the acquisition, maintenance and improvement of

the property, and in the expectation of acquiring a share in the ownership of the property. This claim was adjusted, given the acceptance by Ms Woolf that there was no such oral agreement. Accordingly, despite the use of the words "common intention", the case for Ms Woolf was advanced on the basis that it was an expectation based constructive trust.

[61] In the pleadings, Ms Woolf seeks a declaration that Mr Kaye holds the title to the property as a trustee for himself and the other parties to the proceeding, and she seeks an order that Mr Kaye transfer ownership in the property to those parties and an order fixing the shares of each of the parties in the property.

[62] In his closing submissions, Mr Keene limited the claim for a constructive trust to Ms Woolf only. He abandoned the claim for a constructive trust in relation to the parents.

Fourth cause of action – application for order for sale under s 339 of the Property Law Act 2007

[63] Ms Woolf says by reason of the family agreement and/or the resulting or constructive trusts, she and her father's estate are co-owners of the property and have a combined interest of at least 50 per cent. She therefore seeks an order that the property be sold and the Court act as her agent to oversee the sale of the property, and for associated orders, including an order that the Court fix the shares of each of the parties in the net proceeds of sale.

The defence – in brief

[64] Mr Kaye pleads that there was no family agreement to purchase the property. He alleges that it was never the intention of the parties, nor was it implicit, that all four family members would be shown as co-owners of the property as it was always his property. In other words, there was no contract on which a claim for breach of contract can be based.

[65] In relation to Ms Woolf, Mr Kaye says that there is no resulting trust because Ms Woolf put no money in at the start. As to his parents, they offered, by way of a

gift, the sum of $3,500 (not $14,000 as claimed) to enable the agreement to be completed. The counter-presumption of advancement applies to the parents' contribution, so that a presumption of a resulting trust in relation to the parents does not apply.

[66] Mr Kaye further says that a constructive trust in favour of Ms Woolf does not arise, as any contributions by Ms Woolf to the maintenance and improvement of the property do not manifestly exceed the benefit that she derived. Ms Woolf has lived in the property essentially rent free for over 30 years.

[67] In a nutshell, Mr Kaye says that his generosity towards Ms Woolf, allowing her to remain in the property rent free, has now backfired, given that Ms Woolf, because of her own financial position, is trying to take advantage of him by claiming an interest in the property. He says he was, at times over the years, prepared to consider an interest for Ms Woolf, provided he received a full accounting of contributions from all parties. But, despite his requests for such information and supporting documentation, that was never sent to him.

[68] Mr Kaye also pleads affirmative defences of limitation and laches.

[69] Mr Kaye further raises a number of counterclaims based on two alternatives, as follows:

(a) If the Court were to hold that the parties do have an element of co-ownership, then there are counterclaims for:

(i) A common law occupation fee;
(ii) Occupation rent pursuant to s 343(f) of the Property Law Act 2007 (PLA); and
(iii) Compensation pursuant to s 343(a) of the PLA.

(b) If the Court were to determine that Mr Kaye is the sole owner of the property, then there are counterclaims for rent or mesne profits, limited to six years prior to issuing the counterclaims.

[70] In addition, Mr Kaye seeks an order for possession (together with a writ of possession) and an order discharging the caveat that Ms Woolf lodged on the title in 2006. The success or otherwise of these two counterclaims will largely follow the outcome of the other causes of action.

Ms Woolf's responses to affirmative defences and counterclaims

[71] Ms Woolf denies that her claims based on a resulting trust and constructive trust are statute-barred, because of the provisions of s 21(1)(a) and (b) of the Limitation Act 1950.[5]

[72] Ms Woolf also denies that the principles of laches apply to her claims based on a resulting trust and constructive trust.

[73] Ms Woolf further says that it would not be appropriate for her to be required to pay an occupation fee, occupation rent or mesne profits of any kind.

Extent of the dispute

[74] Ms Woolf and Mr Kaye agree on very few factual matters in this proceeding. Relevant events go back to 1981. Establishing what occurred up to 36 years ago is difficult in any case. There is the natural dimming of memory with time. Additionally, in this case there is the loss of relevant documentation; in particular, as a result of both a fire and a flood at Mr Kaye's properties in Canada. Also, and importantly, the parents, two of the four key players, are now deceased. That leads to my comments on the relationships between the four family members, which I address next.

Overall family dynamic

[75] The nature of the relationships between the four family members is important because Ms Woolf relies on a number of hearsay statements, both oral and documentary, made by the parents. Mr Kaye challenges the admissibility of some of those statements. Even if the circumstances are such that I consider any particular statement is admissible, there will then be the issue of the weight that should be given

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5 The parties agree that the Limitation Act 1950 applies.

to that statement. The dynamics among the four family members is therefore part of the relevant background.

[76] One of the few things that Ms Woolf and Mr Kaye do agree on is that they both had very difficult childhoods. Mr Kaye said it was not an exaggeration to say that their father was a tyrant. He was unreasonable, aggressive and was violent to both children, to their mother and other people. He treated their mother appallingly throughout their childhoods and subsequently.

[77] Ms Woolf did not disagree with any of that. She referred to their father as very controlling and verbally abusive. She said he had a very bad temper, and he would regularly rant and rave at their mother.

[78] Mr Kaye said that, as a result of his dysfunctional family and their untidy and dishevelled home created by their father, he and Ms Woolf, as children, were regularly picked on by others, both children and adults. This led to Mr Kaye changing his name from Woolf to Kaye, his mother's maiden name.

[79] It seems that their mother, on the other hand, was kind and protective of her children. There was an evident fondness on the part of both Ms Woolf and Mr Kaye towards her. One of the reasons Mr Kaye gave for his purchase of the property was to provide his mother with a refuge from his father if she needed it from time to time.

[80] The mother was also something of a peace-maker, even when Ms Woolf and Mr Kaye were adults. Ms Woolf, in her evidence-in-chief, said that she now realises that their mother was caught between Mr Kaye and her to a significant extent. Ms Woolf said that what her mother was saying to her was different to what she was saying to her brother. This will be important in considering some of their mother's statements.

[81] Of particular relevance, in terms of the issue I am presently addressing, is that following their mother's funeral in 2006, Mr Kaye, with the assistance of one of their father's brothers and with the agreement of Ms Woolf, had their father committed to a mental health unit in Timaru for psychiatric assessment and treatment. Ms Woolf says

her father was discharged soon after his committal and he returned to the family home. After her father's discharge, Ms Woolf, on reflection, considered that she and her brother should not have had her father committed, and she contacted her father to apologise and make her peace with him.

[82] However, the already difficult relationship between the father and Mr Kaye was irreparably damaged. They never spoke again. When the father died in 2014, Ms Woolf was the sole beneficiary under her father's will and was also sole executor. In fact, she did not tell Mr Kaye that their father had died, because, she said before his death, her father had asked her not to tell his son of his death when it occurred.

[83] That family background, which is largely agreed, will be important when I come to consider any statements by either of the parents. The statements fall into three broad categories, namely statements made on oath, written statements and oral statements. I will make my assessment of documents or statements as I come to them. However, as is apparent from the foregoing, real caution will be required.

Resulting trust – the pleading

[84] In his closing submissions, having abandoned the claim for breach of contract, Mr Keene's position was that this cause of action was Ms Woolf's primary cause of action both in relation to Ms Woolf herself and the parents.

[85] The second amended statement of claim pleads that:

(a) The payment of $14,000 by the parents towards the purchase price of the property was intended to result in the parents being registered as co-owners of the property;

(b) The agreement of Ms Woolf to contribute towards the repayment of the mortgages and the signing of the loan application in favour of the CBA was intended to result in Ms Woolf being registered as a co-owner of the property;

(c) The payment of monies by Ms Woolf and the parents towards the servicing and repayment of the first and second mortgages constituted payments towards the purchase price (this part of the claim in relation to the parents, but not Ms Woolf, was abandoned in closing submissions); and

(d) At the point when Mr Kaye arranged for his name alone to be shown as the registered proprietor of the property, a resulting trust arose in favour of Ms Woolf and the parents so that he held the title to the property on trust for a group of persons comprising himself, Ms Woolf and the parents.

[86] The terms of the trust obliged Mr Kaye to:

(a) Change the title to the property if called upon to do so by the three other family members;

(b) Recognise and acknowledge their interest in the property; and

(c) Not to attempt to convert that part of the property in effect owned by the remaining three family members to his own use.

[87] As already noted, Ms Kaye's position is that the parents' contribution was $3,500 and it was a gift. Ms Woolf made no contribution prior to purchase. Therefore, no resulting trust arises.

Resulting trust – legal principles

[88] The legal principles are well settled.

[89] The circumstances in which a resulting trust of the type relied on in this case will arise is set out in the well-known statement by Lord Browne-Wilkinson in

Westdeutsche Landesbank Girozentrale v Islington London Borough Council,[6] which was affirmed in New Zealand in *Crampton-Smith v Crampton-Smith*:[7]

> … where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a *presumption*, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer … A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention …

[90] In *Stack v Dowden*, the majority of the House of Lords confined the applicability of resulting trusts, at least in the context of contributions of an unmarried couple, to the purchase of a property while they were living there.[8] However, the New Zealand Court of Appeal, in *Crampton-Smith v Crampton-Smith*, confined their Lordships' observation to the context of that particular case.[9]

[91] As noted by Fitzgerald J in *Hemu Trade Co Ltd v Le*:[10]

> [60] In New Zealand therefore, a resulting trust remains the orthodox response when a party has contributed to the purchase price of property which is then registered in the name (or names) of another (or others). If proved, a resulting trust establishes a proprietary interest or right in rem.

[92] Where the presumption of a resulting trust applies, it is generally regarded as having dispositive effect unless the presumption is rebutted.[11]

[93] The presumption of a resulting trust can be rebutted by proving that the transferor intended a different consequence, such as an outright gift or loan. The presumption may also be rebutted by the counter-presumption of advancement. The onus is on the transferee,[12] in this case, Mr Kaye.

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6 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, [1996] 2 All ER 961 (HL) at 708.

7 *Crampton-Smith v Crampton-Smith* [2011] NZCA 308, [2012] 1 NZLR 5 at [35]-[36].

8 *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432.

9 *Crampton-Smith v Crampton-Smith*, above n 7, at [36].

10 *Hemu Trade Co Ltd v Le* [2018] NZHC 982.

11 *Crampton-Smith v Crampton-Smith*, above n 7, at [37]; referring to *The Venture* [1908] P 218 (CA) at 230.

12 *Crampton-Smith v Crampton-Smith*, above n 7, at [42]; where the Court of Appeal referred with approval to William Swadling "Explaining Resulting Trusts" (2008) 124 LQR 72 at 74.

[94] Both the weight of the presumption and the nature of the evidence required to displace it differ according to the circumstances of the case.[13]

[95] I will consider the position of the parents and Ms Woolf separately as there are different considerations for each of them.

The parents – resulting trust

[96] As noted, in his closing submissions, Mr Keene limited the claim to the parents' contribution for settlement of the purchase. In other words, he no longer pursued the claim for post-purchase contributions. He submitted that the most likely occurrence was that Mr Kaye did in fact reimburse his mother for all of her expenditure in relation to the property post the purchase of the property in 1982. That was an appropriate concession on all of the evidence, both from Mr Kaye and particularly the evidence of Mr Kemp. Mr Kemp analysed the available documentation relevant to the mother's contributions to the property after the purchase and Mr Kaye's repayments of the mother, evidenced by bank drafts from Mr Kaye to the mother, as well as other documentation.

[97] The issues for determination in relation to the parents are:

(a) Whether the parents contributed $3,500 or $14,000 towards the purchase price;

(b) Whatever the amount of the parents' contribution to the purchase price, is the presumption of a resulting trust rebutted by:

(i) the counter-presumption of advancement and, in particular, does such presumption apply to an adult child; or

(ii) direct evidence of the parents' intention to make an outright transfer.

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[13] *Crampton-Smith v Crampton-Smith*, above n 7, at [41]; referring to *Fowkes v Pascoe* (1875) LR 10 Ch App 343 at 353.

Was the parents' contribution to the purchase price $3,500 or $14,000?

[98] Ms Woolf had no knowledge at the time as to how much her parents contributed to the purchase price of the property.

[99] Mr Kaye said that after a second visit to the property, he telephoned his mother and told her he was seriously interested in buying the property, and that he had been looking for a while. Mr Kaye said his mother told his father generally what his plans were and he confirmed with his father what the idea was. Mr Kaye said his parents made it very clear they were willing to help unconditionally as might be necessary. Accordingly, no conditions were placed on him then or since. He asked his parents' permission to consider their AMG certificates if his were not accepted. He said they agreed to that, in the event that became necessary.

[100] Mr Kaye said that the negotiations with Mr Quedley over the purchase of the property were extremely delicate. He was pleasantly surprised when Mr Quedley was interested in the mortgage certificates, but only those that were due very soon and had the highest returns. Mr Kaye says that this was consistent with Mr Quedley's need to finance the house he was building on the other part of the cross-lease site. Mr Kaye showed Mr Quedley the list of his and his parents' certificates, which he did with his parents' explicit permission to proffer if necessary. Mr Quedley picked out the ones he wanted which were to come due very shortly with full bonuses applying. Those certificates then became the basis of the SPA. Three of those belonged to his father. Mr Kaye says until discovery, he thought his mother also had an interest in one of the securities to the value of $1,500.

[101] Mr Kaye says that cash from his parents was never offered and he did not have signing authority to take money for their accounts.

[102] Ms Woolf accepts that three of the mortgage securities had been held by the father and their value was $3,500.

[103] The evidence Ms Woolf relies on in support of her claim that the parents contributed $14,000 is as follows.

[104] Mr Keene first says that in late 1981, when Mr Kaye was contemplating purchasing the property, he was aged approximately 25 years and that during the preceding years Mr Kaye had been at university. A sum in excess of $40,000 (the actual amount was $41,000) was a large amount in 1981. In this context, Mr Keene also notes the comments by Mr Kaye in a letter in early 1982 to his solicitors that finances were "stretched".

[105] Mr Keene therefore submits that it is more likely that Mr Kaye was dependent on a sum in the vicinity of $14,000 from his parents.

[106] However, for the purposes of seeking second mortgage finance from another bank, the POSB,[14] Mr Kaye completed an application form in November 1981. There was no suggestion that the information provided in the form was incorrect. Mr Kemp said that he had undertaken a review of Mr Kaye's likely financial position based on the loan application. In summary, Mr Kemp said that this review indicated that Mr Kaye had sufficient financial means to meet the funding of the property settlement.

[107] This is against a background of Mr Kaye's evidence, which was not contradicted in cross-examination, of his working and savings habits which commenced at High School and continued through university. He said he was always very good with money, saving and investing.

[108] Mr Kaye's evidence referred to earlier was that he worked during his university holidays at an engineering firm in Auckland and continued there after university. At times, he worked multiple jobs. He said after his arrival in Auckland, he kept on working, saving and looking at investment opportunities. He said he had almost no other personal lifestyle.

[109] On the basis of Mr Kaye's unchallenged evidence and Mr Kemp's opinion evidence, I accept that Mr Kaye would have had the necessary money available without requiring a $14,000 input (as opposed to a $3,500 input) from the parents. In accepting that evidence, I bear in mind, of course, that there is no onus on Mr Kaye to

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[14] The application was rejected hence the application to the CBA.

prove that he was able to pay the necessary amount to settle. It is for Ms Woolf to prove that $14,000 was paid by the parents.

[110] Next, Mr Keene relies on a document that consists of two pages of handwritten workings by the mother with a date of 20/11/81. Under the heading "cheques", there are three identified sources (S.C.S.B, Rollestons and P.O.) with the amounts totalling $6,500. There is then a list under the heading "A.M.G." of various certificates identified by name and amounts for the mother, the father and Mr Kaye in the sums of $1,000, $3,500 and $8,750 respectively. There is then a heading "Marac" with certificate numbers and amounts with question marks beside them with a total of $3,492. Lastly, on the first page there is a grand total in the sum of $16,742, with cheques of $6,500 being added, giving a final total of $23,242.

[111] The second page has a heading, "Details of what came from where". The "Amount from Dad" is said to be "Previously to CountryWide" with the amount of $5,317. Under the heading "Mother", there are various references with the total of $5,585.

[112] At its highest, this two-page document could be said to be a document listing sources of funding available for settlement of the property. The document also needs to be seen in the context of Mr Kaye's evidence that he had assisted his parents in financial matters from a very young age. He said that from when he was a very young boy, he prepared and completed his parents' tax returns, as well as his own, and he found many tax and other savings for both parents. He said his mother had invested her money in debentures via her solicitors. But he said because debentures were unsecured against any capital assets and the lawyers were charging high fees to manage his mother's money, he advised them to move to other instruments. He was also able to invest his father's much smaller amount of money.

[113] Mr Kaye said he introduced both his parents to AMG, Marac, Countrywide and other beneficial investments for over three years before he bought the property. They trusted him to invest wisely and safely, and he took that very seriously to maximise their income as they were not well off. But it was not his money and it did not go into his bank account(s). Mr Kaye said that his mother's notes of 20 November 1981 and

the AMG certificates reflect some of the limited money his parents had to invest, and the note confirms that he was helping them to invest long before the property was purchased. That is how his parents had AMG certificates and other investments, all of which he found, told them about, received their confirmation on investing each time, and invested and managed for them.

[114] I accept Mr Kaye's evidence that he assisted his parents with their investments.

[115] As to admissibility, I consider that the circumstances relating to the statement (document) provide reasonable assurance that the document is reliable.[15] The evidence was that the mother was financially astute. Additionally, as the mother is unavailable as a witness, the document is admissible.[16] It is reliable as far as it goes, but I take nothing further from it than what appears on its face, namely these were funds or amounts of money that existed as at the date of the document. Given the date of the document, I do not consider it assists Ms Woolf in her case that the parents in fact contributed $14,000 towards the purchase of the property. Indeed, under cross-examination Ms Woolf acknowledged that the document was not evidence of what the parents contributed to the purchase.

[116] There are two versions of the next document that Mr Keene relies on. The document again contains handwritten workings made by the mother. One version was provided by Ms Woolf on discovery and the other by Mr Kaye. On the version provided by Ms Woolf, some parts of the document are crossed out. Further, the document discovered by Ms Woolf appears as the second and third pages of a four-page document.

[117] The first page of Ms Woolf's document does not form part of Mr Kaye's version of the document. I consider that the first page of Ms Woolf's document is a separate document. It is of a different size from the next two pages. In another respect, it does not seem to be part of the two pages which match the two pages discovered by Mr Kaye. I say that because on page 2 of Mr Kaye's version, the mother refers to the second mortgage and says, "I think it must have been $15,000 because it will be

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15 Evidence Act 2006, s 18(1)(a).
16 Section 18(1)(b)(i).

cleared by 1987". Ms Woolf has purported to date the document (on her fourth page) as "31/01/1988", but that cannot be right given the reference to "it will be cleared".

[118] I will therefore deal with the single page (on which Ms Woolf has noted "Update January 1988") as a separate document after the two-page document which I now address. The document is not dated. As noted, there is a fourth page in Ms Woolf's version. It is blank apart from Ms Woolf's entry at the bottom of the page "31/01/88 Mother's calculations".

[119] One page of the document sets out amounts under the heading of "Noel Bernard Woolf" by reference to AMG certificates, cheques and other sources, totalling $4,510. There is then a heading "Violet Isabel Woolf" (the mother), and certificates and cheques and other sources totalling $6,023.76 are listed. There then follows an amount of $590 from a joint account of the parents. The total of these three amounts is $11,123.76. There are several underlinings under that amount. Below that there is a list of AMG certificates under the heading A B Woolf (Mr Kaye) totalling $8,750 with some Marac certificates, giving a grand total of $12,242.

[120] On the other page, the mother wrote as follows:

> The lawyer asked for a detailed statement of how much Dad & I contributed to cut down the "gift" amount so the top part, down to the double line is a photocopy of what I copied out neatly from our previous notes and sent to him.

[121] It is arguable that the mother, in her reference to the "double line", was there referring to the amount of $11,123.76 which has several underlinings below it.

[122] The mother then records that, "I have a note of the actual cheques I sent to you with the combined moneys taken from our accounts". Various amounts are listed, namely two cheques said to be made out to Countrywide, one for $1,800 and one for $685. There is then a cheque from South Canterbury Finance for $3,300, one from "PO" for $600 and one for $2,600 from Rollestons. They total $8,985. The mother then adds, "but this is not much use as I cannot make the amounts balance up exactly with the cash taken from the different accounts. However, it is a record of the cheques".

[123] The mother's note then says, "Countrywide loan was $30,000. Westpac. 2nd Mtg $15,000". She then queries whether the second mortgage was in fact $25,000. The note continues (as noted above), "I think it must have been $15,000 because it will be cleared by 1987".

[124] The final part of page 2 appears to refer to the lower portion of page 1 where the mother lists out Mr Kaye's certificates. She says:

> Although this lower part does not look much different to the photocopying, it is just ballpoint pen added. The lawyer did not ask for the amount you contributed because he will have that anyway and I did not [word missing] this because it is only the investments & has no relation to the <u>full amount</u> you <u>contributed</u> & of which I have no copy.

[125] At its highest, it can be said that at least part of the document appears to relate to the purchase of the property, having regard to the reference to the two mortgages and also the fact that three of the certificates for the father, totalling $3,500, were those used as part of the settlement amount. One other aspect of the document that arguably assists Ms Woolf is that the total amount of $11,123.76, which is underlined, appears in a document completed by Ms Nunweiler, to which I will shortly refer.

[126] However, there is a difficulty for Ms Woolf, at least in relation to part of the document, in that neither of the two cheques referred to in [122] above, said to be made out to Countrywide, appears as a deposit in Mr Kaye's Countrywide account, either as individual amounts or in combination.

[127] For the reasons given in [115] above in relation to the first document, I consider this document is admissible, but I give it no weight in determining whether the parents contributed $14,000 to the purchase price.

[128] Probably the best document from Ms Woolf's perspective is the one page document written by the mother (which formed part of Ms Woolf's version of the document above). The mother did not date it, but Ms Woolf has written "update January 1988" on it. The one page document is as follows:

Deposit	5000.00
Cash	25430.00
Deb etc	14070.00
Countrywide	30000
Westpac	15000
	$89500.00

Our cheques (cash)		Our Debentures
S.C.S.B	3300	$3,500.00
SC Finance	1800	
Tripp Rolleston	2600	
	685	
PO Thrift Club	400	
Super from PO	1038.76	
	600	
	10423.76	

	CASH		DEBENTURES
Deposit	5000.00	Total	14070.00
Cash	25400	Less ours	3500.00
	30430.00	ALWYN	10570.00
Less our contribution	10423.76		
ALWYN	20006.24		

	Our Total	ALWYN
CASH	10423.76	20006.76
DEB	3500	10570
(debentures)	13923.76	30576.76

Countrywide	30000
Westpac	15000
Alwyn	30577
US	13923
TOTAL	89500.00

1982	Without allowing costs			
US	Virginia			Alwyn
$14000	Westpac	15000	1982	30500.00
	Countrywide	2000	1988	28000.00
		17000.00		58500.00

[129] I consider that the document is admissible for the reasons given in relation to the previous documents.

[130] On its face, the document suggests that the parents did pay $14,000 (rounded up from $13,923.76) towards the purchase. However, the Court is faced with the situation where Mr Kaye strongly denies receiving anything more than $3,500 by way of the mortgage certificates as against the document prepared (apparently) six years after settlement, on which there has been no evidence from the parents and no cross-examination. Additionally, there are some identifiable errors, or at least issues:

(a) An amount of $2,000 is attributed to "Virginia" (Ms Woolf) as payment to Countrywide. However, only $1,600 was paid off at the time Mr Kaye arranged to discharge the mortgage;

(b) The two amounts of $400 and $1,038.76 attributed to PO Thrift Club and Super from PO appearing in the second section of the document do not appear in the document referred to above in [110] and following, whereas the other amounts in that section do; and

(c) There is the difficulty referred to in [126] above in that two cheques said to be made out to Countrywide do not appear in Mr Kaye's Countrywide account.

[131] While on its face the document may appear to support Ms Woolf's claim, I am not prepared to give it any weight for the reasons referred to above and in the absence of evidence from the maker. I also note that Ms Woolf was not able to recall any discussions with her mother about the document.

[132] Mr Keene next relies on a letter addressed to Mr Kaye dated 29 November 1988 from solicitor Deirdre Milne, of Milne, Ireland, Walker. Ms Milne first advises Mr Kaye that both mortgages have been discharged and confirms that he is the sole owner of the property. The second matter that Ms Milne raises, on Ms Woolf's instructions, is the possibility of getting "some kind of settlement in relation to the ownership of the house". In that context, Ms Milne states:

> The figures look like this. The house was purchased in 1982 for $89,500.00 with a mortgage of $45,000.00 leaving capital input of $44,500.00. Of this you paid $30,500.00 plus the legal fees and your mother paid $14,000.00.

[133] Mr Keene submits that this information as to the mother's contribution must have come from the mother. That is not necessarily so. It could have come from Ms Woolf relying on some form of communication from the mother. I do not place any weight on this letter in the absence of evidence from the mother.

[134] The next document Mr Keene refers to is an email from Mr Kaye dated 17 August 1998, together with an attached schedule, sent to Mr Feigler in the context

of the proposal by Ms Woolf that she, Mr Feigler and the mother buy shares in the property. Mr Kaye's evidence was that Ms Nunweiler (who did not give evidence) prepared the table. It is headed "Contributions to NZ house ($NZ) Money PAID IN." What the table shows for January 1982 in the column headed "Mom/Dad" is the amount of $11,123.76. That amount coincides with the total of the certificates referred to in Ms Woolf's version of the document at [119] above. However, there is no contribution recorded in that column for February or March 1982. In other words, it does not reflect the contribution of $14,000 claimed by Ms Woolf.

[135] Further, in support of Mr Kaye's position that his total contribution on purchase was $41,000, in the first column in the same table under the heading "Alwyn", for January 1982, is the amount of $45,370. In a second column headed "Alwyn", there is the amount of $39,770, also for January 1982. The first amount of $45,370 has a footnote which reads, "Down payment, legal fees and stamp duty". My reconstruction of the numbers taken from the settlement statement of Mr Kaye's solicitors falls short of the larger amount. Nevertheless, the two figures in the columns for Mr Kaye approximate the $41,000 he claims to have paid towards the purchase price.

[136] This document, while referring to an amount of $11,123.76 from the parents, in fact supports Mr Kaye's position that he contributed the entire cash amount towards purchase on settlement.

[137] The final document that Mr Keene relies on is a statutory declaration completed by the father before his solicitor Peter Hutt on 22 August 2012, and repeated in the same terms in another statutory declaration in September 2013. In the statutory declaration, the father said that settlement of the property took place in February 1982, the purchase price of the property was $89,500 and was financed in part by a cash contribution of $14,000 from him and his wife.

[138] Mr Hutt gave evidence as to how the declaration was completed. He said the document was initially prepared by Jane Boyce of Foy & Halse lawyers. Ms Boyce was Ms Woolf's lawyer in Auckland. The document was sent to Mr Hutt to discuss with the father and with it came some questions which Ms Boyce wanted Mr Hutt to clarify with the father. Accordingly, Mr Hutt said he did not prepare the statutory

declaration. He said, after talking to the father and going through the already prepared statement with him, Mr Hutt reported back to Ms Boyce and an amended fuller statement was then sent down to him by Ms Boyce. He arranged for the father to read it through again. Mr Hutt discussed it with him and the father then signed it.

[139] Mr Hutt accepted that the statutory declaration contained words that the father would not have used. He said it looked like a lawyer's version of what the father would say in his own colloquial way. However, Mr Hutt said that he was perfectly happy that this was the father's story, albeit definitely not in language that he would habitually have used.

[140] In determining whether to admit the father's statutory declaration, I refer first to other statements made by the father so as to make a reliability assessment of his statements generally. I will then consider the statutory declaration itself.

[141] In a letter dated 9 February 2007 to Jane Boyce, the father stated that Mr Kaye had left the country to work in Canada to earn money to keep the house afloat, but did not send any money. The statement that Mr Kaye did not send any money from Canada is contrary to a large body of documentary evidence by way of visa records, bank drafts and money transfers, as well as acknowledgements by Ms Woolf that Mr Kaye sent money. There are also references in handwritten letters from the mother acknowledging monies sent by Mr Kaye, as well as evidence from Mr Kaye himself.

[142] In a handwritten letter dated 8 February 2009 to Mr Hutt, the father stated, "That with Alwyn's consent from Canada given to Countrywide and to protect our investment, once a fortnight, we on a Friday night at 7 pm would deposit an amount of our money to the Countrywide office." The father repeated this assertion in two other documents. Under cross-examination, Ms Woolf acknowledged there was no money going into the Countrywide account consistently on a fortnightly basis. She also said she did not keep the money and did not use it. She acknowledged that it was quite possible that her father was wrong in those three statements he made.

[143] In his handwritten letter to Mr Hutt dated 8 February 2009, the father asserts that Mr Kaye was always asking "us" to pay his house insurance on the property. That statement does not accord with the documentary evidence.

[144] In relation to the cross-lease issues with Mr Quedley, the father refers to time spent with Ms Woolf's lawyer, at her cost, over the serious problem of the boundary driveway. However, the evidence is clear that the lawyers instructed in relation to the Quedley matter and later the litigation were not Ms Woolf's lawyers, nor did she make any payments to the lawyers. Ms Woolf acknowledges that.

[145] Further, in relation to the Quedley litigation, and again in his letter of 8 February 2009 to Mr Hutt, the father says that Mr Kaye did not get involved with the Quedley litigation until 1997 to face a court case with Mr Quedley. This is also incorrect. The documentary evidence makes it clear that Mr Kaye was involved, at least from 1994. There is a letter dated 1 February 1994 that Mr Bell-Booth wrote to Mr and Mrs Quedley on Mr Kaye's behalf.

[146] There is also, and most significantly in my view, the complete breakdown of any relationship between the father and Mr Kaye as from 2006 onwards. That, and the other matters referred to above, impact in a significant way on the reliability of the statutory declaration to which I now turn.

[147] There are a number of reliability issues in relation to parts of this document itself.

[148] The father says that, "Alwyn, Virginia and Vi looked at several properties before deciding to purchase 14 Woodhall Road, Epsom". However, it is acknowledged by Ms Woolf that her mother was not involved in looking at any properties before the purchase of the property, nor did she inspect the property.

[149] The father further says that Mr Kaye and Ms Woolf dealt with the lawyers in Auckland to settle the purchase. Ms Woolf acknowledges that is incorrect. She accepts that she did not meet or talk with the lawyers involved.

[150] The father also says that the mother contributed towards expenses when there were insufficient funds to meet the payments referred to, namely mortgage payments, rates, insurance, maintenance and outgoings such as electricity, telephone and water. I have already referred to Mr Keene's acknowledgement that any payments made by the mother for property expenses were reimbursed by Mr Kaye. Any payments that the mother may have made on behalf of Ms Woolf for electricity, telephone and water cannot be seen as property expenses, but rather outgoings to be met by tenants.

[151] The father says that it was in or around 1986 that he, Ms Woolf and the mother became aware that their names were not on the title. He said they asked Mr Kaye to regularise this by having them all named, that is all four as registered proprietors on the title. The alleged request for all four family members to be named on the title is inconsistent with Ms Woolf's ongoing, but changing, correspondence through lawyers with Mr Kaye. At times, her proposals related just to her being added to the title, at other times the correspondence included the mother, but it was only in later years that the father was included. I refer to this correspondence further in relation to the constructive trust claim.

[152] Mr Kaye takes issue with many of the other assertions made by his father in the statutory declaration. However, for the present purposes, it is sufficient to focus on those statements of the father that are demonstrably contradicted, either by documentary evidence or the position taken by Ms Woolf, in the proceeding.

[153] Having regard to all the matters I have referred to in relation to the reliability of the father's statements generally, the breakdown of the relationship between father and son in 2006, and the reliability of his statements in the statutory declaration, I do not consider that the statutory declaration passes the necessary reliability assessment under s 18(1)(a) of the Evidence Act 2006. I, therefore, decline to admit it.

Conclusion on amount contributed by the parents to the purchase price

[154] Whether the admissible documents are considered individually or in combination, Ms Woolf has not established that the parents' contribution to the purchase price of the property was $14,000 as she alleges. I find that the contribution was $3,500 made up of mortgage securities.

[155] Although the mortgage securities were in the name of the father, I accept the evidence of Mr Kaye that both parents had offered mortgage securities for the purpose of the purchase of the property. It happened that Mr Quedley selected those three in his father's name. I therefore propose to treat the contribution as a contribution by the parents, rather than as a contribution solely by the father.

[156] Having found that there was a contribution, albeit in the sum of $3,500 rather than $14,000, the property is presumed to be held on a resulting trust for the parents in proportion to the shares paid. However, that presumption of a resulting trust can be rebutted by the counter-presumption of advancement or by direct evidence of the parents' intention to make a gift, to which I now turn.[17]

Advancement

[157] Advancement is a form of gift arising where the transferor is under a natural obligation to provide for the transferee. In those instances, the law will presume that the transferor intended to benefit the transferee by way of a gift. As Fitzgerald J explains in *Woodcock v Woodcock*:[18]

> [111] In some cases, the relationship between transferor (Heather in this case) and transferee (Tony) is such that there is a natural obligation for the transferor to provide for the transferee (*loco parentis*, for example). This raises a counter-presumption to the presumption of a resulting trust, namely the presumption of advancement: the law presumes the transferor to have intentionally relinquished his or her beneficial interest in the property …
>
> (Citations omitted)

[158] Traditionally, the presumption was only thought to apply to transfers between fathers and their children, husbands and wives, and where the transferor was in a position of *loco parentis* to a child.

[159] In *Equity and Trusts in New Zealand*, Jessica Palmer discusses the scope of the presumption in relation to parents and children:[19]

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17 *Crampton-Smith v Crampton-Smith*, above n 7, at [40].

18 *Woodcock v Woodcock* [2018] NZHC 470.

19 Jessica Palmer "Resulting Trusts" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 307 at [12.5.4].

> It is well settled that a father's provision for his offspring, including step-children and ex-nuptial children, gives rise to a presumption of advancement. This has been extended to include anyone who is in loco parentis. A person is said to be in loco parentis to a child if he or she stands in the position of parent to that child. For example, uncles and grandfathers might fulfil the role of father when the natural father died. In the last century there was doubt whether the presumption of advancement applied when a mother, as opposed to a father, purchased property in the name of her children. This was because mothers were under no legal or moral duty to maintain their children. This view is unlikely to prevail today, and is probably inconsistent with s 19 New Zealand Bill of Rights Act 1990 (the right not to be discriminated against on grounds of, among other things, gender), and therefore unlawful. Relationships to which the presumption of advancement has not applied include transfers from a stepparent to stepchild, and from a parent to a son-in-law or daughter-in-law …
>
> (Citations omitted)

[160] Recently, in a footnote in *Zhang v Li*, France J also commented:[20]

> Some of the money was advanced by the mother and some by the father. There are debates as to whether the presumption of advancement extends to mothers. It is unnecessary in this case to consider that. Further, it is preferable to treat the money as "the parents" rather than being an advance from one or the other …

[161] I have treated the money as being advanced by both parents. Although it is strictly unnecessary to consider the question of the position of a transfer from a mother alone, I am satisfied that the presumption does apply to transfers from mothers to their children.[21]

[162] I now turn to the general scope of the presumption of advancement.

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20 *Zhang v Li* [2017] NZHC 129, fn 2.

21 See *Sutherland v Wadham* [1992] NZFLR 455 (HC) at 460; *Charles v Official Assignee (No 1)* HC Wellington CP991/90, 9 May 1994 at 17; *Re Brownlee* [1990] 3 NZLR 243 (HC) at 248; *Holster v Grafton* (2008) 9 NZCPR 314 (HC) at [19]-[20]; *Mulligan v Rhodes* [2015] NZHC 2369 at [25]; *Horsfall v Potter* [2017] NZSC 196 at [50], fn 29; *Terry Schwass Co Ltd v Marsh* [2017] NZHC 1382 at [16]; *Close Invoice Finance Ltd v Abaowa* [2010] EWHC 1920 (QB) at [93]; David Hayton, Paul Matthews and Charles Mitchell *Underhill and Hayton Law of Trusts and Trustees* (19th ed, LexisNexis, London, 2016) at [25.36]; David Fox "Resulting Trusts" in John McGhee (ed) *Snell's Equity* (33rd ed, Sweet & Maxwell, London, 2015) 675 at [25-009]; *Pecore v Pecore* [2007] SCC 17, [2007] 1 SCR 795 at 809-810; *Nelson v Nelson* (1995) 184 CLR 538 (HCA) at [13]-[15].

Adult child

[163] In *Pecore v Pecore*, the majority of the Canadian Supreme Court held that the presumption did not apply to an advance made by a parent to an adult child, regardless of whether the adult child was independent or dependent.[22] It was preserved in relation to transfers by parents to minor children.[23]

[164] The decision in *Pecore* has not been analysed by the New Zealand Courts. Commenting on *Pecore*, Fitzgerald J in *Woodcock v Woodcock* stated:[24]

> [112] … There is some suggestion [the decision] may be given little weight in New Zealand, although later Court of Appeal judgments refer to the presumption without commenting on any suggested limited effect or weight …
>
> (Citations omitted)

[165] The two Court of Appeal judgments referred to in *Woodcock v Woodcock*, namely *Crampton-Smith v Crampton-Smith* and *Chang v Lee*, do no more than acknowledge the existence of the presumption of advancement.[25] They do not comment on its scope.

[166] As Mr Kaye is an adult child, it is necessary to address the scope of the presumption of advancement in light of the *Pecore* decision to determine whether it should apply to adult children.

The Pecore decision

[167] In that case, an elderly father transferred the bulk of his assets into accounts in the joint names of himself and his adult daughter, P. They were both given a right of withdrawal. He informed financial institutions, however, that he owned the assets and was not gifting them to P.

[168] During the rest of his lifetime, the father alone deposited funds into the accounts, controlled the assets and paid taxes on income earned on the assets. In his

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22 *Pecore v Pecore*, above n 21, at 813.
23 At 813.
24 *Woodcock v Woodcock*, above n 18.
25 *Crampton-Smith v Crampton-Smith*, above n 7, at [40]; *Chang v Lee* [2017] NZCA 308 at [24].

will, the father left specific bequests to P, her husband M, and his grandchildren. He did not mention the accounts. The residue of the estate was to be divided equally between P and M.

[169] P and M subsequently divorced. The dispute, therefore, centred around the balance remaining in the accounts. M claimed that P held the balance in the accounts in trust for the benefit of her father's estate, while P claimed that the funds had been gifted to her.

[170] Rothstein J, writing the judgment for the majority,[26] stated that the first issue was whether the presumptions of resulting trust and advancement continued to apply in modern times.[27]

[171] The Judge first provided a definition of advancement:[28]

> Advancement is a gift during the transferor's lifetime to a transferee who, by marriage or parent-child relationship, is financially dependent on the transferor …

[172] The Judge noted that historically the presumption was applied in transfers between husband and wife, and father and child.[29] In that regard, the "traditional rationale behind the presumption of advancement between father and child is that a father has an obligation to provide for his sons".[30] After concluding that the presumption of advancement should apply equally to fathers and mothers, the Judge framed the next question as whether "the presumption of advancement [applies] between parents and adult independent children".[31]

[173] The majority concluded that the presumption should not apply to adult independent children for three reasons:[32]

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26 The majority comprised McLachlin CJ, Bastarache, Binnie, LeBel, Deschamps, Fish, Charron and Rothstein JJ.
27 At 806.
28 At 806.
29 At 808.
30 At 808.
31 At 810.
32 At 811-812.

(a) Parents no longer have a parental obligation to support an adult independent child;

(b) It is common nowadays for ageing parents to transfer their assets into joint accounts with their adult children in order to have their children assist them in managing their financial affairs. There should be a rebuttable presumption that the adult child is holding the property in trust for the ageing parent to facilitate the free and efficient management of that parent's affairs; and

(c) Parental affection is not a basis on which the presumption is held to apply – that factor of affection applies in many relationships, such as that between siblings, but the presumption would not apply in those circumstances.

[174] The majority then concluded that the presumption similarly should not apply to adult dependent children because:[33]

> … it would be impossible to list the wide variety of the circumstances that make someone "dependent" for the purpose of applying the presumption. Courts would have to determine on a case-by-case basis whether or not a particular individual is "dependent", creating uncertainty and unpredictability in almost every instance …

[175] As to the facts of that case, the majority therefore held that the trial judge erred in applying the presumption of advancement because P was not a minor child.[34] Nevertheless, the evidence clearly demonstrated an intention on the part of the father to gift the balance to P.[35]

[176] In dissent, Abella J held that there was no reason to limit the application of the presumption of advancement to non-adult children.[36] Contrary to the majority's view,

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33 At 813.
34 At 826.
35 At 826.
36 At 827.

the Judge stated that "[p]arental affection, no less than parental obligation, has always grounded the presumption of advancement".[37] She commented:[38]

> The origin and persistence of the presumption of advancement in gratuitous transfers to children cannot, therefore, be attributed only to the financial dependency of children on their father or on the father's obligation to support his children. Natural affection also underlay the presumption that a parent who made a gratuitous transfer to a child of any age, intended to make a gift.

[177] As to the majority's second reason, the Judge labelled it a "flawed syllogism", and commented:[39]

> … The intention to have an adult child manage a parent's financial affairs during one's lifetime is hardly inconsistent with the intention to make a gift of money in a joint account to that child. Parents generally want to benefit their children out of love and affection. If children assist them with their affairs, this cannot logically be a reason for assuming that the desire to benefit them has been displaced. It is equally plausible that an elderly parent who gratuitously enters into a joint bank account with an adult child on whom he or she depends for assistance, intends to make a gift in gratitude for assistance. In any event, if the intention is merely to have assistance in financial management, a power of attorney would suffice, as would a bank account with survivorship rights.
>
> The fact that some parents may enter into joint bank accounts because of the undue influence of an adult child, is no reason to attribute the same impropriety to the majority of parent-child transfers. The operative paradigm should be based on the norm of mutual affection, rather than on the exceptional exploitation of that affection by an adult child.

[178] For the Judge:[40]

> … Since the presumption of advancement emerged no less from affection than from dependency, and since parental affection flows from the inherent nature of the relationship, not of the dependency, the presumption of advancement should logically apply to all gratuitous transfers from parents to any of their children, regardless of the age or dependency of the child or the parent. The natural affection parents are presumed to have for their adult children when both were younger, should not be deemed to atrophy with age.
>
> While, as Rothstein J. observes, affection arises in many relationships, familial or otherwise, it is not affection alone that had earned the presumption of advancement for transfers between father and child. It was the uniqueness of the parental relationship, not only in the legal obligations involved, but, more significantly, in the protective emotional ties flowing from the relationship. These ties are not attached only to the financial dependence of the child.

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37 At 831.
38 At 834.
39 At 834-835.
40 At 835-836.

> Affection between siblings, other relatives, or even friends, can undoubtedly be used as an evidentiary basis for assessing a transferor's intentions, but the reason none of these other relationships has ever inspired a legal presumption is because, as a matter of common sense, none is as predictable of intention.

[179] As noted above, there has been no judicial consideration of the decision in New Zealand. However, in *Nelson v Meier*, an elderly mother sought to recover money she said she had loaned to her adult daughter.[41] The amount totalled $54,991. Hinton J first explained the presumption of advancement:

> [57] The presumption of advancement applies between parent and child where the relationship is in loco parentis, i.e. the child is dependent on the parent. The presumption implies the donor intended to make a gift to the donee because of the relationship between the parties, which assumes a natural obligation for the parent to provide for the child.

[180] However, Hinton J then held that the presumption of advancement did not apply in that case.[42] The reason for this was stated as follows:

> [58] … In my view, the relationship here is not one of dependency. I accept that [the adult daughter] was in poor physical and mental health in the years between 2009 and 2012, but nonetheless, I consider that [the mother] and [the adult daughter] were assisting each other in different ways, rather than [the adult daughter] being dependent on her mother.

[181] Hinton J did not cite any authorities in relation to this point. Her reasoning appears to have proceeded on the basis that the presumption did not apply to the adult daughter because she was not dependent on the mother.

[182] In *Parlane v Parlane*, Faire J expressed the view that the evidence in that case tended to support the presumption of advancement.[43] It was unnecessary to decide the issue conclusively, but the Judge commented in relation to a father's advances to his adult daughter:[44]

> (a) The deceased felt an obligation to assist his daughter, who had not made a success of her life. She is, and was at material times, a welfare beneficiary. By contrast, her brother is a retired deputy school principal;
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> …

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41 *Nelson v Meier* [2016] NZHC 787.
42 At [58].
43 *Parlane v Parlane* (2011) 3 NZTR 21-012 (HC) at [38].
44 At [38].

[183] The fact that the adult daughter in that case was dependent to an extent on her father appears to have factored into the Judge's reasoning.

[184] In England, the presumption of advancement applies to adult children. David Fox, in *Snell's Equity*, endorses that view:[45]

> The formal presumption of advancement applies to transfers from a father to his child … The presumption can apply even where the child is no longer a minor, since the rationale of the presumption is no longer confined to cases where the parent has a duty to provide for the child … Even aside from the formal presumption, the inference would be readily drawn that a gift or a contribution to the child's maintenance was intended, even when the child was an adult …
>
> (Citations omitted)

[185] The strength of the presumption and whether it has been rebutted are separate matters. In *Laskar v Laskar*, the English Court of Appeal acknowledged that the presumption of advancement still exists, but commented that "it was said as long ago as 1970 to be a relatively weak presumption which can be rebutted on comparatively slight evidence".[46] It then commented that the presumption is "even weaker where, as here, the child was over 18 years of age and managed her own affairs at the time of the transaction".[47]

[186] The Court, nevertheless, accepted the possibility that the presumption of advancement could apply to adult children.[48]

[187] Since then, provision was made in England to abolish the presumption of advancement by way of s 199 of the Equality Act 2010. But, at the time of this judgment, that section has still not been brought into force.

[188] Ultimately, I consider that the presumption of advancement should extend to adult children, regardless of whether they are independent or dependent. There has been no suggestion by the New Zealand Courts that the majority's approach in *Pecore*

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45 Fox, above n 21, at [25-009].
46 *Laskar v Laskar* [2008] EWCA Civ 347 at [20]. See also *Stack v Dowden*, above n 8, at [101] per Lord Neuberger.
47 At [20].
48 At [20].

should be adopted. Instead, most decisions proceed on the assumption that the presumption does extend to adult children.

[189] In any event, I find the reasoning of Abella J in *Pecore* convincing. The traditional rationale behind the presumption was both parental obligation to provide for their children and parental affection.

[190] I have doubts about the majority's comment in *Pecore* that there is no longer a parental obligation to support an adult independent child. It is true that there is no legal obligation, but many parents still feel a form of parental or moral obligation to support their children. This is irrespective of the age of the child, or whether they are independent or dependent.

[191] In any event, parental affection still underlies the rationale for the presumption.[49] That parental affection underlies the "uniqueness of the parental relationship".[50] The nature of the parental relationship differs from other familial relationships, such as that between siblings. As Abella J commented:[51]

> … The natural affection parents are presumed to have for their adult children when both were younger, should not be deemed to atrophy with age.

[192] These comments also hold true in respect of independent adult children and adult dependent children. Parental affection does not change depending on the status of the adult child.

[193] Further, I agree with Abella J's comments that just because an elderly parent might want or require assistance in managing their daily affairs, that does not mean that the rationale behind the presumption is displaced. In particular, I agree with the following comments:[52]

> … If children assist them with their affairs, this cannot logically be a reason for assuming that the desire to benefit them has been displaced. It is equally plausible that an elderly parent who gratuitously enters into a joint bank account with an adult child on whom he or she depends for assistance, intends

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49 See *Smith v Jones* [2014] NZHC 2674 at [32]; *D v T* [2017] NZHC 904 at [65]; *Seldon v Davidson* [1968] 1 WLR 1083 (CA) at 1088.

50 *Pecore v Pecore*, above n 21, at 835.

51 At 835.

52 At 834-835.

> to make a gift in gratitude for this assistance. In any event, if the intention is merely to have assistance in financial management, a power of attorney would suffice, as would a bank account with survivorship rights …

[194] Ultimately, as noted above, in New Zealand the terminology used in relation to the presumption is blood relationships and familial relationships. That clearly includes adult children.

[195] This interpretation is supported by the Family Protection Act 1955. Section 3(1) of that Act allows the children of the deceased to apply under the Act for some of the estate. This indicates that Parliament has recognised the long lasting affectionate relationship between parents and children, regardless of the latter's age.

[196] It is also consistent with the approach taken in Australia. In *Nelson v Nelson*, Toohey J did not discuss the issue in depth, but commented definitively:[53]

> [14] … it should be stressed that what the Court is concerned with in the present appeal is the very clear relationship of mother and children, albeit adult children. And whether the governing consideration is said to be a duty to support or a lifetime relationship, the result is that the presumption of advancement should apply …
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> [15] While, in the case of many adult children, the statutory obligation cast on parents may have no practical consequences, the obligation is there …

[197] I also note, by way of completeness, that there is debate in some overseas jurisdictions as to whether the presumption should continue to apply. In *Woodcock v Woodcock*, Fitzgerald J noted that "[q]uestions have been raised whether the presumption of advancement is outdated".[54] Palmer, in *Equity and Trusts in New Zealand*, commented that "[i]n other jurisdictions, courts have opined that the presumption of advancement is outdated".[55]

[198] In *Reeves v Lord*, Judge Moore strongly expressed the view that the presumption of advancement should continue to apply:[56]

> [23] It needs to be kept in mind that the presumption of advancement is not some dry legal doctrine divorced from the realities of the human existence. It

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53 *Nelson v Nelson*, above n 21.
54 *Woodcock v Woodcock*, above n 18, at [112].
55 Palmer, above n 19, at [12.5.4].
56 *Reeves v Lord* [2005] DCR 183 (DC).

> expresses some of the most fundamental of those realities which, although readily susceptible to logical exposition, ultimately flow from biological fundamentals. The urge to care for and protect one's partner, to provide now and in the future for one's children, are, in a species such as ours, biological imperatives. They can dominate a person's outlook (and thus explain their actions) without having flowed from conscious analysis. Political correctness notwithstanding, that underlying impetus will often be expressed at its strongest when there is only one person who can perpetuate the combination of a blood line and a name. The authorities take such matters for granted. In this area the law recognises, indeed flows from, the realities of the human situation.

[199] More recently, in *Narayan v Narayan*, Wylie J stated:[57]

> [46] … I note also the discussion in *Young v Young* [2000] NZFLR 128 at 131-134. With respect to Judge Sommerville, it is in my view premature to conclude that the presumption of advancement is a legal anachronism, although I acknowledge that in other jurisdictions the view has been expressed that the presumption is outdated — see *Butler (ed)*, Equity and Trusts in New Zealand, (2ed, 2008) at para 12.5.4.

[200] In my view, it cannot be said that the presumption of advancement no longer exists. The Courts in this country, as well as in Australia, Canada and England, continue to recognise its existence. Only last year the Supreme Court referred to the presumption in *Horsfall v Potter*.[58] The Court of Appeal similarly, in *Chang v Lee*, addressed the presumption last year and concluded that it did not arise in the circumstances of that case.[59] I agree with the remarks of McHugh J in *Nelson v Nelson*:[60]

> [12] … Although the operation of the presumptions may sometimes defeat the expectations of transferors and transferees, it may be that many transfers of property have been made on the basis of the presumptions. If evidence was no longer available to confirm that property had been transferred to achieve a result in accord with the presumptions, serious injustice might be done to those who have dealt in the property. In the absence of knowledge as to what effect the abolition of the presumptions would have on existing entitlements, the better course is to leave reform of this branch of the law to the legislature which can, if it thinks fit, abolish or amend the presumptions prospectively.

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57 *Narayan v Narayan* [2010] NZFLR 161 (HC). See also *Linton v Millar* [2015] NZFC 2048 at [7]; *Parlane v Parlane*, above n 43, at [36].

58 *Horsfall v Potter*, above n 21, at [50], fn 29.

59 *Chang v Lee*, above n 25, at [24].

60 *Nelson v Nelson*, above n 21.

[201] As Deane J commented separately in the High Court of Australia in *Calverley v Green*:[61]

> [2] The relevant presumptions are, however, too well entrenched as "landmarks" in the law of property … to be simply discarded by judicial decision …

[202] If Parliament wished to abolish the presumption of advancement in New Zealand, it presumably would have done so, especially given it expressly legislated for that in terms of transfers between husbands and wives.[62]

[203] Therefore, the presumption of advancement applies to the $3,500 advanced to Mr Kaye by the parents.

Has Ms Woolf rebutted the counter-presumption of advancement?

[204] The onus rests on Ms Woolf to rebut the presumption of advancement on the balance of probabilities.[63]

[205] Although the presumption of advancement may be rebutted, it "should not … give way to slight circumstances".[64]

[206] The following passage in *Equity and Trusts in New Zealand* illustrates what evidence Ms Woolf can use to attempt to do that:[65]

> The donor may rebut the presumption of advancement with evidence of his or her intention to retain the beneficial interest. The donor can use "acts or declarations before or at the time of the transaction" to do this; subsequent acts and declarations are only admissible as evidence against the donor, and not in his or her favour.

[207] In *Narayan v Narayan*, Wylie J stated:[66]

> [47] The presumption of advancement can be rebutted by *evidence showing that there was no intention to benefit the alleged done by way of gift.*

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61 *Calverley v Green* (1984) 155 CLR 242 (HCA). See also *Dullow v Dullow* [1985] 3 NSWLR 531 (NSWCA) at 535.

62 See Property (Relationships) Act 1976, s 4(3)(a).

63 *Pecore v Pecore*, above n 21, at 814; *Holster v Grafton*, above n 21, at [20].

64 *Shephard v Cartwright* [1955] AC 431 (HL) at 445.

65 Palmer, above n 19, at [12.5.5]. See also *Warren v Gurney* [1944] 2 All ER 472 (CA) at 474.

66 *Narayan v Narayan*, above n 57.

> *A contemporaneous act or declaration by the alleged donor will suffice*. Acts or declarations by the donor subsequent to the purchase or transfer, unless so connected with it as to be reasonably contemporaneous, are not admissible in favour of the donor to rebut the presumption …
>
> (Emphasis added)

[208] In this case, there is no evidence of any contemporaneous acts or declarations by the parents. There is a document in the form of a letter dated 17 May 1983 from the mother to Mr Kaye in which she said, "You know, I never did send in the statement to say how much we had invested in the Auckland house. Not that I care a d… about the money, but, as you said it's a safeguard … actually I don't want the money back. You can keep it in return for my forthcoming travel abroad one day…".

[209] In that regard, I accept Mr Kaye's evidence that he paid for a number of trips by the parents to Canada and paid for them while they were there. This evidence was unchallenged, as was his further evidence, which I accept, of his payment for household items for their house in Timaru and household repairs, in addition to other expenses he paid for the parents, including telephone bills and arranging for payment of food, groceries and other goods to be delivered directly to the Timaru house.

[210] When Ms Woolf was asked about the mother's 17 May 1983 letter, she accepted that the inference may be that it was not a large sum the mother was referring to.

[211] In his statutory declaration, the father said it was never his or his wife's intention or understanding that the property would belong solely to Mr Kaye. He says that they always believed it was a long-term family investment. However, this statement is made subsequent to the purchase. It is therefore inadmissible for that reason. It also forms part of a document which I have already determined is inadmissible for its lack of reliability.

[212] There are other statements and handwritten letters made by Mr Woolf, but as they are not contemporaneous, they are not admissible.

[213] There are also statements allegedly made by the mother to Ms Woolf that she had spoken to Mr Kaye, and that he was proposing to put the names of the other family

members on the certificate of title. These alleged statements are problematic for two reasons. The first is that they are not contemporaneous and the second is that even if these statements were made, they are hearsay and I do not consider them reliable having regard to Ms Woolf's own acknowledgement that the mother would say one thing to Mr Kaye and another thing to her.

[214] In the end, it is perhaps irrelevant as to whether the parents provided the amount of $3,500 or $14,000. Either way, the sum is subject to the counter-presumption of advancement and Ms Woolf has not provided any evidence to rebut that presumption. She has therefore not proved her claim of a resulting trust in relation to the parents on the balance of probabilities.

Ms Woolf – resulting trust

[215] There is disagreement between Ms Woolf and Mr Kaye down to a fine level of detail as to who initiated visits to various properties advertised for sale, which of the two of them first located the property, how many times each of them visited the property and who was present on those occasions. It is not necessary to resolve those factual disputes. This is especially so given Ms Woolf's concessions that there was no oral contract as had been pleaded.

[216] Mr Keene submits that the legal basis for Ms Woolf's claim is the principle, he says, that where at the time of purchase of the property, one or more of the parties agrees to contribute towards mortgage repayments where the mortgage provides part of the purchase price of the property, and where the parties who agreed to contribute to mortgage payments are not named on the title, a resulting trust will arise in favour of such parties.

[217] Mr Gilchrist, for Mr Kaye, submits that in order for a resulting trust to arise, it is necessary for a payment to have been made by the time the property was purchased. Therefore, no resulting trust arises in favour of Ms Woolf.

[218] There is the following convenient summary in *Fisher on Matrimonial and Relationship Property* on the legal position concerning resulting trusts:[67]

> … The contribution by the alleged beneficiary must already have been made at the time that legal title to the property in question was acquired by the alleged trustee or trustees. This seems necessarily to follow from the rationale of resulting trusts, namely that a settlor must have intended to retain a beneficial interest in such of his or her own property as he or she has not effectively disposed of to another. When the property is purchased it is for those providing the purchase money or its equivalent to dictate the destination of the beneficial interest for which their particular contribution is responsible and over which they still have a disposing power …

[219] The question therefore arises as to whether Mr Keene is correct when he submits that a resulting trust arises by virtue of a person, prior to purchase, promising to contribute towards mortgage repayments, or whether an actual payment towards the purchase is required. Mr Keene relies on four cases, to which I now refer.

[220] The first is *Hendry v Hendry*, in which the Court held that contributions by a wife towards mortgage repayments gave rise to a resulting trust.[68] In that case, after the parties' marriage in 1943 they lived in a residential property purchased entirely from monies contributed by the husband, and from monies owned and borrowed by the husband. The title was in his name. The property was later sold and the husband purchased a vacant section on which he built a dwelling house. The cost of building came from mortgages raised by the husband, with the balance coming from his own money.

[221] A few years later, the husband suffered an accident and as his payments of workers compensation were no longer sufficient to maintain the family, it was agreed that the wife would then take on employment. Except for a small amount kept for personal expenditure, she then contributed her employment income towards outgoings on the property and reduced mortgage liabilities on the property.

[222] The following comments of Shorland J are relevant:[69]

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67 RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [4.13](i).

68 *Hendry v Hendry* [1960] NZLR 48 (SC).

69 At 52.

> That contributions made to repayment of mortgage moneys raised in order to purchase the property are within the principle is, I think, implicit in the judgments in a number of the decided cases, particularly *Re Rogers's Question* [1948] 1 All ER 328, and *Rimmer v Rimmer* [1953] 1 Q.B. 63; [1952] 2 All ER 863.
>
> After careful consideration of the facts in the present case, I am of opinion that the substantial contributions made by the wife from her own resources in reduction of the principal moneys borrowed on mortgage upon the property for the purpose of enabling a home to be built upon land, the title to which was in the husband's name, enables the wife, in the particular circumstances of this case, to claim that she was a contributor of a material portion of the purchase moneys expended in acquiring the property now represented by the family home, and that there arises a resulting trust in her favour accordingly …

[223] In *Donovan v Beeson*, Tompkins J discussed *Hendry* and concluded as follows:[70]

> Can that repayment be regarded as a contribution for the purpose of fixing her share? On the authority of *Hendry* it can be as that was exactly the circumstance in that case. Shorland J concluded that the substantial contributions made by the wife from her own resources in reduction of the principal monies borrowed on mortgage on the property for the purpose of enabling a home to be built upon the land, the title to which was in the husband's name, enables the wife to claim that she was a contributor of a material portion of the purchase monies, and that there arises a resulting trust in her favour accordingly.
>
> Also to be considered is the relevance of the effort put into managing the property after acquisition, to which I have already referred …

[224] Mr Keene also relied on the case of *Harwood v Harwood*, which involved the purchase of a property and payments towards a mortgage.[71] This was a case involving a husband and wife. The husband told the wife that he purchased the property for both of them, the wife undertook a joint contractual liability for repayment of the mortgage and although the husband's contribution to the purchase price was greater than the wife's, the presumption was that in doing so he intended to benefit her.

[225] The Court held that the proper inference from the parties' conduct, judged objectively, was that the wife had a one half beneficial interest in the property as from the date of the purchase. The Court applied the presumption of advancement between husband and wife.

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70 *Donovan v Beeson* HC Auckland CP864/86, 28 March 1990.
71 *Harwood v Harwood* [1991] 2 FLR 274 (EWCA Civ).

[226] I do not consider, however, that these cases provide the necessary support for Mr Keene's argument. The two New Zealand cases have not been referred to since in relation to resulting trust claims, while *Harwood v Harwood* has not been considered in relation to that point. They also do not appear to have been referred to in resulting trust commentaries. In my view, they have been superseded by the principles in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* and the development of constructive trust principles in relation to contributions post-purchase.[72]

[227] The most recent of the authorities relied upon by Mr Keene is *Mamat v Mamat*.[73] There, two brothers signed an agreement for the sale and purchase of a residential property, registered in their joint names. Both were parties to a mortgage agreement with the bank. Importantly, they were both liable under the mortgage, for the principal sum and interest.

[228] The two brothers subsequently severed the joint tenancy, becoming tenants in common in equal shares. One brother eventually sought a declaration that he should have the entire equitable interest. That brother had lived in the property since 1996, paid for its upkeep, financed the mortgage and paid off part of the mortgage debt from his own resources. He had "*nearly* been the sole contributor to the property".[74] The other brother's only contribution was his joint liability under the mortgage.

[229] Davidson J first observed that a "significant difference" between constructive and resulting trusts are that resulting trusts "arise at the time of the transaction *not* by virtue of conduct/contributions of the parties after the transaction".[75]

[230] However, Davidson J acknowledged that there was some debate as to whether assumption of mortgage liability constitutes a "contribution".[76] The Judge concluded that the other brother provided consideration in the form of liability under the

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72 *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, above n 6.
73 *Mamat v Mamat* [2018] NZHC 639.
74 At [106].
75 At [113].
76 At [117].

mortgage, meaning that the presumption of a resulting trust applied not in relation to the entire share, but a share proportionate to the brothers' contributions.[77]

[231] I consider that this case is distinguishable because, unlike in this case, the brothers had a shared mortgage liability. Here, Ms Woolf had no liability under the mortgages. In that regard, she had not contributed to the purchase of the property at the time of purchase. Her claimed contributions arise after the time of purchase.

[232] Therefore, I do not consider that the authorities support Mr Keene's proposition.

[233] Even if an agreement to contribute towards mortgage payments, without having any liability under the mortgage, will suffice, Ms Woolf faces an evidential difficulty in proving her claim. I do not consider she has established there was such an agreement with Mr Woolf.

[234] The evidence for Ms Woolf on this issue is that the estate agent involved with the sale of the property arranged for her to meet with a loans manager at the CBA. Ms Woolf said she attended a meeting with just the estate agent and the loans manager, who was very positive about the prospects of Mr Kaye and her obtaining second mortgage finance. She said she reported on the meeting to Mr Kaye and the two of them attended a further meeting with the loans manager. At that further meeting, she says that the loans manager indicated that if she and Mr Kaye were joint applicants, he was confident a loan would be approved. Further, Ms Woolf says it was very clear from what the loans manager said that if Mr Kaye was the only applicant for the loan, it would be most unlikely for the loan to be granted.

[235] However, Ms Woolf's evidence was that she did not become a joint applicant for the loan, but instead became a guarantor of the loan to Mr Kaye. She says she did not understand at the time, and still does not understand now, how and why that change came about.

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[77] At [117].

[236] There was no documentary evidence to support Ms Woolf's assertion that she signed a document guaranteeing the second mortgage loan.

[237] Mr Kaye disputes all Ms Woolf's evidence on this issue. He says there was no such meeting at the bank; all arrangements regarding the loan were made through his solicitors. He was the sole applicant and no guarantee was signed by Ms Woolf.

[238] In general terms, I did not find Ms Woolf's evidence reliable. She made significant concessions on a number of issues under cross-examination. However, on the issue of this alleged meeting, she remained firm. The basis of her assertion that she had an ownership interest is because she says that she signed documents at the bank. She also says that at the meeting she and her brother attended, they discussed with the loans manager that both their incomes were going to go towards the payment of the mortgage and that her teaching career was going to contribute towards that mortgage as an interest in the property.

[239] However, that evidence needs to be set against her concession that there was no oral contract in relation to the purchase of the property.

[240] The various concessions were:

(a) At the time of the purchase of the property, as well as having no capital to contribute, she had no ability to service a mortgage;

(b) There was no discussion about the title at the time the property was purchased;

(c) There was similarly no discussion about ownership at the time the property was purchased;

(d) At the time of purchase, there was no discussion about the basis on which she would occupy the property;

(e) At the time of purchase, there was no discussion about her "position in the place". Nor was there a discussion of what percentage interest, if any, she would have;

(f) There was also no discussion about how long she might live in the property or what would happen if she wanted to leave or if Mr Kaye wanted to sell the property;

(g) Ms Woolf accepted that at no time did she, Mr Kaye or the parents sit down and have a discussion about contractual terms and arrangements;

(h) There was nothing in writing setting out any sort of property sharing agreement;

(i) Ms Woolf put nothing in at the time of settlement and there was no agreement on "what [she] would put up, on what basis into the future"; and finally

(j) "A. As I said I understood when I was involved and the CBA second mortgage I understood that that I was contributing towards that and once I earned money as a teacher, that that money was going to go towards an interest in the property, being well aware that my brother had put up a lot of money as had my parents.

Q. Did you ever have a discussion to that effect with your brother?

A. At that particular time, no."

[241] Ms Woolf has not satisfied me that there was a meeting at the CBA which she and Mr Kaye attended with a loans manager where it was said that her teaching career was going to contribute towards the mortgage as an interest in the property.

[242] In any event, leaving aside the question of Ms Woolf obtaining an interest in the property, a statement that her teaching career was going to contribute towards the mortgage is not inconsistent with Mr Kaye's position that Ms Woolf would be a tenant

paying rent (with those rental payments going towards mortgage payments). He says that his mother wished him to use the house to provide some stability for his sister. After the deposit had been paid, he took her to see the property and suggested she could rent it if she chose to as it would be secure, and that both parents were in favour of that. He said that she liked the idea of renting there along with other tenants as company.

[243] In relation to the alleged guarantee signed by Ms Woolf, there was no document in the nature of a guarantee produced in evidence. The existence of a guarantee is inconsistent with a letter from the CBA.

[244] That letter to Mr Kaye's then solicitors dated 22 February 1982 would tend to support Mr Kaye's position that Ms Woolf did not sign a guarantee in relation to the CBA mortgage. The letter confirms advice in a telephone conversation between the bank manager and Mr Kaye's solicitor that the CBA will make finance of $15,000 available for the purchase of the property. The letter continues that:

> Security for the advance will be a registered second mortgage over the property being purchased and in this connection we enclose the following documents for your attention.
>
> 1. Mortgage forms (2)
>
> 2. Solicitors undertaking
>
> On return of item 2 we shall be pleased to make the funds available.

[245] There is no mention of a guarantee having been signed and forming part of the security.

[246] Finally, and significantly, the unchallenged evidence of Mr Kemp was that Ms Woolf made a negative contribution to the CBA mortgage (Ms Woolf accepts that she did make a negative contribution, but disputes the amount calculated by Mr Kemp).

[247] Mr Kemp's analysis of the CBA account shows the following. The CBA loan was for $15,000 over a period of five years, with monthly repayments of $381.25 for interest and principal. This equated to an interest expense over five years of $7,875.

[248] The CBA loan was repaid with the final payment debited from the CBA cheque account on 26 February 1987.

[249] The majority of the deposits into this account were payments from the flatmates.

[250] Overall, Ms Woolf withdrew more than she deposited into the CBA account. Mr Kemp says that it is evident on numerous occasions that Ms Woolf utilised the account for her personal expenses. In some cases, these borrowings were repaid and in others they were not. On a net basis, over the period from 9 March 1982 to 11 January 1988, this amount was $1,841, summarised by year as follows:

1982	($231)
1983	$189
1984	$130
1985	($892)
1986	$179
1987	($1,216)
	($1,841)

[251] In addition to the overall net funds withdrawn by Ms Woolf, Mr Kemp says that the remaining balance of the account as at 11 January 1988 was $406.09. Ms Woolf accepts that the amount of $406.09 was withdrawn by her and incorrectly used for her personal purposes.

[252] Ms Woolf's position is that she does not accept Mr Kemp's demarcation as to what was personal expenditure and what was expenditure by her for the benefit of the family in his analysis of the CBA account. She says that Mr Kemp has wrongly excluded three amounts, namely $100 for carpet cleaning in 1985, $400 for a cupboard in 1985 and $50 for curtains in 1987. Accordingly, she says Mr Kemp's net withdrawal figure of $1,841 needs to be adjusted by $550.

[253] In my view, Mr Kemp has correctly classified the three items as items that would be paid by a person renting the property. However, even accepting Ms Woolf's

view of the expenditure, her contribution to the CBA account is still a negative contribution.

Conclusion on resulting trust in relation to Ms Woolf

[254] Even if Mr Keene is correct in his proposition that an agreement to contribute to mortgage repayments is sufficient to give rise to a resulting trust, Ms Woolf's claim fails on the evidence. She has failed to prove her claim on the balance of probabilities.

Constructive trust – legal principles

[255] The pleadings are unclear as to whether Ms Woolf was claiming that the constructive trust she says has arisen is "a common intention" constructive trust, or whether it is expectation based. The statement of claim refers to both a common intention and expectation.

[256] In his closing submissions, Mr Keene confirmed that it is a constructive trust based on reasonable expectations.

[257] The legal principles in relation to constructive trusts based on reasonable expectations are well settled. In *Lankow v Rose*, the Court of Appeal considered the circumstances in which a constructive trust may arise in the context of a de facto relationship.[78] In the often-quoted judgment of Tipping J, he referred to the following elements which needed to be proved, for a claimant to be granted "a beneficial interest in property owned in law by the defendant":[79]

1. Contributions, direct or indirect, to the property in question.
2. The expectation of an interest therein.
3. That such expectation is a reasonable one.
4. That the defendant should reasonably expect to yield the claimant an interest.

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78 *Lankow v Rose* [1995] 1 NZLR 277 (CA). See also *Mamat v Mamat*, above n 73, at [105].
79 At 294.

[258] More recently, the Court of Appeal summarised how the principles in *Lankow v Rose* have been interpreted since that judgment.[80] The Court said a claimant must establish that:[81]

> (a) More than a minor contribution was made to the acquisition, preservation or enhancement of the defendant's assets, whether directly or indirectly;
>
> (b) In all the circumstances both parties must be taken to reasonably have expected the claimant would share in the assets as a result;
>
> (c) Contributions need not be monetary in nature, but there must be a causal relationship between the contributions and the acquisition, preservation or enhancement of the defendant's assets; and
>
> (d) The contributions must manifestly exceed any benefits that the claimant derives from the arrangement.

Ms Woolf's contribution to the property

Introduction

[259] Ms Woolf did not call any expert evidence to support her claims as to her contributions to the property. She relied instead on tables of claimed contributions, which she prepared with the assistance of Mr Feigler and which were annexed to the second amended statement of claim. The tables were further amended by Ms Woolf and updated versions, Tables 3A and 3B, were attached to her brief of evidence. Additionally, she made a number of concessions in her reply brief of evidence and under cross-examination in relation to her claims.

[260] On the other hand, Mr Kaye called evidence from Mr Kemp, whose evidence was detailed, careful and transparent. He undertook a full analysis of expenses in relation to the property based on invoices, receipts and other documents provided in discovery as recorded in his Table F. Although Mr Kemp completed his own analysis, where possible he attempted to reconcile it with Ms Woolf's evidence. His evidence

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80 *Wakenshaw v Wakenshaw* [2017] NZCA 252.
81 At [25].

was of real assistance to the Court. I was impressed with his grasp of detail and his evident independence.

Ms Woolf's claim quantified

[261] Mr Keene submitted in closing that the evidence establishes that Ms Woolf's contribution to the property between 1982 to 2018 is $171,754. To arrive at that sum, he adopts Mr Kemp's total in Table F of $83,537.81 and adds back in the value of items Mr Kemp had excluded as items of a personal nature. He then adds the balance of the cost of the new roof and finally payments towards the two mortgages. The various figures and the figures that follow are historical figures rather than representing a present day analysis.

[262] For contributions to the Countrywide mortgage, Mr Keene purports to adopt Mr Kemp's figures. Mr Keene claims the amount of $10,710 plus an amount of $3,009.14, being 65 per cent of the flatmates' rent payments. That gives a total of $13,719.14 for the Countrywide mortgage.

[263] For the CBA mortgage, Mr Keene adopts a negative amount of $500 plus $13,087.75, being 65 per cent of the flatmates' rent payments. That gives a total of $12,587.75 for the CBA mortgage.

[264] Mr Keene therefore submits that the total for payments into the Countrywide and CBA accounts for which Ms Woolf should get credit is $26,306.89.

[265] For her other contributions, Mr Keene notes Ms Woolf's own total of $160,327.88. This is a total of Ms Woolf's Table 3A, being a schedule of payments excluding "grounds, lawns, waste and hedge", with a total sum of $127,946.59. Ms Woolf's Table 3B is a schedule of payments made in relation to the "grounds, lawns, waste, hedge payments" from 1982 to 2018. The total of those claimed amounts in Table 3B is $29,381.29.

[266] The total of the items in Tables 3A and 3B is $157,327.88. To that, Ms Woolf adds $13,000, being the balance of the payment for a new roof completed in 2018. Her final total is therefore $160,327.88.

[267] However, instead of using that figure, Ms Woolf relies on a figure of $145,448, being the figure that she says Mr Kemp should have arrived at, adding to his Table F items which she says he wrongly excluded. Ms Woolf therefore adds the amount of $145,448 to the net contributions to the Countrywide and CBA accounts of $26,306.89 to reach her grand total of $171,754.

Analysis

Overall impression of Ms Woolf's claims

[268] Overall, and by way of example, I find that Ms Woolf:

(a) Mischaracterised a number of deposits into the Countrywide bank account between January 1985 and April 1985 as gifts. In her reply brief of evidence, she acknowledged that the contributions having arisen from her brother were mistakenly categorised by her as her contributions to the mortgage rather than contributions by Mr Kaye.

(b) Acknowledged in her reply brief of evidence that she had improperly allocated interest monies earned on the Countrywide account solely to her. To do that, she accepted, was unfair.

(c) Said in her reply brief of evidence that in 1982 to 1984, when she invested $1,000 from the Countrywide account into KISS investments, she had no intention of diverting monies needed for the mortgage. She says she had every intention of returning the capital to the mortgage account. She accepted that it was mistake for her to take the credit of the KISS interest and also a mistake in that she subsequently overlooked reimbursing the mortgage account.

(d) Accepted that, with the exception of one withdrawal of $200 to purchase a sofa for the property, Mr Kemp's figure of $6,053 as representing monies removed by her from the Countrywide mortgage account for her personal benefit was accurate. She said she had

intended to make the reimbursement. Withdrawals for personal items included money for a car and a holiday.

(e) In relation to Mr Kemp's evidence that she had withdrawn a net amount of $1,841 from the CBA (Westpac) account, she said that she accepted that figure with the exception of three items totalling $550 for carpet cleaning, a cupboard and curtains (she disputes these items were items of personal expenditure).

(f) Claimed a number of items as contributions to the property when they were items of a personal nature.

(g) Otherwise wrongly allocated contributions to herself.

Countrywide account

[269] It appears that Mr Keene has taken the figure of $10,710 from Mr Kemp's written brief of evidence. In the course of giving his evidence, Mr Kemp corrected his calculations and adjusted that figure to $10,210. I will adopt that figure.

[270] I accept that Ms Woolf assisted in the "preservation or enhancement" of the property by ensuring that the flatmates paid their rent. In the end, it is not possible to come up with a precise mathematical basis for apportioning her share. However, I consider that 65 per cent is too high. I consider that a 50 per cent split as between Ms Woolf and Mr Kaye is fair. Therefore, the amount to be attributed to Ms Woolf would be 50 per cent of the flatmates' rent payments of $4,629.46, namely $2,314.73.

[271] I, therefore, assess Ms Woolf's contribution to the Countrywide account as $12,524.73.

CBA account

[272] I have already expressed my view that Mr Kemp's figure of a negative contribution in the sum of $1,841 is the correct figure. To that, I add 50 per cent of the flatmates' contributions of $20,135, namely $10,067.50.

[273] Ms Woolf's total contribution to the CBA account is, therefore, $8,226.50.

Total of Countrywide and CBA contributions

[274] Ms Woolf's total contribution to both the Countrywide and CBA accounts is therefore $20,751.23.

Other contributions

[275] As noted, Mr Kemp prepared his Table F by relying on all available documentation and attempting to reconcile his work with Ms Woolf's Tables 3A and 3B. Mr Kemp removed items that he considered were items of a personal nature.

[276] Mr Kemp's resulting figure was $83,537.81. He added to that figure the sum of $13,000, which was the balance of the payment Ms Woolf made for the cost of a new roof for the property. That balance was paid by Ms Woolf to a roofing contractor after Mr Kemp prepared his Table F.

[277] The background to the new roof, in brief, is as follows. Ms Woolf's solicitors had raised the need for a new roof in correspondence with Mr Kaye. When Mr Kaye visited New Zealand in November and December 2017, Ms Woolf gave him access to the property for the purpose of inspecting the roof with a roofing contractor. Mr Kaye's position was that a new roof was not necessary, that in the absence of these proceedings the property would already have been sold and, in any event, a purchaser would almost certainly rebuild on the site. However, Ms Woolf went ahead and replaced the roof. She called evidence from a roofing contractor that a roof replacement was necessary.

[278] It is not necessary for me to decide who was right and who was wrong as between Mr Kaye and Ms Woolf on this issue. Mr Kaye called evidence from Peter Bates, a valuer, whose evidence it was that the new roof and a new hot water cylinder, which Ms Woolf had installed previously, might have increased the value of the property by, around, $25,000. Mr Kemp, therefore, properly included the sum for the new roof and the hot water cylinder in his Table F.

[279] I turn then to the amounts that Mr Kemp excluded from his Table F and which Ms Woolf says should be added in to give a total of $145,448. First, there is the amount of $23,934 for grounds and maintenance, including expenditure on lawns, gardening and hedge trimming. In my view, these are items of domestic expenditure in the nature of common maintenance items, which cannot be considered on any basis as contributions towards the preservation or enhancement of the property.

[280] Mr Keene also adds in to Mr Kemp's table a sum of $6,542.80, being a sum for security monitoring. In my view, Mr Kemp was correct not to include this item in his Table F. This was not for the benefit of the property. The evidence was that Ms Woolf put in place security monitoring to enable her to go overseas for a period of 18 months without telling Mr Woolf that she was proposing to go overseas. She left the property empty.

[281] Other items assigned by Mr Kemp as "personal" totalled $18,435.29. Mr Keene adds these in to Mr Kemp's total. These included items such as washing machine repair, locksmith, lawnmower repairs, a gas heater, recovering of an armchair, the construction of a freestanding studio and associated costs, as well as back fence and decking. The significant items amongst those, in terms of cost, were the studio and associated decking and the fence.

[282] I will return to Mr Kemp's evidence shortly. But I first refer to Mr Bates' evidence which, in short, was that a number of the contributions claimed by Ms Woolf added no value to the property. The value added by other contributions was de minimis. Notwithstanding that evidence, Mr Kemp has nevertheless given Ms Woolf credit for her payment for those items as contributions to the property. I will come to that. But first, I will address Mr Bates' evidence (I note that Ms Woolf did not call any contrary valuation evidence).

[283] Included in Ms Woolf's claim for contributions to the property are the following items as set out in her Table 3A:

Year	$	Description
1992	1,503.75	Veranda infill, decking
1992	216.79	Veranda windows
1992	507.13	Veranda French doors
1992	210.00	Veranda window
1993	270.00	Bathroom lino
1994	80.00	Bathroom lino
2001	220.08	Side gate
2001	142.25	Side fence
2002	12,840.00	Studio
2002	527.96	Studio electric wiring
2002	81.56	Studio lighting
2004	835.00	Kitchen, laundry and dining lino
2004	1,800.00	Lino laying
2009	866.25	Back fence (half share)
Total	**$20,100.77**	

[284] Mr Bates' evidence in relation to each of the items I have referred to was as follows:

(a) The studio and associated area of deck would be considered an undercapitalisation and a purchaser would not likely pay more for this minor feature. Mr Bates said the studio did not appear to be constructed to a high standard, and lacked both practice and aesthetic amenity for use as accommodation space. He said he was aware of many circumstances whereby residential tenants add such studio rooms and remove them at the end of the tenancy (sometimes at the request of the landlord);

(b) Mr Bates said that the area of deck associated with the studio addition would be considered an undercapitalisation and adds no market value;

(c) In relation to fencing costs, Mr Bates said this would normally be covered by both neighbours (as may be required under the Fencing Act 1978). A basic timber fence is likely to cost around $85 per metre new. He said that when considering the depreciation since construction and the cost, this is a very minor factor of negligible significance to value;

(d) Mr Bates' position in relation to the vinyl floor covering was that it is an especially inexpensive product and would be considered an

undercapitalisation for the property. He said a purchaser would be expected to remove it and either polish the floors or lay a higher quality product such as tiles;

(e) Mr Bates observed that the rear veranda seemed to have an issue with a roof leak. He said a leak was observed dripping within the enclosed back veranda. One of the bedrooms had effectively been made into an internal room due to the enclosure of the small rear area. Mr Bates' opinion was that the enclosure does not appear to add value, relative to the pre-existing walls and veranda; and

(f) Mr Bates said that the small metal garden sheds appeared to be "removable chattels" and did not appear to form part of the value of the "real estate". As with the studio, Mr Bates commented that he was aware of many circumstances whereby residential tenants add such garden sheds and remove them at the end of the tenancy (sometimes at the request of the landlord).

[285] Mr Bates' opinion overall, having considered the above items, was that they are of no significance or relevance to the market value of the property as at the date of his valuation, 17 July 2017. He said he did not believe that a purchaser would pay more to have these features. Rather, he said it would be better if the veranda were not enclosed and the vinyl floor covering was not an appropriate quality of product for the property in the Epsom location. He said the studio and garden sheds could readily be removed if an occupant believed that the studio and sheds have added value to that occupant.

[286] Finally, in relation to the fencing, he said it is a very minor item, but it is insignificant or de minimis in the context of the value of the real estate.

[287] I accept Mr Bates' evidence.

[288] Returning then to Mr Kemp. Notwithstanding Mr Bates' opinion on the items I have mentioned, Mr Kemp has, most fairly in my view, included the following as contributions to the property:

(a) The veranda costs (but mostly attributed to the mother rather than Ms Woolf);

(b) Bathroom lino attributed to Ms Woolf;

(c) Side fence and side gate attributed to Ms Woolf;

(d) Kitchen, laundry and dining lino and lino laying attributed to Ms Woolf; and

(e) The back fence (half share) attributed to Ms Woolf.

[289] A significant contributor to the total of the $18,435.29 excluded by Mr Kemp as personal items is the cost of the studio and associated costs.

[290] It is not disputed that the studio was constructed by Ms Woolf to enable her to use it as tutoring space for students. Ms Woolf's evidence was that she spoke to her mother before she constructed it, but she did not communicate with Mr Kaye about the proposed construction. No other party benefited from the studio. Mr Kemp observed that if Ms Woolf did use it for the purposes of professional teaching, he would have expected that it would have been at least partly tax deductible to her.

[291] Mr Keene submits it would be unreasonable to exclude the expenditure on the studio as he submits that most people in Ms Woolf's position would believe at the time that the addition of such a building would add value to the property. I do not accept that submission. That is not a proper basis for it being a contribution to the property. This studio was added by Ms Woolf for her personal use as a teaching space. It is a movable item.

[292] The remaining items excluded by Mr Kemp as personal items come to just under $5,000 in total. I accept Mr Kemp's evidence. But, in the overall scheme of

things, the amount is de minimis. There were also some concessions made by Mr Kemp in cross-examination in relation to whether items should be attributed to the mother or Ms Woolf. They were in the hundreds of dollars and again de minimis.

[293] I, therefore, accept Mr Kemp's evidence on his assessment of Ms Woolf's expenditure as contributions to the property. The sum is $83,537.81 plus the balance of the cost of the new roof of $13,000, bringing the total to $96,537.81. To that, I add the contributions to the mortgages of $20,751.23, bringing the final amount to $117,289.04. I round that down to $116,000 to take into account the concessions I referred to in [292] above.

Other (non-monetary) contributions to the property

[294] I accept that Ms Woolf assisted in ways other than by making a financial contribution in relation to keeping flatmates in the property and ensuring the flatmates' rent was paid during the period from 1982 through to February 1988. I accept that this involved interviewing and selecting flatmates, and checking that their rent was paid. I accept that Ms Woolf also ensured that there were always sufficient funds in the two bank accounts. When she considered that more was required, she communicated with her brother seeking further funds.

[295] I have already given Ms Woolf credit for that by attributing 50 per cent of the flatmates' rent payments to her.

Causal relationship between the contributions and the preservation/ enhancement of the property

[296] I have already referred to Mr Bates' evidence that a number of items which Ms Woolf paid for, and which Mr Kemp included in his Table F, did not add value to the property.

[297] However, as against that I accept that Ms Woolf should be given credit for her time in arranging repairs and maintenance.

[298] I set those two items off against each other.

Expectation that Ms Woolf would share in the property as a result of her contributions

[299] I now turn to consider whether, in all the circumstances, both Mr Kaye and Mr Woolf must be taken to reasonably have expected that Ms Woolf would share in the property as a result of her contributions.

[300] A determination of this issue is not made any easier by what I consider were changing positions on the part of both Ms Woolf and Mr Kaye over the years.

[301] There is correspondence from solicitors on behalf of Ms Woolf to Mr Kaye and from Ms Woolf herself to Mr Kaye regarding an interest for her in the property. I do not refer to all communications but mention a large sample.

[302] In April 1984, Ms Woolf forwarded to Mr Kaye a letter from Countrywide dated 3 April 1984 which had been sent to the property address, advising that the interest rate on the Countrywide account would be reduced. On the letter, Ms Woolf handwrote that "I really do want to have my name on the house papers as part-owner but they (sic) may be quite a difficult legal arrangement now". Ms Woolf did not mention an interest for either of her parents.

[303] In August 1984, the law firm Mahony, Samuel, Becker & Co wrote to Ms Woolf referring to a query by her regarding putting her name on the title of the property. Gifting is suggested. Ms Woolf forwarded the letter to Mr Kaye proposing a gifting process to ensure that her name would go on the title and on both mortgages. Again, she does not mention an interest for her parents.

[304] In January 1985, Ms Woolf forwarded to her brother a further letter from Mahony, Samuel, Becker & Co to her regarding her proposal for a gifting process. This time Ms Woolf mentions her mother as well in the context of gifting.

[305] In January 1985, Bell-Booth solicitors wrote to Mr Kaye on behalf of Ms Woolf. The letter refers to a contribution by Ms Woolf to the mortgages and a $20,000 contribution by the mother to the purchase price (Ms Woolf accepts that that

amount is incorrect). The letter refers to a gifting process to include both Ms Woolf and the mother. The father is not mentioned.

[306] On 11 April 1988, Deirdre Milne, solicitor of Williams, McDonald & Co, wrote to Mr Kaye on behalf of Ms Woolf. Ms Milne raised the matter of contributions by Ms Woolf and suggested the property be transferred into the names of the mother, Ms Woolf and Mr Kaye, and be held by the three as tenants-in-common in equal shares or in shares to be determined according to each person's monetary input.

[307] Ms Milne wrote to Mr Kaye again on 29 November 1988 on behalf of Ms Woolf. The letter sets out amounts which Ms Woolf claimed to have paid. The letter states that Ms Woolf's capital contribution has been by way of paying the mortgages: "She has completely paid off the $15,000.00 Westpac [CBA] mortgage at a cost to her of $23,092.00. She also reduced the Countrywide Bank mortgage from $30,000.00 to $27,000.00 at a cost of $23,684.00".

[308] I note that those sums are contradicted by the careful analysis of Mr Kemp which I have accepted.

[309] Then, in June 1992, Ms Milne wrote to the parents (no address) enclosing a transfer, transferring the property from Mr Kaye's sole name into the joint names of Mr Kaye and Ms Woolf as joint tenants. The parents' interest is not mentioned.

[310] In November 1998, Ms Woolf wrote in intemperate terms to Mr Kaye apparently responding to a communication from him that matters in relation to the property needed to be settled. She said that she should be able to afford a bank loan of $50,000, that Mr Feigler was prepared to put in $50,000 as well and that Mr Kaye would need to leave in some money as a non-interest paying loan.

[311] By September 2007, Jane Boyce of Foy & Halse solicitors had been instructed on behalf of Ms Woolf. Ms Boyce wrote to Mr Kaye in September 2007 stating that Ms Woolf wished to be jointly registered with Mr Kaye on the title, in other words for each to own a half share. There is no mention of an interest for the mother's estate or for the father.

[312] In December 2010, Ms Boyce again wrote to Mr Kaye on behalf of Ms Woolf. The letter states that throughout the last 28 years Ms Woolf made all repayments of the second mortgage and acted as guarantor under the mortgage (that statement does not accord with the evidence which I have already discussed.) The letter goes on to suggest that Mr Kaye agree to the property being listed for sale, and notes that Ms Woolf's estimate of the purchase for a suitable property for her would be in the region of $650,000 - $750,000.

[313] In March 2011, Ms Boyce sent a further letter to Mr Kaye. The letter records that Ms Woolf believes the property to be worth approximately $900,000. The letter proposes a transfer of a 75 per cent share of the property into Ms Woolf's name with 25 per cent to be in Mr Kaye's name. There is no mention of the mother's estate or of the father having an interest.

[314] In August 2011, Ms Boyce sent an email seeking resolution with Mr Kaye. Ms Boyce added that the father and the mother's estate had indicated that they would fund High Court proceedings.

[315] In January 2013, Ms Boyce wrote to Mr Kaye this time asserting that the parents and Ms Woolf had an interest in the property.

[316] As against the claims referred to in the above correspondence, there are examples of Ms Woolf asserting that the property belonged to her brother and that she had no interest in it. For example, Associate Professor Thomas said in relation to the Quedley litigation that at no time was there any suggestion or advice given to him by either Ms Woolf or Mr Feigler to the effect that he should take instructions from Ms Woolf or that she had any interest in the property. In fact, Associate Professor Thomas said it was quite to the contrary.

[317] There is correspondence in connection with the Quedley matter where Ms Woolf refers to the property being Mr Kaye's property. She does not suggest that she had an interest in the property.

[318] There is also the matter of the Countrywide account passbooks in which Ms Woolf recorded her payments as "Jinny (rent)". In the discovery copy of the passbooks provided to Mr Kaye, the word "rent" was blacked out and the words "towards mortgage" were written in instead. The changes came to light when Mr Kaye made a request to examine the original passbooks.

[319] Ms Woolf's explanation for making the changes was that she was concerned about using the word "rent", but she said it was not a deliberate attempt to mislead. She said she had not prepared the copies of the passbooks for the purpose of discovery, rather she had prepared them for earlier discussions with a solicitor whom she had consulted. She agreed that in hindsight it was "not a good thing to do". I accept her explanation that this was not a deliberate attempt to mislead. Nevertheless, her initial entries would tend to count against a person claiming an ownership interest.

[320] Mr Kaye's position is that he never considered that Ms Woolf had an interest in the property. He refers to the correspondence from Ms Woolf and her solicitors set out above. He says Ms Woolf clearly understood that he did not agree with her proposals to either gift her money, or to put her name on the title without due consideration or without agreement, nor did he agree to the demands she made, nor did he state that she was already entitled to be on the title as a joint owner, tenant-in-common or shareholder.

[321] Mr Kaye says he never agreed to give her an equity interest. He considered giving her an equity interest. But that had to be based on contributions and his receiving clear and accurate figures about legitimate contributions, which despite his many requests, he did not receive.

[322] In that regard, Mr Kaye refers to his fax to Ms Woolf sent in January 1999 where he said, "I intend to replace all the money contributed and you are very fortunate in that your input may be turned into equity".

[323] Under cross-examination, Ms Woolf was referred to her correspondence and her solicitor's correspondence with Mr Kaye. She acknowledged that Mr Kaye did respond to the correspondence over the years and that on many occasions he asked her

to provide him with full details of her claimed contributions. She also acknowledged that was not an unreasonable response from Mr Kaye. Ms Woolf said she thought she needed to get the appropriate accounting advice to be able to go through the papers and provide Mr Kaye with details, but she never did that. She accepted that if she wanted a share of the property on a contributions basis, she needed to show what her contributions were and that she should have provided those to Mr Kaye. Finally, she agreed that looking at the series of communications from her and her solicitors with Mr Kaye, that was effectively a demand for money or a percentage of the house without supporting justification.

[324] However, having said all of that, and noting Ms Woolf's concessions that Mr Kaye needed to see evidence of her contributions before considering an equity interest for her, there are statements by Mr Kaye made in the early days suggesting that Ms Woolf did have an interest in the property. They are as follows:

(a) In the course of dealing with the Quedley matter and before litigation commenced, Mr Kaye sent an email to his then solicitors, Bell-Booth Burgess, in December 1993. Added to the email was the following:

> Separate matter; we would also like to discuss with you the proposition of creating a Family Trust and placing the house in question in it. What I envisage is our selling it to the Trust with due consideration for Jinny's and our parents [sic] contributions. I will outline to you a draft of a proposal for you to assess and configure. There are a number of ramifications which I will try to address as comments to my proposal. In the meantime I have asked Jinny to have an informal &/or formal appraisal so we know what we are dealing with.

(b) On 21 May 1996, Mr Kaye sent a letter to Williamson J, care of the Judge's former firm of solicitors, Raymond Donnelly, in Christchurch. Mr Kaye referred to an earlier and unrelated matter in Christchurch in which the then Mr Williamson acted on his behalf. It is apparent that the purpose of the letter was to seek Williamson J's advice and recommendation as to a lawyer who might assist in the Quedley litigation. The letter includes the following:

> In 1981 I purchased a property in Auckland before I left New Zealand. My sister has lived there since I emigrated to Canada and my retired parents use it when they visit her. All parties have a financial interest in it, although it is in my name as the primary purchaser.

(c) In an email dated 22 September 1996, from Mr Kaye to Associate Professor Thomas, in relation to the Quedley litigation, Mr Kaye said the following:

> Virginia was very concerned about her vulnerable position in the house once I married. They were justifiably concerned my new wife would put Jinny's position in great jeopardy. The title of the property in NZ needed to be changed to get us off the unsatisfactory Cross-Lease which Mr Quedley was abusing in my absence. *we wanted to get Jinny's name onto the title as part of the changes*.
>
> (Emphasis added)

(d) Mr Kaye swore an affidavit in the Quedley litigation on 4 October 1996. He relevantly deposed as follows:

> 27. … On 6 November 1985 I wrote to Quedley, a copy of which is annexed and marked with the letter "G". This letter put him on notice that I wanted him to complete his obligations under the contract and get his stuff out of our garage and carport. The intention of this letter was to stir him into action. *Once he completed his obligations we would redocument the title and then I would be in a position to record Virginia's ownership.* I was well aware of the great significance of this letter and posted it by registered or certified mail because of its gravity.
>
> (Emphasis added)

[325] It therefore appears that Mr Kaye did contemplate at least up to the 1990s that Ms Woolf did have an interest in the property. The above statements appear to conflict with his position that he needed to have an accounting done before acknowledging that interest.

[326] Having regard to all of the evidence, I accept that Ms Woolf certainly expected that she would share in the property. She made contributions to the Countrywide mortgage and made payments that related to the property. She also made non-

monetary contributions by ensuring that the flatmates paid their rent and that work was done in relation to the property.

[327] Although Mr Kaye claimed in his evidence that his position was that he simply considered giving Ms Woolf an equity interest, in my view, the earlier documents referred to in [324] above showed an intention to put Ms Woolf on the title.

[328] I therefore consider it can be said that both parties must be taken to have reasonably expected that Ms Woolf would have a share of the property, but in respect of the later years, that was subject to an accounting being done.

Do the contributions manifestly exceed any benefits?

[329] I now turn to consider whether Ms Woolf's contributions manifestly exceed any benefits that she derived from the arrangement.

[330] It is here where Ms Woolf's claim fails and it fails by a very wide margin.

[331] Mr Bates describes Woodhall Road as a quiet cul-de-sac, rising from the eastern side of Gillies Avenue. It lies opposite the Epsom Teachers Training College. The property lies within a central Epsom location with public transport, schools and suburban shopping within walking distance, and the southern motorway access in Gillies Avenue is within a distance of two kilometres. It is within the zoning for Auckland Grammar School.

[332] Ms Woolf has lived in this area on a "rent-free" basis for 30 years. The property itself was assessed by Mr Bates as having a value of $1,600,000 as at 7 July 2017 (he then adds $25,000 for the new roof and hot water cylinder).

[333] Ms Woolf suggested in her evidence that she considered that she was tied to the property and felt unable to leave it, and generally it was something of a burden for her. I do not accept that evidence. It was contradicted by Ms Woolf's own evidence of her travel to the United Kingdom, where she lived and worked for a period of 18 months. She went without telling her brother that she was going and without making any attempt to tenant the house while she was away.

[334] Ms Woolf did not call any evidence to quantify the benefit from her perspective. This was despite a statement in a letter from her solicitors to Mr Kaye, dated 29 January 2013, informing Mr Kaye that they acted for Ms Woolf, the father and the estate of the mother, and that they had been requested to advise as to a possible claim by them in relation to the property. In the letter, the solicitors suggested that alternative dispute resolution would be a desirable alternative to legal proceedings. The letter went on to suggest that Mr Kaye enter into an agreement with Ms Woolf making provision for a forensic account to be appointed, and for that person to take primary responsibility for determining an equitable distribution of the net proceeds of sale. The solicitors stated that "[t]he forensic accountant would also need to assess in a careful manner the benefit that your sister has had from her occupation of the property".

[335] The issue of Ms Woolf paying rent was not new. Mr Kaye had raised the issue with Ms Woolf over the years. Ms Woolf interpreted Mr Kaye's raising of the rent with her as implying she was a mere tenant and not a co-owner paying occupation rent, and she reacted angrily to such a suggestion.

[336] When asked in closing submissions how he would quantify the benefit to Ms Woolf, Mr Keene orally adopted a figure of $45 a week for the preceding 30-year period. It will be recalled that $45 was the weekly payment for each flatmate in 1982. That produces a figure of $70,200 for the 30-year period.

[337] That is plainly completely unrealistic when compared with the expert evidence from Mr Bates. His evidence was that the total market rent for the 35 years and five months from 1 February 1982 to 7 July 2017 would be $650,544.98.

[338] I would exclude from that figure the amount for the years from 1 February 1982 to 1 February 1988 (when Ms Woolf was paying rent), being a total of $45,381.43. That leaves a figure of $605,163.55.

[339] To that latter figure, I add Mr Bates' assessment of a rental at $660 per week from one year from 7 July 2017 on the basis of a one year's fixed term rental. That produces a figure of $34,414.29.[82] That results in a figure of $639,577.84.

[340] I consider that this is the value of the benefit that Ms Woolf has had from living in the property from 1 February 1988 to 7 July 2018, from which time she was living there "rent-free".

[341] The value of the benefit overwhelms the contributions I have assessed at $116,000 by a considerable margin. Even using the calculation made by Mr Keene based on Mr Kemp's Table F, and adding in the items, which Mr Keene submitted Mr Kemp had wrongly excluded, resulting in the figure of $171,754 that Mr Keene claimed for Ms Woolf's contributions, that still results in the benefit overwhelming the contributions.

[342] I note that Mr Bates' figures (and resulting calculations) are all historical figures, as are all the contributions I have referred to.

Conclusion on constructive trust

[343] Ms Woolf has failed to prove her claim on the balance of probabilities that Mr Kaye holds the property on a constructive trust.

Application for sale order

[344] As I have found that Ms Woolf is not a co-owner of the property, this fourth cause of action fails.

Counterclaim – rent or mesne profits

[345] Mr Kaye, accordingly, remains the sole owner of the property. He seeks either rent or mesne profits from Ms Woolf for her occupation of the property. In relation to

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82 There was no evidence from Mr Bates as to a weekly rental figure for the property as from 7 July 2018 onwards. Although Ms Woolf has occupied the property since 7 July 2018, there is no evidential basis for the Court to quantify the benefit for the period from 7 July 2018 to the date of this judgment.

rent, Mr Kaye says it was agreed between the parties that Ms Woolf would pay rent for her occupation of the property. As she has not paid any rent since 1988, she has breached the parties' agreement to pay rent. Alternatively, Mr Kaye submits that if the Court finds there was no rental agreement, then Mr Kaye seeks mesne profits for Ms Woolf's wrongful occupation of the property.

[346] In my view, there was no rental agreement. Ms Woolf's evidence which I accept was that there was no discussion about rental payments when she first moved into the property. Although Mr Kaye raised with her the paying of rent more than once over the years, there was no agreement.

[347] It is well-accepted, however, that where a person has wrongfully been in possession of another's land, the owner is entitled to recover damages or mesne profits.[83]

[348] The learned authors of *Hinde McMorland & Sim Land Law in New Zealand* state:[84]

> Where a person (B) has wrongfully been in possession of another's (A's) land, A is entitled to recover from B damages (mesne profits). These are measured at a reasonable rate, usually assessed by the current market rental, for the period of use. This is regardless of any actual loss suffered by A, possibly none, or any actual benefit derived by B.
>
> (Citations omitted)

[349] Bill Atkin, in *The Law of Torts in New Zealand*, comments:[85]

> Where the defendant wrongfully makes use of the plaintiff's land, the plaintiff is entitled to recover by way of damages (generally called "mesne profits") a reasonable rate of remuneration for the full period of use, regardless of any actual loss suffered by the plaintiff or any actual benefit derived by the trespasser. This strict "user principle" is justified by the need to remove any financial incentive to interfere with the possessory rights of others.
>
> (Citations omitted)

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83 *Harvey v Beveridge* [2014] NZHC 947 at [15]-[16].

84 DW McMorland and others *Hinde McMorland & Sim Land Law in New Zealand* (online looseleaf ed, LexisNexis) at [7.004].

85 Bill Atkin "Trespassing on Land" in Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) 481 at [9.2.07(4)].

[350] The property owner is entitled to the sum whether or not he or she can show that the property would have been let to anybody else, and whether or not he or she would have used the property themselves.[86]

[351] Mr Kaye acknowledges that his claim is limited to a period of six years prior to the filing of the statement of defence and counterclaim dated 22 December 2017.

[352] Mr Kaye submits that the calculations by Mr Bates as to letting fees are an appropriate basis for an order. Those figures are:

One Year Rental Period	Rental Estimate $ Per Week	Annual Rent
From 22 December 2011 to 1 February 2017 (42 days)	$515	Part year $3,090.00
From 1 February 2012	$530	$27,711.43
From 1 February 2013	$560	$29,200.00
From 1 February 2014	$575	$29,982.14
From 1 February 2015	$610	$31,807.14
From 1 February 2016	$645	$33,724.29
From 1 February 2017 to 7 July 2017 (156 days)	$650	Part year $14,485.71
From 7 July 2017 to 22 December 2017 (168 days)	$660	Part year $15,840.00

[353] For Ms Woolf, Mr Keene made submissions in relation to occupation rent (founded on Ms Woolf's position that she was a co-owner). However, Mr Keene made no separate submissions in relation to this counterclaim. Ms Woolf's pleading in response to the counterclaim was simply a denial.

[354] The evidence that the Court is left with is the evidence of Mr Bates. There is no evidence to contradict his opinion evidence. I accept that Mr Kaye has provided a

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[86] Robert Megarry and William Wade *The Law of Real Property* (8th ed, Sweet & Maxwell, London, 2012) at [4-029].

proper basis for calculating mesne profits. Based on Mr Bates' figures, I calculate the amount as $185,840.71 for the period of six years prior to 22 December 2017.

[355] Mr Kaye is also entitled to interest pursuant to s 87 of the Judicature Act 1908 on that sum.

[356] I now address the remaining two (relevant) counterclaims.

Counterclaim – order for possession

[357] There are no separate issues arising on this counterclaim. Success or otherwise depends on my findings in relation to Ms Woolf's claims. She has failed in her claims. Therefore, there is no reason not to make an order for possession of the property.

[358] There is, however, the question of when Ms Woolf should vacate the property. Mr Keene refers to Ms Woolf's tutoring business for school children that she carries on in the studio on the property. He says she would need time to make satisfactory alternative arrangements. Mr Keene also advises that Ms Woolf has two small dogs, which would reduce her options in terms of alternative accommodation. Mr Keene says that Ms Woolf's instructions were to ask for, at least, until the end of January 2019 to vacate the property if she was completely unsuccessful in her claims.

[359] The submission on behalf of Mr Kaye is that he would accept that Ms Woolf might have two months to vacate the property on a rent-free basis. Mr Gilchrist submits that this is entirely reasonable if Ms Woolf's occupation is to come to an end.

[360] I consider that Mr Kaye's proposal is reasonable. My order for possession will take effect two months after the date of this judgment.

Counterclaim – discharge of caveat

[361] In August 2006, Ms Woolf lodged a caveat (No. 7005424.1) over the property. This Court made an order by consent on 31 March 2015 that the caveat not lapse pending the resolution of these proceedings.

[362] Mr Keene accepts that if the Court determines that Ms Woolf has no equitable interest as a co-owner of the property, it would be appropriate for the Court to discharge the caveat.

[363] I therefore make an order discharging the consent order that the caveat not lapse and an order that the caveat be removed from the title to the property.

Limitation Act 1950 – affirmative defence

[364] Had I found in favour of Ms Woolf and concluded that Mr Kaye held the property on a resulting trust for Ms Woolf and/or the parents, and/or had I decided in favour of Ms Woolf that a constructive trust had arisen, it would be necessary for me to consider Mr Kaye's affirmative defences of limitation and laches.

[365] However, given my decision that Ms Woolf has failed in her claims, both on her behalf and on behalf of the estate of her father, I mention Mr Kaye's two affirmative defences only briefly.

[366] The Limitation Act 1950 applies. Mr Gilchrist submits that pursuant to s 21(1) of the Limitation Act, no limitation period applies in respect of an action by a beneficiary in respect of fraud or to recover from the trustee trust property. Mr Gilchrist refers to the definition of a trust and trustee, namely "trust … extends to implied and constructive trusts, and to cases where the trustee has a beneficial interest in the trust property …" and "trustee" has a corresponding meaning.[87]

[367] Mr Gilchrist submits that Ms Woolf's claim is not in respect of fraud or a claim to recover from the trustee, trust property, the property itself being in Ms Woolf's possession. Mr Gilchrist therefore submits that as the claims do not fall within s 21(1) of the Limitation Act, they fall within s 21(2), in which case a six-year limitation period applies to Ms Woolf's claims.

[368] Mr Gilchrist finally submits that if s 21 does not apply, then the constructive trust and resulting trust claims should be barred by analogy pursuant to s 4(9) of the

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87 Limitation Act 1950, s 2 and Trustee Act 1956, s 2(1).

Limitation Act. He says the plaintiffs are endeavouring to "dress up" what is in reality a breach of contract claim as an equitable claim.

[369] In response, Mr Keene submits that this action by Ms Woolf and the estate of her father amounts to an action by a beneficiary under a resulting trust, and Mr Kaye's defence of the action amounts to an attempt by him to convert the shares of Ms Woolf and his parents to his own use. In other words, this is a fraud.

[370] Mr Keene also submits that there is no limitation period in respect of the constructive trust claim.

[371] In the judgment of Heath J in *Staite v Kusabs*, there is a helpful discussion of the application of the Limitation Act to equitable claims.[88]

[372] Were I to rely on the reasoning in that judgment, I would conclude that s 21(1) of the Limitation Act applies and accordingly that Act would provide no bar to Ms Woolf's claims in relation to a resulting trust[89] or a constructive trust.

[373] However, in the Supreme Court decision of *Proprietors of Wakatū v Attorney-General*,[90] there is reference in the judgment of the Chief Justice,[91] the joint judgment of Arnold and O'Regan JJ,[92] and the minority judgment of William Young J[93] to the judgment of the English Court of Appeal in *Paragon Finance Plc v DB Thakerar & Co.*[94] Both the Chief Justice and William Young J note that the Supreme Court of the United Kingdom recently approved the reasoning of Millett LJ in *Paragon*.[95]

[374] If I were to follow the approach referred to by the English Court of Appeal in *Paragon*, it would seem to follow that the resulting trust claim would not be barred by the provisions of the Limitation Act, but a constructive trust claim would be. However,

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88 *Staite v Kusabs* [2017] NZHC 416 at [181]-[190].

89 A resulting trust would appear to come within the definition of a trust within the Trustee Act 1956 as an implied trust. See *Ecurie Topgear SA v Kerr* HC Auckland CP202/92, 30 October 1996.

90 *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423.

91 At [446]-[451].

92 At [815].

93 At [932]-[936].

94 *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 All ER 400 (CA).

95 *Williams v Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189.

given my decision against Ms Woolf on the claims, it is not necessary to decide any issue of limitation and I do not do so.

Laches – affirmative defence

[375] Again, given my decision against Ms Woolf on the claims, I mention this affirmative defence only briefly.

[376] The equitable doctrine of laches is an affirmative defence which prevents a plaintiff from relying on a legal argument where he or she has delayed pursuing the rights or remedies available to him or her in equity.

[377] The leading authority on laches in New Zealand is *Eastern Services Ltd v No 68 Ltd*.[96] In that case, the Supreme Court stated that "the doctrine of laches requires a balancing of equities in relation to the broad span of human conduct".[97] The Court referred to the remarks of Lord Selborne in *Lindsay Petroleum Co v Hurd* as the classic exposition of a doctrine:[98]

> Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine … But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

[378] In the present case:

(a) Ms Woolf has delayed since 1983/84 when she says she first became aware that her brother's name was the sole name on the title to the property. Ms Woolf brought proceedings on 11 May 2015 when the original statement of claim was filed.

(b) The parents, who would have been key witnesses, have both since died, the mother in 2006 and the father in 2014.

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96 *Eastern Services Ltd v No 68 Ltd* [2006] NZSC 42, [2006] 3 NZLR 335.
97 At [37].
98 At [34]; citing *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 (PC) at 239-240.

(c) In support of her resulting trust claim, Ms Woolf relies on a number of handwritten documents prepared by the mother to support her claim as to the amount of the parents' initial contribution to the purchase price. The first of those documents was prepared sixteen weeks before settlement of the property and the last, around six years after settlement. Ms Woolf acknowledges that she had no discussion with her mother about the documents and what they meant. There is now no ability to rely on the mother's actual evidence or seek explanations as to the nature and context of the documents.

(d) Ms Woolf similarly relies on a statutory declaration made by the father to support her case as to the amount of the parents' contribution to the purchase price. That statutory declaration was first prepared in 2012 by which time there had been a complete breakdown in the relationship between the father and Mr Kaye. Further, I have found that the father's statement in other documents and this document demonstrate that his written statements are unreliable. The father is similarly unavailable to give evidence and to be cross-examined on his documents.

(e) Other contemporaneous documentation around the time of the settlement of the purchase which may have assisted, for example the parents' bank records, cannot now be accessed due to the passage of time.

(f) Some of Mr Kaye's documentation has been either lost or destroyed by both a fire and a flood at Mr Kaye's properties in Canada.

(g) In relation to the constructive trust claim, in his defence Mr Kaye relied on copies of bank drafts as records of money remitted to Ms Woolf (and the mother). Mr Kaye's evidence was that in addition to the bank drafts he sent money through visa, cheques and had money transferred from other New Zealand bank accounts. He says he did not expect there ever to be an issue and accordingly did not keep copies or records of all the money he sent.

(h) Mr Kaye also refers to Ms Woolf having paid for matters without his knowledge, and there being no proper payment records and no proper receipts or verification. He says this has denied him the ability to do proper accounting or verify expenses. He says he is now aware that this has occurred repeatedly over the years, and now considerable sums are claimed against him of which he was denied knowledge and did not have any say in these or the ability to manage them. Ms Woolf acknowledged under cross-examination that Mr Kaye did seek such documentation from her, but it was never provided.

(i) As a consequence of Ms Woolf claiming compensation for various expenses over the years, but by failing to provide Mr Kaye with receipts and records, Mr Kaye has been denied the ability to deduct expenses against income.

(j) Ms Woolf herself says that with the benefit of hindsight she realises that her record-keeping could have been better than it was.

(k) Ms Woolf also acknowledged that she has found it difficult at times to recall some of the detail of the important events and the important statements made by her parents, her brother and herself over the last 36 years relevant to the purchase of the property. She also acknowledged that if she had had difficulty recalling events, her brother might also have had the same difficulty.

[379] If I were required to decide the case on the basis of the affirmative defence of laches, I would have determined that Mr Kaye had established this defence for all of the above reasons.

Admissibility objections

[380] Finally, Mr Gilchrist annexed to his closing submissions a schedule of documents and statements to which objection was taken. I have not found it necessary to refer to or rely on any of those documents. It is therefore unnecessary to determine their admissibility.

Orders

[381] I make the following orders:

(a) Ms Woolf's claims for breach of contract, resulting trust, constructive trust and for a sale order are all dismissed (Ms Woolf having failed to prove those claims on the balance of probabilities).

(b) I enter judgment for Mr Kaye in the sum of $185,840.71, being mesne profits for the period of six years prior to 22 December 2017, together with interest pursuant to s 87 of the Judicature Act on that sum.

(c) I make an order in favour of Mr Kaye for possession of the property at 14 Woodhall Road, Epsom, being all that parcel of land containing 562m² more or less being contained in Lot 1 on Deposited Plan 190523 Indemnifier NA 120B/931 (North Auckland Registry), to take effect two calendar months from the date of this judgment.

(d) I make an order in favour of Mr Kaye for a writ of possession for the property at 14 Woodhall Road, Epsom, being all that parcel of land containing 562m² more or less being contained in Lot 1 on Deposited Plan 190523 Indemnifier NA 120B/931 (North Auckland Registry), to take effect two calendar months from the date of this judgment.

(e) I make an order discharging the consent order under CIV-2015-404-603 that Caveat No. 7005424.1 on the property at 14 Woodhall Road, Epsom, not lapse.

(f) I make an order that Caveat No. 7005424.1 on the property at 14 Woodhall Road, Epsom, being all that parcel of land containing 562m² more or less being contained in Lot 1 on Deposited Plan 190523 Indemnifier NA 120B/931 (North Auckland Registry), be removed.

(g) The remaining counterclaims made by Mr Kaye are dismissed.

Costs

[382] Mr Kaye, as the successful party, is entitled to costs. I encourage the parties to reach agreement and file a joint memorandum within 20 working days of this judgment. That may be a vain hope given the extent of the dispute between Ms Woolf and Mr Kaye. In the event that agreement cannot be reached, Mr Kaye is to file and serve his memorandum within five working days of the date for the joint memorandum and Ms Woolf within a further five working days. The memoranda should not exceed six pages (excluding attachments).

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Gordon J