EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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IN THE FAMILY COURT
AT CHRISTCHURCH

I TE KŌTI WHĀNAU
KI ŌTAUTAHI

FAM-2021-009-000755
[2024] NZFC 6201

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[TW] Applicant
AND	[SD] Respondent
AND	[HD] and [LZ] Interested Parties

Hearing:	29 April to 3 May 2024
Appearances:	S Marsden and R Van Eekelen for the Applicant Y Park for the Respondent A Brown and S Zhu for the Interested Parties
Judgment:	20 May 2024

RESERVED JUDGMENT OF JUDGE P W SHEARER

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[1] These proceedings under the Property (Relationships) Act 1976 (“the PRA”) concern the division of relationship property between the applicant (“Ms [TW]”) and

respondent ("Ms [SD]") and a separate application by Ms [TW] under the Family Proceedings Act 1980 for past spousal maintenance.

[2] The interested parties ("Mr [HD]" and "Ms [LZ]") are Ms [SD]'s parents. They plead that a property at [address deleted — address 1], (the "[address 1]" property) which would otherwise be the family home under the PRA, is actually their property pursuant to a resulting trust.

[3] The parties are all Chinese. Ms [SD] and Ms [TW] commenced a same sex de facto relationship in China in [2012] and immigrated to New Zealand in [2016][1] and in [2017][2] respectively. They separated in 2020.

[4] The precise date of separation is disputed. Ms [TW] argued the date of separation was 5 August 2020 and not 19 April 2020 as contended by Ms [SD]. For reasons that I will explain later I prefer and accept Ms [SD]'s evidence on this point, but nothing turns on the date of separation. The parties were in a qualifying relationship in terms of the PRA for 7½ years.

[5] The proceedings were filed by Ms [TW] on 21 May 2021, now three years ago. Mr [HD] and Ms [LZ] were formally joined as parties to the proceedings under s 37 on 20 April 2022.

[6] A large amount of evidence has been filed. The bundles of documents extend to some 1,610 pages. I heard evidence over five full days and have received comprehensive legal submissions and bundles of authorities from all counsel.

Issues

[7] The legal issues that I am asked to determine, arising from the evidence and the competing arguments are:

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[1] Ms [SD].
[2] Ms [TW].

(a) Is the [address 1] property relationship property as Ms [TW] contends or are Mr [HD] and Ms [LZ] the beneficial owners pursuant to a resulting trust as they contend.

(b) If I find a resulting trust in favour of Mr [HD] and Ms [LZ] they seek further orders as follows:

(i) Vesting [address 1] in them; and

(ii) That Ms [SD] and Ms [TW] are to repay rental income they received for [address 1] during their occupation of the property.

(c) If I determine that [address 1] is relationship property:

(i) Ms [TW] seeks an equal share on the basis it was the family home, <u>and</u> an equal share in the rental income received post-separation.

(ii) Ms [SD] seeks unequal sharing in her favour pursuant to s 13 and occupation rental for the period that Ms [TW] had exclusive occupation after separation.

(d) The status of the Lexus car purchased by Ms [SD] with funds from her parents in December 2019. Ms [SD] argues the car is her separate property, whereas Ms [TW] claims the car is a "family chattel" and relationship property.

(e) Finally, Ms [TW] seeks a lump sum of $20,000 for past spousal maintenance for the approximately 10 month period after August 2020 (the date of separation asserted by Ms [TW]).

Factual background and findings

[8] Ms [TW] and Ms [SD] met in [a city in China], in or about the middle of 2012 and started dating soon after that. Ms [TW] was [in her mid 20s] at the time and

Ms [SD] was [in her early 30s].[3] Ms [TW] was working as a [employment details deleted][4] where she had worked since [2009].[5] Ms [SD] was working full-time as a [employment details deleted], a position she held from [2006].[6]

[9] Both parties already had university degrees in China. According to their application subsequently submitted to Immigration New Zealand, Ms [TW] had a [qualifications and university details deleted].[7] Ms [SD] had a [qualifications and university details deleted].[8]

[10] In her initial narrative affidavit Ms [TW] deposed that Ms [SD] was running her own [business] as well as working for the [employment details deleted] when the parties met. She said that at or about the end of 2012 she started helping part-time with the [details deleted] at the [business] and resigned from her employment in early 2014 to help manage the [business] full-time.[9] There is no mention, however, of working at the [business] in the "employment history" that Ms [TW] submitted to New Zealand Immigration. In that history Ms [TW] advised that she worked at the [shop] until [2014].

[11] Ms [TW] acknowledged that the [business] was owned under Ms [LZ]'s name, and not in Ms [SD]'s name, but suggested that was an arrangement to get around the law in China about government employees not being allowed to incorporate their own companies.[10] [Details deleted].

[12] The [business] is a "red herring" and inconsequential to the legal issues I am asked to decide. It was suggested by Ms [TW] that when the [business] was sold in [2015],[11] at which point Ms [SD] and Ms [TW] were living temporarily (and studying) in the [country Z], that Ms [SD] received or benefited from the sale proceeds and may

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[3] BOD, page 6 at [5].
[4] NOE, page 5, line 26, to page 7, line 4.
[5] New Zealand Immigration National Security Check form at page 4.
[6] Separate National Security Check form at page 4.
[7] See n 5 above at page 3.
[8] See n 6 above at page 3.
[9] BOD, page 6 at [6] and [7].
[10] BOD, page 372 at [33].
[11] BOD, page 898 at [21].

have subsequently used or received those proceeds to assist with the purchase of [address 1].

[13] Without going too much into the detail, I am satisfied that was not the case. Ms [SD] and her parents all confirmed that the [business] was owned by Ms [LZ]. In his first affidavit Mr [HD] deposed that he and Ms [LZ] purchased the [business] in [2010] for RMB200,000[12] and he attached to his affidavit a copy and English translation of the business licence.[13]

[14] Ms [SD], and later Ms [TW], helped on the front desk of the business, and were not paid. While the evidence about that was disputed and may well have been minimised by Mr [HD] and Ms [LZ] (and Ms [SD]), the relevant point for current purposes is that the business did not own the premises it operated from. The business leased the shop it operated from and only owned the [details deleted]. The business was sold in [2015][14] for RMB100,000.[15]

[15] Renminbi or "RMB" is the Chinese currency and NZ$1.00 is equivalent to RMB4.50, and so the [business] sale proceeds amounted to NZ$22,222. I am satisfied on the evidence that the business, and therefore the sale proceeds, belonged to Ms [LZ].

[16] In [2012] Ms [TW] moved in with Ms [SD] at an apartment owned by Mr [HD] where Ms [SD] was already living. Homosexual relationships are not recognised in Chinese law, society and culture and expert evidence was given that Chinese parents generally feel "shameful" if their children are LGBT.[16]

[17] Subsequently, in 2013, Ms [SD] and Ms [TW] moved into what was referred to during the hearing as the "[apartment 1]". This was a newly built apartment that had been purchased off the plans in September 2010, prior to Ms [SD] and Ms [TW] meeting. The evidence, which I accept, is that the apartment was purchased by

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[12] Ibid at [17].
[13] BOD, page 921.
[14] BOD, page 898 at [21].
[15] NOE, page 252, line 16.
[16] Affidavit of Dr Zhixiang (Leo) Liao, BOD page 1504 at [29(c)].

Ms [SD]'s parents as her "dowry" when Ms [SD] married a Chinese man in [2011]. Mr [HD] and Ms [LZ] paid the initial deposit of RMB420,000 and paid the balance of the RMB800,000 purchase price by bank loan.[17]

[18] Ms [SD] acknowledged in her evidence at the hearing that her marriage in China was a "sham" or "*fake marriage*" as Ms [TW] described it in her evidence. Ms [SD]'s husband was a gay man who was in a gay relationship. He and Ms [SD] met through a dating app and married to satisfy their respective parents who do not accept homosexuality. Ms [SD] acknowledged that she and her husband lived together for "*maybe about a week*".[18]

[19] Dr Laio advised that it is not entirely clear whether dowry is required to be returned if a marriage breaks down[19] but Ms [LZ] was certainly very clear in her view and evidence that the apartment belonged to Ms [SD] while she was married but reverted to her and Mr [HD] after Ms [SD]'s divorce.[20]

[20] Ms [SD]'s evidence is that she sold the [apartment 1] in 2023, well after the parties separated in 2020. The apartment sold for RMB3,000,000[21] and Ms [SD] said she retained only RMB300,000 and returned the balance to her parents.[22]

[21] Mr [HD]'s evidence was that he had to repay the balance of the mortgage on the property, which was about RMB200,000, before it could be sold.[23]

[22] Regardless, the [apartment 1] was immovable property at the date of separation and is outside the jurisdiction of the PRA.[24] It would have been Ms [SD]'s separate property if the PRA did apply, given that it was acquired well prior to Ms [SD]'s relationship with Ms [TW]. Ms [TW] does not make any claim against the [apartment 1].

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[17] BOD, page 897 at [11].
[18] NOE, page 137, line 18.
[19] BOD, page 1536 at [145].
[20] NOE, page 244, lines 8 to 11.
[21] NOE, page 228, lines 10 to 13.
[22] NOE, page 163, lines 16 to 18 and page 228, line 6.
[23] NOE page 282, lines 6 to 10.
[24] Section 7(1).

[23] What Ms [SD] did not disclose anywhere in her written evidence, let alone in her affidavit of assets and liabilities as she should have, is that she also owns a second apartment in China, which is the apartment where her parents live.[25]

[24] Ms [SD] acknowledged in cross-examination that she purchased this apartment, which was referred to in the evidence as the [apartment 2], in 2012 at a subsidised price as a special privilege due to her employment with the [government department in China deleted].[26] Ms Brown referred to it in her closing submissions as a "Government welfare subsidy". Ms [SD] confirmed that her father paid the balance of the purchase price[27] and that the apartment had been the primary residence for her parents since 2012. The [apartment 2] is, again, outside the jurisdiction of the PRA.

[25] In 2014 and through her employment with the [employment details deleted] Ms [SD] was offered a scholarship to study [a programme at a University] in the [country Z]. She received a scholarship of US$1,000 per month.[28] She and Ms [TW] lived in the [country Z] from [2014] until [2015].[29] In that period Ms [TW] obtained a [degree from the same University].[30] Ms [SD]'s evidence was that she paid Ms [TW]'s tuition fees, paid for their rent, and also paid for their extensive overseas travel whilst they were in the [country Z], all from her savings.[31]

[26] Ms [TW]'s evidence, which Ms [SD] accepted, was that she worked part-time as a [employment details deleted] while they were in the [country Z]. It is highly unlikely that Ms [TW]'s income would have covered her living costs, tuition fees and international travel. Photographs provided to Immigration New Zealand with Ms [SD]'s residence visa application show Ms [SD] and Ms [TW] in the [holiday dates and location deleted].

[27] In October 2015 Ms [TW] and Ms [SD] returned to China and resumed living together in the [apartment 1], although that was kept a secret from Ms [SD]'s parents.[32]

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[25] NOE, page 138, line 17.
[26] NOE, page 140, line 11, and page 215, lines 26 to 31.
[27] NOE, page 215, line 33.
[28] BOD, page 508 at [14].
[29] Ms [TW]'s New Zealand Immigration "Additional Information Form" at page 5.
[30] Ibid.
[31] BOD, page 508 at [12] and [14].
[32] BOD, page 509 at [17].

Ms [SD] returned to her previous position with the [employment details deleted] and through until [2016]. Ms [TW] worked as a [employment details deleted] from [2015] to [2016] and then as a [employment details deleted] from [2016] to [2017]. In that period of time Ms [SD] and Ms [TW] decided to immigrate to New Zealand.

[28] In her first affidavit Ms [SD] said that she decided to move to New Zealand to further her studies and that Ms [TW] followed her.[33] In her affidavit Ms [TW] said that they decided to migrate to New Zealand and settle down.[34]

[29] Ms [SD] holidayed in New Zealand with her parents in [2016], which was the first trip to New Zealand for all three of them. Ms [SD]'s evidence is that prior to that trip she had been discussing her plans to move to New Zealand with her mother, but had not discussed it with her father, although she said her mother would have told him.[35] In his first affidavit and referring to the first trip to New Zealand in February 2016, Mr [HD] said that "*[SD] told us that she was interested in immigrating to New Zealand and would like to go there to have a look*".[36] He went on to say:

> [26] While we were in New Zealand, we visited some of our friends who were originally from our hometown. They told us that [SD] could gain a residency visa by completing a course and finding a job in New Zealand. They also told us that we may purchase a property in New Zealand and use rental income to pay for our living costs after we moved to live with our daughter later. Both my wife and I were really happy about that approach.
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> [27] After that trip, we decided to sell one of our apartments in China and planned to use the sale proceeds to purchase a property in New Zealand.
>
> [28] In March 2016, we entered into an agreement to sell an apartment in China. That apartment was sold for RMB2,100,000 (equivalent to approximately NZD$430,000). …

[30] In June 2016 Ms [SD] came back to New Zealand for a business trip and subsequently moved to Christchurch in August 2016. Ms [TW], at that time, remained in China.

[33] BOD, page 509 at [20].
[34] BOD, page 6 at [12].
[35] BOD, page 867 at [50].
[36] BOD, page 899 at [24].

[31] Ms [SD] found rental accommodation and completed a [study programme] before returning to China for the Christmas holidays. She returned to New Zealand in [2017] and Ms [TW] arrived in New Zealand in [2017].[37] Ms [SD] commenced a [study programme at University] in [2017].

[32] Mr [HD] deposed in his first affidavit dated 9 March 2022 as follows:

> [30] Since we have set our minds on purchasing a property in New Zealand, I have been communicating with [SD] about house hunting not long after she moved to New Zealand in or about [2016]. As my entire career was relating to architectural design and property development, I have a good sense of property investment. I asked [SD] to keep an eye on the property market in New Zealand. Initially [SD] told me that she would like to rent for a while and did not want to buy a house until she settles down…

[33] Mr [HD] provided a copy of WeChat messages with Ms [SD] on 4 September 2016 to that effect.[38] He went on to say that Ms [SD] subsequently told him that it would be a better idea to buy a section and build a house that suited their needs. He said:

> [32] In or about October 2016, [SD] told me that she found a suitable section, which is close to [University]. That means the house, once built, would be well sought after by university students and capable of generating good rental incomes in the future. After discussing it with my wife, we asked [SD] to buy that section for us.

[34] Mr [HD] provided a copy of the agreement for sale and purchase of the bare section at [address 1], which was dated 16 October 2016.[39] The purchase price was $216,000. Mr [HD] deposed:

> [33] …[SD] signed the agreement as purchaser. Our names were not included in the agreement. That was because we were based in China, and we believed it would be more convenient for [SD] to handle all the matters required on our behalf.

[35] Ms [SD] then contracted a developer, [name deleted], to build a house on the section. A building agreement was signed on 21 December 2016.[40] The total construction cost was $461,809.

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[37] BOD, page 509 at [21].
[38] BOD, page 945.
[39] BOD, page 947.
[40] BOD, page 976.

[36] The house was designed and intended to maximise future rental income, being built over two stories with six bedrooms and each bedroom having its own bathroom.[41]

[37] The house was completed in or about [2018] and rooms were rented to [University] students as from [2018].[42] Ms [SD] and Ms [TW] occupied one bedroom and it appears that the remaining five bedrooms were rented for approximately $200 each per week, such that the property was generating rental income of approximately $1,000 per week or $4,000 per month. Mr [HD] deposed that *"my wife and I asked [SD] to manage all rental incomes for us."*[43]

[38] The evidence of Mr [HD] and Ms [LZ], supported and confirmed by Ms [SD], is that Mr [HD] and Ms [LZ] transferred the total sum of $704,151 from China to Ms [SD] in New Zealand in a series of 13 separate transfers through different family members or friends, as follows:

	Date	**From**	**Amount $**	**Bank Statement reference**
1	29 November 2016	[LZ]	67,980	BOD page 647
2	1 December 2016	[FS]	68,000	BOD page 647
3	2 December 2016	[YK]	67,980	BOD page 648
4	8 December 2016	[YW]	67,985	BOD page 648
5	15 March 2017	[FW]	39,485	BOD page 654
6	16 March 2017	[HD]	39,485	BOD, page 654
7	28 March 2017	[HD]	29,985	BOD, page 655
8	28 March 2017	[FW]	29,985	BOD, page 655
9	11 April 2017	[LZ]	68,990	BOD, page 532
10	2 May 2017	[ZZ]	71,400	BOD, page 534

[41] BOD, page 1186 at [6] and page 1272 at [6(b)].
[42] Exhibit "E".
[43] BOD, page 1063 at [6].

11	1 June 2017	[HZ]	72,500	BOD, page 535
12	20 July 2017	[MC]	65,388	BOD, page 662
13	12 September 2017	[HZ]	14,988	BOD, page 665
		Total	**704,151**	

[39] For Ms [TW], Ms Marsden submitted that Mr [HD] and Ms [LZ] have not produced their Chinese bank statements or other evidence to prove the source of the funds that were transferred to New Zealand. The inference I am invited to draw is that the funds, or some of them, may have come from other sources.

[40] Ms Marsden is correct that Mr [HD] and Ms [LZ] could have provided further documentary evidence to conclusively establish that chain of evidence, but I accept their evidence that it was their money that they transferred or arranged to be transferred, and I accept Ms [SD]'s evidence that it was not her money and that she did not have any other money of any significance. In making these findings I note:

(a) The evidence that Mr [HD] did provide as to the sale of an apartment owned by Ms [LZ] in China in March 2016 for RMB2,100,000 (NZ$430,000).[44]

(b) Mr [HD]'s oral evidence that he owned four properties in China in 2016.[45] He is retired now but had worked as an architect his entire career. Mr [HD]'s friend from university, [YL], who was not required for cross-examination, described Mr [HD] as *"fairly wealthy and quite commercial-minded"* in his affidavit.[46]

(c) While Ms [SD] did, until 2023, own two apartments in China, the evidence has established that these apartments were not producing any income for her. Her parents lived in the [apartment 2] and did not pay

[44] BOD, page 899 at [28] and annexure "D" at page 935.
[45] NOE, page 259, line 26.
[46] BOD, page 1290 at [4].

any rent, no doubt in light of the fact that they funded the initial purchase. Similarly, the [apartment 1] which Ms [SD] (and Ms [TW]) had lived in until Ms [SD] immigrated to New Zealand in 2016, was rented for a short period but Mr [HD]'s mother then lived in the apartment until she passed away in [2021].[47]

(d) Ms [SD]'s evidence that she had used her savings to live and travel in the [country Z] in 2014/2015 and further (oral) evidence that she transferred her savings of NZ$50,000 to New Zealand, which funds arrived in her ASB account ($49,980) on 14 February 2017,[48] just after she commenced her [study programme at University].

(e) There were no significant funds from the sale of the [business], let alone evidence that the sale proceeds were transferred to Ms [SD]. On the contrary, the evidence is that money belonged to and was retained by Ms [LZ].

[41] In summary, I have been satisfied on the evidence that the $704,151 transferred from China to New Zealand was not Ms [SD]'s money in China, but rather, was her parents' money as they assert. I accept the submission made by Ms Park in her closing oral submissions that "there is no other explanation as to where the funds could have come from, other than from Mr [HD] and Ms [LZ].

[42] In theory the $704,151 was more than sufficient to cover the combined cost of the section ($216,000) and build ($461,809), being $677,809. On the face of it there is a surplus of $26,342.

[43] The evidence and bank statements also establish, however, that there was an intermingling of funds. For example:

(a) The transfers of $68,990, $71,400 and $72,500 on 11 April, 2 May and 1 June 2017 respectively, were all transferred to Ms [SD]'s and

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[47] BOD, page 897 at 13.
[48] BOD, page 652.

Ms [TW]'s joint ANZ account, rather than Ms [SD]'s personal ASB bank account.

(b) On 10 February 2017, and using funds that her parents had deposited in her ASB account purportedly for the house build, Ms [SD] paid her [University] fees of $29,704.[49] It was only four days later, on 14 February 2017, that Ms [SD] transferred her own savings of $49,980 from China, but she then transferred $30,000 to her and Ms [TW]'s joint ANZ account on 30 March 2017.[50]

(c) On 24 March 2017 Ms [SD] put $120,000 of the funds from China into a 6-month ASB term deposit[51] and she made a second term deposit of $40,000 with ASB on 5 May 2017.[52] Those term deposits matured on 24 September 2017[53] and 5 April 2018[54] respectively. On 9 May 2017 Ms [SD] made a separate term deposit of $150,000 using funds in the joint ANZ account,[55] which term deposit matured 3 months later on 10 August 2017.[56]

(d) On 5 December 2017 Ms [SD] and Ms [TW] then loaned $150,000 from their joint account to their mutual friend, [CK],[57] who was the boss of the [Group] whom Ms [TW] was working for. Analysis of the bank statements during cross-examination of Ms [SD] revealed that Mr [CK] had only repaid $90,000 to Ms [SD] and Ms [TW] as at May 2018 when the build of [address 1] was complete:

Payment Date	Amount $	Bank Statement Reference
23 January 2018	20,000	BOD, page 546
2 February 2018	10,000	BOD, page 546

[49] BOD, page 651.
[50] BOD, page 655.
[51] BOD, page 654.
[52] BOD, page 720.
[53] BOD, page 667.
[54] BOD, page 724.
[55] BOD, page 606.
[56] BOD, page 609.
[57] BOD, page 544.

19 February 2018	5,000	BOD, page 549
21 February 2018	3,000	BOD, page 616
22 February 2018	19,000	BOD, page 549
16 April 2018	20,000	BOD, page 680
20 April 2018	6,000	BOD, page 680
24 April 2018	5,000	BOD, page 680
9 May 2018	2,000	BOD, page 680
Total	**90,000**	

(e) Ms [SD]'s evidence was that Mr [CK] also paid a bill of $13,807.40 on behalf of the parties in March 2018 for concreting the [address 1] driveway,[58] although there is no documentary evidence of that payment. Ms [TW] did not deny that Mr [CK] made that payment.[59] Mr [CK] subsequently made further payments of $15,000 and $2,000 to the joint accounts on 11 January 2019[60] and 5 December 2019[61] respectively but giving Mr [CK] credit for the driveway bill at $14,000 (rounded up) means that he had repaid a total of $121,000 only as at the date of separation, and still owed $29,000. If Mr [CK] has repaid that $29,000 subsequently it must have been paid to Ms [SD] because Ms [TW] has not seen or shared in those funds.

The point, however, is that as at [2018] when the house build was complete and paid for, Mr [CK] had repaid only $104,000 of the $150,000 loan, and still owed $46,000. That shortfall and the fees that Ms [SD] paid to [University] for her tuition meant that the funds that Mr [HD] and Ms [LZ] transferred from China did not quite cover the full cost of the section and build.

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[58] NOE, page 189, lines 1 to 10.
[59] NOE, page 188, line 22.
[60] BOD, page 570.
[61] BOD, page 637.

(f) As Ms Van Eekelen put to Ms [SD] and established in cross-examination, Mr [HD] transferred sums of $39,980, $20,980 and $9,985 to Ms [SD]'s ASB account on 30 January 2018, 31 January 2018[62] and 15 March 2018[63] respectively, which made up the total of $70,945 that was the gross income for the first Chinese study-tour group that Ms [SD] and Ms [TW] ran in 2018. Expenses were then paid from those gross fees, and from the spreadsheet that Mr [HD] provided[64] it seems that the net profit from the 2018 study-tour group was $26,330, but immediately after the deposits of $39,980 and $20,980 were received on 30 and 31 January 2018, Ms [SD] paid bills related to the build of $39,948 and $15,979 respectively from her ASB account,[65] so the parties' income (relationship property) was also used to fund build expenses.

[44] Mr [HD]'s evidence is that he transferred study-tour group income of $43,000 to Ms [SD] for the second study-tour group in 2019. His spreadsheet advises[66] that he transferred $43,000 on 22 January 2019 and a deposit of $42,988 from Mr [HD] can be seen in the joint ANZ 00 account on 24 January 2019,[67] before expenses were then paid. Mr [HD] calculated that the profit from the 2019 tour group was $16,519, such that Ms [SD] and Ms [TW] earned a total of $42,849 (net) from the two tour groups combined.

[45] I am satisfied on the oral evidence given by Ms [SD] and Ms [TW] that they each did work organising and then guiding the tour groups, which were groups of school children from China, and that they contributed approximately equally. Clearly that money they earned together was relationship property.

[46] The income that Ms [TW] and Ms [SD] earned while in New Zealand was also paid into their joint ANZ 00 account, which was the same account where tenants at the

[62] BOD, page 671.
[63] BOD, page 679.
[64] BOD, page 1134.
[65] BOD, page 675.
[66] BOD, page 1135.
[67] BOD, page 571.

[address 1] property paid their rent. That said, there was not a lot of income that the parties earned from employment:

(a) When Ms [TW] first arrived in New Zealand in March 2017, Ms [SD] was studying full-time at [University] and until 2018.

(b) Ms [TW] deposed that she worked at [employment details deleted], and that she worked continuously to support Ms [SD],[68] although my understanding is that these roles were all part-time or casual. The employment history submitted by Ms [TW] to Immigration New Zealand in December 2019 listed the following employment in New Zealand to that point:

(i) [2017] to [2017]: [employment details deleted]. Bank statements for the joint ANZ 00 account reveal six separate deposits from [employment details deleted] between [2017] and [2017] which total $891.74.[69]

(ii) [2017] to [2018]: [employment details deleted]. This was clearly more significant employment. Deposits (x13) to the joint account between [2017] and [2018] total $12,621.72.[70]

(iii) [2018] to [2019]: [employment details deleted]. Deposits to the joint account from [CY] labelled "wage" between 6 December 2018 and 23 July 2019 total $2,899.01.[71]

(iv) September 2019 to December 2019: [employment details deleted]. Three separate deposits from [details deleted] between 11 December and 23 December 2019 total $2,012.26.[72]

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[68] BOD, page 7 at [14].
[69] Deposits on 19 July, 2 August, 16 August, 30 August, 13 September and 27 September 2017.
[70] Deposits on 2 October, 20 October, 30 October, 14 November, 29 November and 11 December 2017, and 26 January, 29 January, 26 February, 6 April, 17 April, 2 July and 2 August 2018.
[71] Deposits on 6 December, 13 December, 21 December and 27 December 2018 and 4 February, 11 February, 20 February, 26 February, 5 March, 7 March, 15 March, 20 March, 28 March, 23 April, 29 April, 16 May and 23 July 2018.
[72] Deposits on 11 December, 16 December and 23 December 2019.

(c) When Ms [SD] completed her full-time study at [University] she undertook some different part-time jobs through [recruitment agency name deleted]. Her employment history submitted to Immigration New Zealand refers to working as a [employment details deleted]. Deposits to the joint account from [the recruitment agency] between 15 November 2018 and 21 August 2019 total $3,083.78.[73]

(d) Ms [SD] obtained full-time employment with [employment details deleted] on or about [2019]. The position was based in [town A] and commenced on 24 October 2019. In the (approximately) six months up to and including her fortnightly salary payment on 22 April 2020, net wages of $24,646.14 were paid into the joint account.[74]

[47] Ms [TW] commenced full-time study for a [education details deleted] in February 2019, which was a two year programme. Her course fees of $22,053.50 were paid from the joint 00 account on 22 January 2019,[75] and further payments of $5,743.50 and $255.00 were made to [the education institute] on 17 and 19 December 2019 respectively.[76]

[48] Ms [TW] went back to China to visit her parents in early [2020] and only planned to stay in China for about a month,[77] but due to the COVID-19 pandemic which started in Wuhan and New Zealand closing its borders, Ms [TW] got stuck in China and was not able to return to Christchurch until [mid 2020].

[49] Hence the reason she was not able to complete her diploma until 2021. Ms [TW] graduated in [2021] and immediately commenced [employment details deleted] on a starting salary of $56,500.[78] As at the date of hearing Ms [TW] was earning $75,000.[79]

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[73] Deposits on 15 November, 22 November, 29 November and 6 December 2018, 17 January, 15 August, 22 August, 29 August, 5 September and 26 September 2019.

[74] Fortnightly deposits paid on 6 November, 20 November, 4 December, 18 December, 31 December 2019 and 15 January, 29 January, 12 February, 26 February, 11 March, 25 March, 8 April and 22 April 2020.

[75] BOD, page 571.

[76] BOD, page 595.

[77] BOD, page 7 at [19].

[78] BOD, page 375 at [58].

[79] NOE, page 109, line 32.

[50] Ms [SD] acknowledged in her first affidavit that she and Ms [TW] were both responsible for arranging the various rentals of the rooms at [address 1] and that they both benefited from the rental income.[80] Tenants' rent was paid, in the main, into the joint 00 account, or an ANZ account in Ms [LZ]'s name which she opened on 23 April 2018, but which account Ms [SD] controlled. Some rental was also paid into Ms [SD]'s personal ASB account.

[51] The rental income received was significant. The evidence did not provide precise calculations or summaries of the sums received from May 2018, but with five spare bedrooms that were rented for between $180 and $200 per week each,[81] there was the ability to collect between $900 and $1000 per week. A rental appraisal completed by Rempstone Property Management on 1 July 2021 assessed a market rental for the house as a whole to be $860 to $920 per week.[82]

[52] What the evidence has established is that Ms [SD] treated the rental income as her income, notwithstanding the various arguments and evidence that the rental income was her parents' money. The income was used to cover Ms [SD]'s and Ms [TW]'s living costs and with very little, if any, monitoring or control by Mr [HD] and Ms [LZ].

[53] Ms [TW] stated as follows in her second affidavit when responding to Ms [SD]'s initial affidavit:[83]

> [27] Mr [HD] and Ms [LZ] have never asked me or Ms [SD] any questions about the tenancy at the family home or to account for the rental income generated by the family home prior to these proceedings.

[54] In contrast, Mr [HD] deposed as follows in his first affidavit dated 9 March 2022:[84]

> [47] As previously mentioned, the property is our investment property and [SD] was holding it on trust for us. It has always been our plan to rent out the rooms in return for money. I knew that since the completion of the construction there were about five bedrooms being rented out to students for

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[80] BOD, page 514 at [52].
[81] NOE, page 110, line 27, to page 111, line 2.
[82] BOD, page 827.
[83] BOD, page 370.
[84] BOD, page 903.

> approximately $4,000 per month. My wife and I asked [SD] to manage all rental incomes for us.
>
> [48] I understand that [SD] has been paying the rent into her mother's New Zealand bank account with some funds set aside to pay for unfinished outdoor building work as well as her living costs. I know that she did not have enough money until she found a full-time job at [employment details deleted] in or about [2019].
>
> [49] Only recently were we made aware that [SD] has used some of our rental income to pay for [TW]'s tuition fees as well as her living costs. My wife and I would not have agreed to [TW] using our money. [SD] told us that [TW] has also kept some of the rental income of the property since September 2019 immediately before [SD] moved to [town A] in [2019] to be close to her work.

[55] Similarly, the parties have different versions about the beneficial ownership of the [address 1] property. Ms [TW] stated as follows in her first affidavit:[85]

> [38] Ms [SD] always told me that the family home is our joint asset. There was never any discussion about Ms [SD]'s parents having an interest in the family home. While Ms [SD]'s parents helped us fund the costs of its construction, it was never discussed between Ms [SD] and I that this gave them an interest in the family home. Rather, I understood that Ms [SD]'s family were simply helping us out, which is common among Chinese families.
>
> …
>
> [42] Since our separation, I have repeatedly sought to divide my interest in the family home with Ms [SD]. To my surprise, Ms [SD] now refuses to acknowledge my interest in the family home.

[56] Ms [SD] then responded as follows in her first affidavit:[86]

> [39] The [address 1] property was funded entirely by my parents, [LZ] and [HD], who reside in China. They are not legally entitled to own property in New Zealand as they are not New Zealand residents. They funded the purchase of the property for their use when they visit me in New Zealand from time to time.
>
> …
>
> [50] I deny ever saying that the [address 1] property is our joint asset. This view is unreasonable when she knows neither she nor myself ever financially contributed to it. There is no evidence to support [TW]'s position that my parents provided 100% of the capital with the intention of benefiting me and [TW]. My parents were not even aware that [TW] and I were married, let alone in a relationship.

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[85] BOD, page 9.
[86] BOD, page 512.

> [51] The funds transferred for the purchase of the [address 1] property were not gifts, but money transferred by or on behalf of my parents for the specific purpose of acquiring a property for my parents and me.

[57] The position of Mr [HD] and Ms [LZ] is summarised by the following further paragraphs in Mr [HD]'s first affidavit:[87]

> [37] My wife and I transferred in total $708,748[88] for the land purchase as well as the construction. Due to the restrictions imposed by the government of China, each person was only allowed to transfer no more than USD$50,000 per year. We had to transfer those funds via our friends and relatives in China. Details of those transactions were provided in [SD]'s affidavit dated 23 July 2021.
>
> [38] It was our plan and agreement with [SD] from the very beginning that [SD] is to hold the property as a trustee, for us and for our interest…

[58] The respective understandings are complicated by the fact that Mr [HD] and Ms [LZ] were not aware of Ms [SD]'s relationship with Ms [TW], and notwithstanding that they visited New Zealand three times during the relationship, between [2018], [2018] and [2019], and [2019] to [2020].[89] Mr [HD] deposed in his first affidavit as follows:[90]

> [39] We never met [TW] in China, nor were we made aware that she went to study in the [country Z] with [SD]. The Chinese culture disapproves homosexuality. [SD] never told us she was in a relationship with [TW] as she knew that we would not have approved of it.
>
> [40] We came to New Zealand again in or about [2018], to attend [SD]'s graduation, and also to check out the construction of our house. The main part of the house was almost completed when we arrived. My wife and I stayed at the house for most of our visit…
>
> [41] While we stayed at the house, we noticed that [TW] was also staying at our place. [SD] told us that [TW] was a friend, and she was helping her financially as she was not working at the time. In order to save money, she was staying with [SD] in one bedroom rent free while the other rooms were let out to other students for rent. We thought she was [SD]'s good friend and did not pay too much attention to her.

[59] Ms [TW] does not accept that Ms [SD]'s parents were not aware of their relationship. In particular, she referred to the fact that she and Ms [SD] always shared the master bedroom in the [address 1] property and slept on the same bed, which

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[87] BOD, page 901.
[88] Later amended to $704,151 as set out at [38] and confirmed during the course of the hearing.
[89] BOD, page 430 at [21].
[90] BOD, page 901.

Ms [LZ] and Mr [HD] were aware of as they stayed for several weeks (in fact months) at a time when they visited.[91]

[60] This prompted Mr [HD] and Ms [LZ] to obtain and file expert cultural evidence from Dr Liao as to a special kind of relationship in Chinese society known as "guimi". It is a term that describes a long-term and very close/best friend relationship between two females. These friends can talk about anything and may be better described as "long-term sisterhood." Dr Liao explained that when Chinese women want to talk to someone about highly private and personal topics, most of them would choose to talk to their "guimi," rather than their parents or husband. He said Chinese parents are generally comfortable with this relationship and would not suspect a lesbian relationship.[92]

[61] Whilst it has been suggested and argued that Mr [HD] and Ms [LZ] may have seen Ms [TW] as "guimi," they did not use that term themselves in either their affidavit evidence or their oral evidence. They simply said that they were never told and did not know that Ms [SD] was in a romantic relationship with Ms [TW].[93]

[62] There is certainly some significant evidence to support Mr [HD]'s and Ms [LZ]'s understanding or lack of knowledge/understanding about Ms [SD]'s relationship with Ms [TW], because it is clear that Ms [SD] and Ms [TW] deliberately and carefully kept their relationship from their respective families in China. Neither Ms [SD] or Ms [TW] ever told their family they had got married and Ms [TW] acknowledged that she had not told her parents about these Court proceedings which she is, therefore, going through on her own.[94] Ms [SD] said in her initial affidavit as follows:[95]

> [23] As I have previously stated, my parents were unaware of my relationship with [TW]. I have never spoken to my parents about our relationship. This is a highly sensitive topic for me as well as to them. I tried to tell them that I was gay when I was in my 20's. They did not take it well. They sent me to my doctor for some sort of psychological support because

[91] Eg: BOD, page 371 at [31].
[92] BOD, pages 1529 to 1531 at [113] to [125].
[93] Eg: BOD, page 1193 at [46] and BOD, page 1555 at [16].
[94] NOE, page 109, line 12.
[95] BOD, page 509.

> they see it as a mental illness. To this day, my mother frequently asks me to get married and settle down with a man.
>
> [24] I understand [TW]'s parents have also asked her to marry a man. Very few people (perhaps not more than six people) know about our relationship. In most situations, I tell people that [TW] is my cousin.
>
> [25] It is correct that my parents have visited me three times since I moved to New Zealand. We did not talk about our relationship – they had understood that we were close friends. It is not uncommon for two friends of the same sex to share a room, particularly in Asian culture. I often invited another friend over to hide our relationship.

[63] Ms [TW] was dismissive of the suggestion in cross-examination that their relationship could be described as "guimi," In response she said:[96]

> I want to say we Chinese also very…we have our own privacy. Normally we don't want to share a room and a bed with others except some special situations like if we went travelling, we go travelling, we share one room to save some costs. But it's just a short period of time. And we don't normally share one blanket, you know? So, but, you know I, living together with Ms [SD] from China to [country Z] then to New Zealand, its almost eight years.

[64] She went on to say:[97]

> …from when I was very young to now, I never saw two girls they are just close friends. They can share one bed for eight years. And also they said in my affidavit that – sorry said in their affidavit that because my financial condition was not good so that's why I share one bed with her. I wanted to say since my, got my first work visa I've kept working constantly. I was not so poor to even buy a blanket you know? I don't have to share one blanket with her. It's so – such a private thing if we're just a close friends it's weird you know?

[65] Ms [TW] suggested that Mr [HD] and Ms [LZ] turned a "blind eye" to the relationship,[98] and I think that may be a fair comment. Ms [SD] initially stated, in her first affidavit, that "*my parents were unaware that I was a lesbian"*[99] but she also said in the same affidavit that *"I tried to tell them that I was gay when I was in my 20's…".*[100]

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[96] NOE, page 20, line 20.
[97] NOE, page 21, line 7.
[98] NOE, page 16, line 33.
[99] BOD, page 509, at [17].
[100] At [23].

[66] Ms [SD] acknowledged that her marriage to a man in China was a sham, and I infer, an attempt to satisfy or please her parents with a traditional marriage. Nonetheless, Mr [HD] and Ms [LZ] were aware that the marriage only lasted a short time. Whether Mr [HD] and Ms [LZ] genuinely did not know about the relationship with Ms [TW], or whether they did not want to know and, therefore, did not ask any questions or turned a blind eye, I am not sure.

[67] It is crystal clear, however, that Mr [HD] and Ms [LZ] do not approve of homosexuality, nor their daughter being in a homosexual relationship. Ms [LZ] was asked about it:[101]

> Q. [SD] has disclosed now that she was in a homosexual relationships, do you acknowledge that?
>
> A. I only knew about it after – because of this case but I still cannot accept.

[68] Similarly, Mr [HD] said:[102]

> Q. But you do know that now and do you understand in New Zealand and probably, as in China people who are married have financial obligations to support each other. Do you know that?
>
> A. Because the problem is I don't accept this marriage. Because my wife and I we are in our 70's. We are traditional Chinese thinking. We cannot accept this homosexuality relationship. So, even I do know it I still cannot accept that they are married couple. This is, they did behind us.

[69] While there is some considerable doubt about it, I have not been satisfied on the balance of probabilities that Mr [HD] and Ms [TW] knew about the romantic relationship between their daughter and Ms [TW] prior to these Court proceedings. The obvious point is that it is highly unlikely they would have transferred money to Ms [SD] as frequently and as freely as they did, had they known about the relationship or even the remotest possibility or concern that there could be a relationship property claim against Ms [SD].

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[101] NOE, page 241, line 30.
[102] NOE, page 268, line 16.

[70] Ms [SD] acquired a 2010 Lexus car in December 2019, soon after she started her full-time job in [town A], which car was funded by money Ms [LZ] transferred to her own ANZ account from China, and which funds Ms [SD] was then able to access.

[71] On 20 September 2019 Ms [LZ] deposited $30,000 in her ANZ Go account (suffix 00).[103] On 25 September 2019 Ms [SD] transferred $25,000 from the Go account to Ms [LZ]'s 50 "Serious Saver" account.[104] From Ms [LZ]'s 50 account three payments were made to "Autoterminal" for the Lexus car:

• 8 October 2019	$8,500	[105]
• 2 December 2019	$6,799	[106]
• 2 December 2019	$10,000	[107]
	$25,299	

[72] As I mentioned, Ms [TW] returned to China in early [2020] to visit her family, and then got stuck there due to the COVID lockdown and border closure.

[73] It was on 19 April 2020 that Ms [SD] advised Ms [TW] via a WeChat message that she had cheated on her with another woman who was a colleague. The screenshots of the messages which Ms [SD] attached to her first affidavit as Annexure "A" run to nine pages and are unequivocal. They include the following exchanges:[108]

> Ms [SD]: *I am sorry, but I don't want to cheat you, I cheated on you, did what I was most ashamed of.*
>
> Ms [TW]: *So you're breaking up with me?*
>
> …
>
> Ms [SD]: *Let's break up. I know it's cruel to tell you at this point.*
>
> Ms [TW]: *And who?*
>
> Ms [SD]: *Colleague.*
>
> Ms [TW]: *You're getting together?*

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[103] BOD, page 1215.
[104] BOD, page 1216 and NOE, page 98, line 1.
[105] BOD, page 1245.
[106] BOD, page 1243.
[107] Ibid.
[108] BOD, page 520 to 528.

Ms [SD]: *not necessarily.*

Ms [SD]: *But I think it's better to break up with you.*

…

Ms [TW]: *When did this happen?*

Ms [SD]: *These two days.*

Ms [TW]: *Indian colleague?*

…

Ms [SD]: *Yes.*

Ms [SD]: *Also a roommate.*

Ms [TW]: *Okay.*

…

Ms [TW]: *So you're gonna stay with her for a while?*

Ms [SD]: *Yes.*

Ms [SD]: *But I want to go out for a while before I decide.*

[74] Ms [TW]'s affidavit evidence was that the relationship "deteriorated" in mid-April 2020 when Ms [SD] told her about the affair,[109] but she said that they remained in contact and continued to have long phone conversations. She deposed that the parties separated on 5 August 2020 when Ms [SD] informed her she had unilaterally withdrawn their joint residence visa application in July.[110]

[75] I do not accept that the parties continued to be in a relationship after Ms [SD] informed Ms [TW] of her affair on 19 April. Ms [TW] has not provided evidence of regular or amicable communication, let alone any declarations of love or forgiveness after 19 April and I am influenced in my conclusion by the affidavit evidence of the parties' mutual friend, [YK], who was not required for cross-examination.

[109] BOD, page 373 at [43].
[110] At [44].

[76] Ms [YK] deposed that while communicating with Ms [TW] via WeChat in July 2020, Ms [TW] said that she had split up with Ms [SD] in April.[111] Ms [YK] provided an English translation from a translation service of the WeChat message where Ms [TW] said, "*I haven't told you that I actually broke up with her in April.*" Ms [TW]'s follow-up message, sent the same day, 18 July 2020, said *"Might as well tell you today, [you] will find out anyway"*.[112]

[77] Accordingly, and as noted earlier, I find that the date of separation was 19 April 2020 as stated by Ms [SD], and not 5 August 2020 as argued by Ms [TW].

[78] Ms [TW] was able to return to Christchurch [in 2020].[113] At that stage she was still completing her [education details deleted]. Ms [TW] acknowledged that she obtained an internship in [2021][114] and has been working full-time since she graduated in [2021].

[79] Ms [TW] lived at the [address 1] property from [mid-2020] until [mid-2021]. She said that she moved out of [address 1] as soon as she secured full-time employment.[115] However, it was not until 6 October 2021 that her (former) solicitor advised Ms Park by email that Ms [TW] had moved out of the [address 1] property.[116]

[80] Ms [TW] has also acknowledged that she received and used rental of $5,760 from tenants in the home between August and December 2020.[117] Ms [TW] said in her oral evidence that three bedrooms were still rented out when she returned to New Zealand [in mid-2020].[118] Gradually the tenants all moved out and it was just Ms [TW] in the house as from [early 2021].[119]

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[111] BOD, page 1298 at [8].
[112] BOD, page 1350.
[113] NOE, page 110, line 1.
[114] NOE, page 109, line 25.
[115] NOE, page 110, lines 7 to 9.
[116] BOD, page 417.
[117] BOD, page 311 at [6(a)].
[118] NOE, page 110, line 21.
[119] NOE, page 111, lines 27 to 30.

[81] Ms [TW]'s evidence was that she was not able to sign tenancy agreements as the landlord to rent rooms to new tenants because the house was registered in Ms [SD]'s name and Ms [SD] did not agree to Ms [TW] arranging further tenants.[120]

[82] Ms [SD] confirmed that [address 1] has been rented again as from 19 April 2022 and has been managed since then by a rental management company, Rempstone.[121] Ms [SD] advised that the house is now rented to one tenant for $970 per week.[122]

[83] It is agreed that Ms [SD] paid $7,500 to Ms [TW] on 1 September 2020, being one half of the $15,000 that Ms [SD] had withdrawn from the joint 02 account on 20 July 2020.[123] The respective ANZ joint account balances at the date of separation (19 April 2020) were $6,088.98[124] and $9,611.37,[125] so $15,700 in total. That being the case, and as conceded by Ms [TW] she is required to account for the $4,000 that she withdrew from the joint 02 account on 13 July 2020[126] to fund her airfares from China to New Zealand.

[84] The most recent developments are that Ms [SD] moved from [town A] to [town B] in April 2022[127] to take up a new job as a [job title deleted]. Ms [SD] was made redundant from that position only a couple of weeks before the hearing, on 17 April 2024,[128] and does not yet have new employment.

[85] Ms [SD] purchased a three-bedroom house in [town B] in [2023] for $800,000 with significant assistance from her parents who gifted her half the purchase price. The balance was borrowed from the bank. The house is registered in Ms [SD]'s sole name.[129]

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[120] BOD, page 14, at [73].
[121] NOE, page 203, line 7.
[122] NOE, page 119, lines 12 to 26.
[123] BOD, page 23.
[124] BOD, page 601.
[125] BOD, page 643.
[126] BOD, page 23.
[127] NOE, page 229, line 5.
[128] NOE, page 115, line 31.
[129] NOE, page 229, line 29, to page 230, line 17.

[86] Ms [SD] now has permanent residency in New Zealand.[130] Ms [TW] is not yet a permanent resident but has a residency visa. She advised that she will receive permanent residency in 12 months' time.[131]

[87] Having set out the background in some detail, I turn now to the particular legal issues and decisions on those issues.

Is the [address 1] property held on resulting trust?

[88] For Mr [HD] and Ms [LZ] it is pleaded that the [address 1] property is held for them (by Ms [SD]) on resulting trust.

[89] As noted by the Court of Appeal in *Chang v Lee*[132] the principle of resulting trust was explained by Lord Browne-Wilkinson in the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington London Burrough Council*[133] and arises in circumstances where:

> " … A makes a voluntary payment to B or pays (wholly or in part) for the purchase of a property which is vested in either 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 the joint purchase by A and B in shares proportionate to their contribution. It is important to stress that this is only a *presumption*, which presumption can be easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer … "

[90] Lord Browne-Wilkinson went on to state that:

> " … resulting trust[s] are traditionally regarded as examples of trusts giving effect to the common intention of the parties. 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. … If the settlor has expressly, or by necessary implication, abandoned any beneficial interest in the trust property, there is … no resulting trust … "

[130] NOE, page 230, line 31.
[131] NOE, page 239, lines 14 to 21.
[132] *Chang v Lee* [2017] NZCA 308 at [18].
[133] *Westdeutsche Landesbank Girozentrale v Islington London Burrough Council* [1996] 2 All ER 961 at 990.

[91] In *Chang v Lee* the Court of Appeal said that:

> [20] The rationale for a resulting trust is that, absent evidence to the contrary, the law presumes a person intends to retain the beneficial ownership of funds which he or she advances towards the purchase price of a property. The legal owner holds title to the property subject to the payer's equitable interest. In this way a trust results to the payer to the extent of his or her contribution. Evidence which might contradict or rebut the presumption is traditionally of an intention to gift or of consideration in the nature of satisfaction of independent indebtedness ...

[92] And further:

> [27] … a resulting trust takes effect once it is established that the settlor did not intend to part with beneficial ownership of the contribution. By using as its reference point the property acquired with that contribution (to which the funds can be traced directly and without controversy) equity recognises that any benefits attaching to its acquisition should be shared according to the parties' respective contributions. Whether conceptualised as a presumption of non-beneficial transfer or as a response to an absence of consideration, the law of resulting trusts provides an equitable remedy where an injustice would otherwise result.

[93] As emphasised in the authorities, the presumption of a resulting trust is just a presumption and can be rebutted.

[94] In the circumstances of this case there is also a counter-presumption of advancement, which presumption was summarised by the High Court as follows in *Kamal v Long Stream Limited*:[134]

> The "presumption of advancement" is that property transferred without consideration between close family members is by way of gift.

[95] Ms [SD] is an only child. Expert evidence from Dr Liao was that different to western culture, Chinese culture gives priority to parent-child relationships over husband-wife relationships.[135]

[96] Dr Liao filed two affidavits and stated in his first affidavit as follows:

> [53] Chinese parents are extremely willing to work hard and give up his or her own current enjoyments for a "bright" future for their children. This is

[134] *Kamal v Long Stream Limited* [2021] NZHC 2260 at [48].
[135] BOD, page 1515 at [46].

> because success is perceived by looking at the family as a whole (a collective unit), and looking at the future of the family – how well their children will be in the future.
>
> …
>
> [55] It is perceived that Chinese parents will transfer a large amount of money to their children with the expectation that the child/children would look after them when they get old.
>
> [56] Parents helping their children, including adult children, is not unique to Chinese culture. New Zealand parents, when giving their children financial support, generally do not expect to live with the child/children in the future, but many Chinese parents do expect so. The expectation will be much stronger if the child is the only child of the parents.
>
> [57] In this sense, helping the child is helping the parents themselves. The welfare and benefits of the child is also the parents' future welfare and benefits.

[97] Dr Liao also stressed, however, that where there are transfers from Chinese parents to their adult children without clear evidence to show whether the transfer is of the nature of a gift, a loan or an investment, the focus has to be on ascertaining the true intention of the transferor (the parents).[136] That is, therefore, the same question and issue as posed by the presumption of resulting trust.

[98] Dr Liao suggested, and ultimately advocated, perhaps stepping outside of his brief as an independent expert, that there were "*attractive, reasonable and practical" reasons*"[137] to register the [address 1] property in Ms [SD]'s name and rather than in her parents' name.

[99] These reasons include the obvious matters that Mr [HD] and Ms [LZ] do not speak English and were living in China, whereas Ms [SD] is proficient in English and living in New Zealand and would be on hand and the one dealing with the real estate agents, builder, Council, insurance company, bank and tenants, etc.

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[136] BOD, page 1571 at [51].
[137] NOE, page 1576 at [75].

[100] Mr [HD] and Ms [LZ] were both adamant and, indeed, emphatic in both their affidavit and oral evidence, that the [address 1] property was an investment property for their benefit.[138] Mr [HD] deposed in his initial affidavit that:[139]

> [6] … My wife and I have paid for the entire land purchase and house construction of the property. The property was intended to be an investment property and to be used by us and our family when we moved to live in New Zealand.

[101] Ms [LZ] said the same thing in her initial affidavit:[140]

> (a) The property is an investment property of my husband and me, and we have paid for the entire costs for land purchase and house construction.
>
> (b) We intended to use rental income generated from the property to pay for our living costs after we move to live with [SD] in New Zealand. The property was designed for maximum rental returns.
>
> (c) It was our plan and agreement with [SD] from the very beginning that [SD] is to hold the property as a trustee, for us and for our interest. That was evidenced by the fact that [SD] consulted us for all big decisions that related to development of the property.
>
> (d) We did not know [SD] was in a romantic relationship with Ms [TW]. Even if we did, we would not have approved of it due to our traditional beliefs.
>
> (e) We are the beneficial owners of the property. There has never been an intention for us to gift the property to [SD] nor Ms [TW].

[102] Mr [HD] and Ms [LZ] did not waver in their evidence and were supported in their position by Ms [SD]. Whilst I acknowledge that there is some considerable doubt about it, given the conflicting evidence, it is the civil standard of proof that applies and I have ultimately been satisfied (on the balance of probabilities) that the significant sums of money that Mr [HD] and Ms [LZ] transferred to New Zealand in 2016 and 2017 were, at the time, intended as "gifts" to Ms [SD] so that she could buy/build a house.

[103] I have reached that conclusion for a number of reasons:

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[138] Eg: BOD, page 1063 at [5].
[139] BOD, page 896.
[140] BOD, page 1272 at [6].

(a) I am satisfied that Mr [HD] and Ms [LZ] did not know that Ms [SD] was in a romantic relationship with Ms [TW] when they were making the plans and arrangements to buy a property in New Zealand. The fact of the matter is that Ms [TW] did not arrive in New Zealand until March 2017 and the section had already been signed up in October 2016 and settled in December 2016. The building contract had also been signed in December 2016 and the whole project was, therefore, well underway. Ms [SD] did not inform her parents about her relationship with Ms [TW], let alone their marriage in [2017]. Because Mr [HD] and Ms [LZ] were completely unaware they had no reason to be cautious about advancing money to Ms [SD] to buy a property.

(b) The expert evidence is clear that Chinese culture gives priority to parent/child relationships. An adult child is still a member of the "core" family as long as they are still single,[141] as Mr [HD] and Ms [LZ] thought Ms [SD] was. Chinese parents commonly transfer large amounts of money to their children with the expectation that they will then be looked after by their child/children when they get old. Mr [HD] and Ms [LZ] can rightly expect, and will likely live with Ms [SD] one day, when they are older, as is the Chinese culture and custom but they do not need to own the house or have provided the funds for the house to do that. While I accept that they did provide the funds to buy the section and build the house, my understanding of Chinese custom is that they would be welcome and able to live with Ms [SD] even if they had not done that.

(c) Notwithstanding that Mr [HD] could, at the time (in 2016), have purchased the [address 1] property in his own name, given that it was not until October 2018 that amendments to the Overseas Investment Act 2005 prevented the purchase of residential land by overseas investors, he and Ms [LZ] deliberately authorised the purchase of the section and house build in Ms [SD]'s name. They had done that

[141] BOD, page 1516 at [48].

previously with [apartment 1] and [apartment 2] in China and Mr [HD] as a professional person and career architect and Ms [LZ] as a government employee would be well aware that legal title means ownership. I accept that it was practical and convenient for Ms [SD] to own the property in her name and that she could have been their agent, given that she was here in New Zealand and able to speak English, but there is an equally valid counter-argument. The property ownership and building contract could still have been in Mr [HD]'s name or Ms [LZ]'s name, with Ms [SD] being formally appointed as their agent by way of a Power of Attorney or similar Chinese equivalent, but there was no such documentation.

(d) I acknowledge and accept the evidence that Mr [HD] was in constant communication with Ms [SD] about the purchase of the section and the design and build of the house. That is only natural, however, and was to be expected when Mr [HD] is an experienced architect and property investor. Ms [SD], at that time, was all alone and newly arrived in a foreign country. I would expect nothing less than for her parents, and her architect father in particular, to be heavily involved in the planning and designing, which is what occurred.

(e) The point about the WeChat messages between Mr [HD] and Ms [SD] that were provided in the evidence, is that there is not a single message where Mr [HD] referred to "my" house or build or "our" house or build.

(f) While I am also conscious of the expert evidence that it is unlikely for a parent/child arrangement to have written documentation, the complete lack of paperwork is a problem and ultimately to Mr [HD] and Ms [LZ]'s detriment. Quite apart from a formal property sharing agreement, declaration of trust or deed of acknowledgement of debt, there is not even so much as an email or WeChat message addressing the issue of legal ownership or intention, in terms of the sums of money transferred. Given the sums of money involved and the differences in law and the language barrier as between the two countries, it was

imperative that there be some sort of written record or documentation. The failure to document anything was at the parents' peril, given the starting point is the legal ownership in Ms [SD]'s name and the presumption of advancement.

(g) I am also influenced by the fact that Ms [SD] held out to Immigration New Zealand, when seeking residency here, that she owned the [address 1] property. There was no requirement for her to own land in New Zealand to obtain residency and, therefore, no need for her to say what was said to Immigration, but the letter from her immigration lawyer, Mr Yoon, dated 11 December 2019 clearly, and I assume deliberately, stated:

> [19] Ms [SD] and Ms [TW] are in a genuine and stable relationship. They have been in a relationship for many years and legally married as a same sex couple.
>
> [20] Their primary home address is [address 1], which is owned by Ms [SD] in her name…

As part of the supporting documents provided with the residency application, Ms [SD] provided a copy of the [address 1] certificate of title in her sole name and a District Council rates notice also in her name. In a further joint letter to the Immigration case officer, Ms [SD] and Ms [TW] stated *"In May 2018, we moved to our newly built house [at address 1]. We were so excited that we had our own house…"*. They then provided further detail about landscaping they had completed themselves and planting they had done. The very clear impression the reader of that letter would have had was that the [address 1] house was owned by Ms [SD] personally and was not a rental property. Presumably that was the understanding at the time.

(h) The letter and application to Immigration was written before the parties' separated but even after Ms [SD] and Ms [TW] separated Ms [SD] acknowledged, at least initially, that the house was hers. Ms [TW] has provided a screenshot of WeChat messages she and Ms [SD] exchanged on 25 September 2020 when she received notification of the PRA notice

of claim of interest that Ms [TW] had lodged against the [address 1] title. In these messages Ms [SD] asked if Ms [TW] wanted half of the sale proceeds and before Ms [TW] even replied Ms [SD] sent a further message saying *"Will transfer it to you if it is sold at auction"*.[142]

I accept that Ms [SD] had not taken legal advice and clearly the narrative has changed once she has had advice, but it is noteworthy that Ms [SD]'s initial response was not something or anything along the lines of "it is not my house, it is my parents' house, so you are not entitled to anything". Her response was quite the opposite.

(i) I am also of the view that Mr [HD]'s and Ms [LZ]'s "hands-off" approach to the management of the completed house and the expenditure of the rental income is consistent with the property being Ms [SD]'s property, and such that she was free and able to spend the rental income as she deemed fit. In taking that approach and attitude Mr [HD] and Ms [LZ] were no doubt assured and satisfied that Ms [SD] was more than comfortably provided for whilst living in New Zealand.

(j) Seeing the rental income as Ms [SD]'s property is also consistent with Ms [LZ] transferring further funds to New Zealand in advance of their visits to New Zealand to cover their living costs, and as opposed to an expectation that accumulated rental income would cover any costs that they incurred. Similarly, Ms [LZ] transferred further funds to Ms [SD] to buy the Lexus car, and as opposed to simply authorising or facilitating the withdrawal of funds already accumulated from rental and in her ANZ account (or which she would have expected to be in her ANZ account).

(k) Whilst Mr [HD] and Ms [LZ] have both been emphatic in their affidavit and oral evidence that the [address 1] property was purchased and held on trust for them, all of that evidence has been given after Ms [SD] and

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[142] BOD, page 464.

> Ms [TW] separated and Court proceedings were filed. There is no evidence from Mr [HD] or Ms [LZ] that is contemporaneous with the time that the money was transferred to New Zealand and the house was built.

[104] Accordingly, I find that the presumption of advancement applies and rebuts the presumption of a resulting trust in this case.

[105] Even without the presumption of an advancement, or if I am wrong in my finding that the transfers of money from China were not intended (at the time) as gifts to Ms [SD] contrary to the presumption of resulting trust, I would have declined to grant the equitable remedy sought by Mr [HD] and Ms [LZ] for another reason.

[106] The High Court in *Kaimore Construction Limited (in liq) v Wichman*[143] noted that *"the presumption of resulting trust can be rebutted in a number of ways"* and referred, for example, to *"establishing that the trust would, if it existed, effect a fraudulent or illegal purpose."*

[107] Various cases have considered this issue and including the Supreme Court in *Horsfall v Potter*.[144] There the Court reviewed various authorities, including a United Kingdom Supreme Court case[145] and commented:

> [54] … illegality is a bar to relief only where the court is satisfied that the public interest would be harmed by enforcement of the illegal contract. In deciding this issue, courts are to consider the purpose of the prohibition in question, any other relevant public policy and whether the result contended for would be proportionate to the illegality.

[108] A dishonest purpose has also been held to be able to rebut the presumption of resulting trust.[146]

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[143] *Kaimore Construction Limited (in liq) v Wichman* [2016] NZHC 936 at [15].
[144] *Horsfall v Potter* [2017] NZSC 196.
[145] *Patel v Mirza* [2016] UKSC 42.
[146] *Brown v Brown* [2017] NZHC 350 at [24].

[109] A finding of resulting trust is ultimately an equitable remedy and turns on the exercise of discretion. It is a fundamental principle of equity that whoever seeks equitable relief must not have acted improperly in relation to the matter.

[110] The Court of Appeal summarised the doctrine known as "clean hands" in *Milloy v Dobson:*[147]

> The equitable principle is that "he who comes into equity must come with clean hands". The essence of clean hands is that if the petitioner is guilty of impropriety in a matter pertinent to the suit, equity may refuse the decree sought.

[111] Whilst I accept that Mr [HD] and Ms [LZ] are honest, respected, hardworking and successful people in China, I am not satisfied that they have "clean hands" seeking a resulting trust in respect of the [address 1] property for the following reasons:

(a) Mr [HD] openly acknowledged that law/restrictions in China mean he cannot send more than US$50,000 out of China per year, and that he had got around that law by asking *"many people"* to help him with the various international transfers to Ms [SD].[148]

(b) Evidence was given that Chinese law prohibits Chinese citizens from buying property overseas.[149]

(c) Thirdly, and more importantly, if Mr [HD] genuinely considers that he owns the [address 1] property and the rental income derived, he would have an obligation to pay tax on that money but he has made no effort or attempt to do so in six years now. Mr [HD] said he did not know the New Zealand tax system or whether he would have to pay tax here,[150] but when I asked Dr Liao he confirmed that someone who has an investment property in China and earns rental income from tenants would be expected to declare that income and pay tax on it. Again,

[147] *Milloy v Dobson* [2016] NZCA 25 at [99].
[148] NOE, page 272, lines 11 to 21.
[149] NOE, page 176, line 32 and NOE, page 259, lines 6 to 15.
[150] NOE, page 264, line 25.

Mr [HD] as a professional person and property investor would be well aware of that.

(d) There is also the point already mentioned that Ms [SD] held out to Immigration New Zealand in 2019 that she owned the [address 1] property and whilst completing and signing a statutory declaration.

(e) Nor did Ms [SD] disclose in the Land Transfer Tax Statement that she signed on 30 November 2016 that she was acting in the capacity as a trustee or on behalf of another person (her father). As per the notes to Land Transfer Tax Statements[151] that should have been explained to her by her conveyancing solicitor at the time, if that was genuinely the arrangement at the time.

[112] In these circumstances finding a resulting trust in favour of Ms [SD]'s parents would sit uncomfortably with me. I do not suggest that Mr [HD] and Ms [LZ] set out with a specific purpose to avoid income tax, but that would be the effect if they are found to have beneficial ownership of the property and the rental income earned therefrom, but no legal ownership or obligation.

[113] Even if I wanted to, I am not certain that I can vest the property in Mr [HD] or Ms [LZ], given that the Overseas Investment Act currently prevents overseas persons who are not resident in New Zealand from owning residential property.

[114] Whilst Mr [HD] and Ms [LZ] were likely oblivious to these legal issues and complexities, save for the obligation to declare and pay income tax on rental income, ignorance of the law is not an excuse. I refer to these matters as a further explanation and basis for my decision declining to uphold a resulting trust in favour of Mr [HD] and Ms [LZ].

[115] That is not, however, the end of the matter.

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[151] Exhibit "H".

Relationship property pool

[116] In circumstances where the [address 1] property is owned in Ms [SD]'s sole name and I have declined to find a resulting trust in favour of Mr [HD] and Ms [LZ], it is relationship property and falls for division as "the family home" under the PRA.

[117] There can be no debt owing to Mr [HD] and/or Ms [LZ] in circumstances where I have found that the sums of money they transferred to Ms [SD] from China were "gifts" to Ms [SD].

[118] Ms [SD] disclosed that she had a balance of RMB$7,267.86 in her personal account with the China Merchants Bank at the date of her affidavit of assets and liabilities.[152] That "movable property" falls within the jurisdiction of the PRA and is the equivalent of NZ$1,615.08. Ms [SD]'s evidence was that she also had other bank accounts in China but they did not have much money in them[153] and do not have a credit card attached.[154]

[119] Similarly, Ms [TW] disclosed in her affidavit of assets and liabilities that her Chinese bank account (with the China Construction Bank) had a balance of RMB11,461.02 (NZ$2,546.89) at the date of her affidavit of assets and liabilities.[155] Neither party provided a statement or balance as at the date of separation for their Chinese bank account but presumably the balances did not change as neither party was working or earning income in China in 2020.

[120] Notwithstanding that the Lexus car was purchased by Ms [SD] from funds gifted by her mother late in the relationship, s 10(4) provides that family chattels are relationship property regardless of being acquired by gift. By definition motor vehicles are family chattels if used wholly or principally for family purposes.

[121] Although Ms [SD] only acquired the car in December 2019, it is clear that she used the car for family purposes up until the parties' separation some five months later

[152] BOD, page 837.
[153] NOE, page 172, line 24.
[154] Ibid at line 19.
[155] BOD, pages 309 and 357.

in April 2020. In particular, she drove the car to and from her employment in [town A] and Ms [TW]'s evidence was that they used the car together when Ms [SD] returned from [town A] every few days, up until Ms [TW]'s departure to China on or about [2020].

[122] As noted earlier, Ms [SD] paid $25,000 for the car (not $30,000) in December 2019, and I accept the value of $25,000 for relationship property purposes. The [Honda car] that Ms [TW] retained had an agreed value of $3,000 at separation.

Section 13 claim for unequal sharing

[123] Section 11 of the PRA provides the statutory presumption that parties are entitled to share equally in all relationship property.

[124] In s 13 the Court has a discretion to part from equal sharing if there are extraordinary circumstances which render equal sharing repugnant to justice:

> **13 Exception to equal sharing**
>
> (1) If the court considers that there are extraordinary circumstances that make equal sharing of property or money under section 11 … repugnant to justice, the share of each spouse or partner in that property or money is to be determined in accordance with the contribution of each spouse to the marriage or of each civil union partner to the civil union ...

[125] Numerous cases have noted that this is a high threshold. As the Court of Appeal said in *Martin v Martin*:[156]

> Clearly enough "extraordinary circumstances" and "repugnant to justice" are strong words and reflect a parliamentary intention that the primacy of the equal sharing of the matrimonial home and the family chattels is not to be eroded in the ordinary circumstances of marriage. … "Extraordinary circumstances" imposes a stringent test, particularly when it is recognised that such matters as the provision of the matrimonial home by one spouse or by gift to that spouse are not in themselves extraordinary circumstances. "Repugnant to justice", even when stripped of its emotional overtones, is a most emphatic phrase. Moreover, it is repugnancy to justice giving full weight to the scheme and objectives of the legislation that must be established … it seems to me that the legislature intended to impose a rigorous test allowing very limited scope for unequal sharing of the matrimonial home and the family chattels.

[156] *Martin v Martin* [1979] 1 NZLR 97 at page 111 per Richardson J.

[126] Case law has also established that post-separation events are not relevant to this issue.[157] The extraordinary circumstances must relate to the period of time that the parties lived together.

[127] While the threshold in s 13 is "a stringent test" and a difficult test to overcome, it was never designed to be an impossible one.[158] On appeal in *Venter v Trenberth* the High Court stated as follows:[159]

> Whether extraordinary circumstances exist is a factual question. Are the circumstances out of the ordinary? If there are extraordinary circumstances, whether they are repugnant to justice is a value judgment. Is the equal sharing of relationship property completely unfair?

[128] On any objective assessment there has been a very significant mismatch in Ms [SD]'s and Ms [TW]'s respective financial contributions to their qualifying relationship of 7½ years. In particular, the [address 1] property and also the Lexus car and the credit balance in the two joint bank accounts at separation, which in total comprise almost the entire relationship property pool, all came from funds provided to Ms [SD] by her parents.

[129] Various cases have noted, however, that mere disparity in financial contributions by itself cannot give rise to the exception for unequal sharing. It is not extraordinary that one party contributes the family home or earns a significantly greater income.

[130] In the High Court in *Bowden v Bowden,* Mander J summarised the law as follows:[160]

> [27] Disparity and [sic] contribution by itself cannot give rise to the exception to equal sharing. The fact of a disproportionately greater contribution is not a circumstance which on its own will attract unequal sharing under s 13. However it does not follow that disparity of contributions may never be regarded as an extraordinary circumstance.
>
> [28] The "extraordinary circumstances" that make equal sharing of property repugnant to justice must give rise to an exceptional situation

[157] *Meikle v Meikle* [1979] 1 NZLR 137.
[158] *Venter v Trenberth* [2014] NZFC 4902 at [38]; and *Kidd v Russell* [2018] NZFC 3989 at [41].
[159] *Venter v Trenberth* [2015] NZHC 545 at [16].
[160] *Bowden v Bowden* [2016] NZHC 1201.

> and one so out of the ordinary as to make an equal division, something which the Court "simply cannot countenance." Neither an imbalance in the contributions of the parties to the relationship nor even a substantial imbalance will be sufficient to constitute an extraordinary circumstance. Such a situation in the context of relationships is unremarkable.
>
> [29] However there may be cases where the disparity in contributions is so gross as to compel a Court to conclude that an equal division of property would be repugnant to justice. In addressing the question of whether a disparity of contributions may ever be regarded as an extraordinary circumstance, Richardson J observed:
>
> > "It would be going too far to rule out any consideration of the respective contributions to the marriage partnership whatever the circumstances. The entire range of possible circumstances is open for consideration. Circumstances may be extraordinary in kind or degree. A circumstance which is not inherently extraordinary may have some additional features which make it extraordinary. Mere disparity of contributions or even a disproportionately greater contribution is not sufficient to justify unequal sharing. But the disparity may be so gross as to be an extraordinary circumstance rendering equal sharing repugnant to justice."
>
> [30] The whole of the circumstances taken in combination need to be reviewed on a cumulative basis before determining whether there are extraordinary circumstances that make equal sharing repugnant to justice.

[131] Noting that the whole of the circumstances taken in combination need to be reviewed on a cumulative basis to determine whether they are extraordinary, what then are the circumstances? To recap:

(a) When the parties met in 2012 and commenced a relationship, they were relatively young. Ms [SD] was [in her early 30s] and Ms [TW] was [in her mid 20s].

(b) Both had tertiary qualifications already and both were working. Ms [TW] did not have any savings at all. Ms [SD] did have savings. She had the better paying "government" job and had been working longer.

(c) When Ms [TW] moved in with Ms [SD] in October 2012 she lived rent-free in Ms [SD]'s apartment (owned and provided by Mr [SD]).

(d) It was due to Ms [SD]'s government scholarship to the [university name deleted] that the parties then lived for one year in the [country Z]. Ms [SD]'s evidence is that her savings and scholarship funded their rent in the [country Z] and Ms [TW]'s tuition. Ms [TW] obtained an extra masters qualification in the [country Z].

(e) While in the [country Z] the parties travelled extensively, in the context of only one year there, to the [countries deleted].

(f) Upon returning to China Ms [TW] again lived rent-free with Ms [SD] in her apartment.

(g) Whilst it can be said that Ms [TW] made the sacrifice of moving from her home country to New Zealand to continue her relationship with Ms [SD], it is apparent that the move to New Zealand was led by Ms [SD] and has been beneficial to Ms [TW]. In New Zealand Ms [TW] has been able to retrain in [details deleted] and is now working full-time and earning a salary (currently $75,000 per annum), significantly in excess of what she had been earning in China as an assistant store manager. Ms [SD]'s evidence was that Ms [TW] had been earning RMB3,000 per month in 2012.[161] Ms [TW] said it was on average RMB6,000 per month.[162] RMB6,000 per month or RMB72,000 per annum, is the equivalent of NZ$16,000 per annum.

(h) Ms [TW]'s tuition fees in New Zealand were funded by Ms [SD], courtesy of money from her parents, and Ms [TW] again lived rent free in New Zealand and until more than a year after the date of separation.

(i) Ms [SD] earned more income than Ms [TW] during their time (three years) in New Zealand.

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[161] BOD, page 507 at [7].
[162] BOD, page 372 at [32].

(j) Whilst the provision of a family home by one partner is not in itself unusual, the family home in this case was brand new and has always been entirely mortgage-free. It is, therefore, a significant asset, the current estimated value by homes.co.nz (as advised by Ms Marsden) being $970,000.

(k) Whilst I have found that the money used to purchase the section and build the house was "gifted" to Ms [SD] by her parents, it is clear that Mr [HD] and Ms [LZ] did that with the intention that Ms [SD] would acquire a house for their "core" family unit, where they would be able to visit and stay in at their discretion and where they could eventually reside permanently with Ms [SD] in their old age, as per Chinese custom and tradition.

(l) Not only is the house the major relationship property asset, it is also an income producing asset that has effectively covered all of the parties' living costs the entire time since they moved in.

(m) In addition, there have been further lump sums contributed to the parties' bank account(s) by Ms [SD]'s parents.

(n) Most recently, Ms [SD]'s parents funded the entire purchase price of the Lexus car, which is the second most significant relationship asset.

(o) Both Ms [SD] and Ms [TW] were forced to keep their sexuality a secret in China. In New Zealand they are free from that discrimination and prejudice. The relationship has provided both parties with residency in New Zealand and, seemingly, a much better standard of living and employment prospects.

(p) Ms [SD]'s parents provided virtually all of the funding for the relationship property that is now available for division, and in circumstances where they were not aware they were doing that given that they did not know about their daughter's relationship or marriage.

As already noted, they thought they were creating an asset for their core family. Ms [TW]'s parents, in comparison, who were also unaware of their relationship, have not provided any financial support or assistance to Ms [TW].

(q) The relative brevity of the relationship, in comparison to other cases is another factor, given that the financial contributions are so one-sided. Caselaw has noted that the effects of a substantial financial contribution may be balanced out by other contributions in a lengthy relationship, but this is far from a lengthy one. This was not a 20 or 30 year relationship and child rearing/care was not a factor. It was 7½ years and of that 7½ years Ms [SD] and Ms [TW] lived apart from one another in different countries for the best part of 12 months. Ms [SD] visited New Zealand without Ms [TW] in February and June 2016 and Ms [SD] was in New Zealand while Ms [TW] was in China from [2016] to [2017], and again from [2020] to [2020]. Ms [SD] and Ms [TW] lived together in New Zealand for just less than 3 years, from [2017] to [2020]. In that context and given that Ms [TW] was studying and working different part-time jobs only, the provision by Ms [SD] (through her family) of a brand new, mortgage free, family home, which also generated ongoing (and significant) income sufficient to cover the couple's living costs, is an exceptional situation.

[132] In combination, the particular facts of this relationship amount, in my assessment, to extraordinary circumstances.

[133] Overall, Ms [SD]'s contributions to the relationship, and particularly her financial contributions, are so completely disproportionate as to be exceptional. I find the overall circumstances to be extraordinary, but must still consider separately whether, in those circumstances, equal sharing of relationship property would be repugnant to justice.

[134] Clearly, the answer to that question is "yes." Equal sharing of the relationship property would be completely unfair to Ms [SD] (and her parents) and an outcome that

I cannot countenance in these circumstances. In reaching that conclusion I take express and deliberate notice of the purposes and principles of the PRA as set out in ss 1M and 1N.

[135] In particular, I acknowledge the purpose of the Act to recognise the equal contribution of both partners, but the point here is that the overall contributions have not been anywhere near equal. All forms of contribution to the relationship are to be treated as equal and I am satisfied that the non-financial contributions are or were approximately equal. Each party undertook study and employment in different periods of time and each contributed to the running of the house, the two overseas study-groups to New Zealand and the management of the [address 1] tenancies.

[136] As I have mentioned, the relationship was not a long relationship in comparison to other cases. Consequently, it is relevant that significant assets have been acquired in the relatively short period of time that the parties lived in New Zealand.

[137] The Act provides for a "just" division of relationship property and in my assessment it would not be just if the relationship property is divided equally or anywhere near equally.

[138] How then do I weight the respective contributions? It is the assessment of the contribution of each partner to the relationship as a whole that is relevant, and not just their contribution(s) to the particular items that comprise the relationship property.

[139] The PRA itself states as follows in terms of what constitutes a "contribution" and how contributions are to be assessed:

> **18 Contributions of spouses or partners**
>
> (1) For the purposes of this Act, a contribution to the marriage, civil union, or de facto relationship means all or any of the following:
>
> (a) the care of—
>
> (i) any child of the marriage, civil union, or de facto relationship:

(ii) any aged or infirm relative or dependant of either spouse or partner:

(b) the management of the household and the performance of household duties:

(c) the provision of money, including the earning of income, for the purposes of the marriage, civil union, or de facto relationship:

(d) the acquisition or creation of relationship property, including the payment of money for those purposes:

(e) the payment of money to maintain or increase the value of—

(i) the relationship property or any part of that property; or

(ii) the separate property of the other spouse or partner or any part of that property:

(f) the performance of work or services in respect of—

(i) the relationship property or any part of that property; or

(ii) the separate property of the other spouse or partner or any part of that property:

(g) the forgoing of a higher standard of living than would otherwise have been available:

(h) the giving of assistance or support to the other spouse or partner (whether or not of a material kind), including the giving of assistance or support that—

(i) enables the other spouse or partner to acquire qualifications; or

(ii) aids the other spouse or partner in the carrying on of his or her occupation or business.

(2) There is no presumption that a contribution of a monetary nature (whether under subsection (1)(c) or otherwise) is of greater value than a contribution of a non-monetary nature.

[140] The High Court stated in *S v W*[163] that it is inherent in s 18(1) that the Court needs to arrive at *"a contribution"* which requires a determination of the overall global monetary and non-monetary contributions.

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[163] *S v W,* HC Christchurch, CIV-2005-409-663, 20 March 2006, Chisholm J at [126].

[141] Noting that s 18(2) specifically states that there is no presumption that any monetary contribution is of greater value than a contribution of a non-monetary nature, Chisholm J expressly rejected a submission that non-monetary contributions must carry the same weighting as monetary contributions. His Honour said:[164]

> The monetary contributions were relatively large. On the other hand, the short duration of the relationship meant that there had not been much time for the non-monetary contributions to build up…Stepping back and making an overall assessment it seems to me that monetary contributions should represent 75% of the overall contribution and non-monetary 25%.

[142] Assessing the respective financial contributions to the relationship the point of difference arises from the very significant "gifts" of money from Ms [SD]'s parents. That money not only financed the building of the family home and the acquisition of the Lexus car, which is virtually all of the relationship property, but it provided the rental income that Ms [SD] and Ms [TW] lived off from 2018 to 2020.

[143] Without that money from Ms [SD]'s parents the reality, quite simply, is that Ms [SD] and Ms [TW] would not have had the capacity to acquire a house. They would have been living in rental accommodation and there would not be any relationship property at all.

[144] In my assessment Ms [SD] (and largely as a result of the very significant funds provided to her by her parents, but also because of her initial resources and savings in China) was responsible for 95% of the financial contributions to the relationship.

[145] In all the circumstances and given, in particular, the relatively brief period of time living together in New Zealand, which provided a very significant asset, I do not accept that the various non-monetary contributions should carry the same weighting as monetary contributions. As the High Court concluded in *S v W,* I find that the monetary contributions were relatively large. That is precisely the reason that so much time, angst and resource has gone into this case which has now been before the Court for almost three years. There has been a lot at stake for all parties.

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[164] At [127].

[146] Making an overall assessment it is my view and conclusion that monetary contributions should represent two-thirds (66.66%) of the overall contributions to the relationship and non-monetary contributions one-third (33.33%). That is deliberately a lesser weighting than the 75:25 assessment by the High Court in *S v W*, given the relationship there was just less than 3 years, as compared to 7½ years (total) here and 3 years together in New Zealand.

[147] On that basis the calculation is:

Party	**Monetary Contribution**	**Non-monetary contribution**	**Monetary contribution as part of total**	**Non-monetary contribution as part of total**	**Overall Contribution**
Ms [SD]	95%	50%	63.33%	16.66%	80%
Ms [TW]	5%	50%	3.33%	16.66%	20%
	100%	**100%**	**66.66%**	**33.33%**	**100%**

[148] Accordingly, the relationship property is to be divided between Ms [TW] and Ms [SD] as to 80% to Ms [SD] and 20% to Ms [TW].

Occupation rent

[149] Ms [SD] seeks occupational rental from Ms [TW] for the period of time (January 2021 to July 2021) that Ms [TW] had exclusive occupation of the [address 1] property following her return to New Zealand post-separation. In reality, Ms [TW] occupied the house and had free rent from August 2020 until October 2021 (i.e:14 months) because she did not inform Ms [SD] that she had moved out in July 2021 until 6 October.

[150] For reasons that I will explain I am not going to order Ms [TW] to pay occupation rent to Ms [SD]. Occupation rent is appropriately offset against Ms [TW]'s claim for spousal maintenance for the same period of time.

[151] I do accept, however, that Ms [TW] now has a valid claim for occupation rent against Ms [SD], given my finding that [address 1] is relationship property.

[152] An award of occupation rent is entirely discretionary and is assessed pursuant to s 18B which provides for compensation for contributions made after separation.

[153] Case law under s 18B is clear that continued occupation of the family home by one party post-separation can be a contribution to the relationship by the non-occupying party. As Fitzgerald J said in *Little v Little:*[165]

> The non-occupying party is effectively contributing their share in the capital of the family home, which for a time is being used exclusively by the occupying party. The occupying party accordingly retains emotional and practical benefits from their continued occupation, and avoids the financial burden of relocating to alternative accommodation. In such circumstances, and when considered just, the courts will often award compensation to the non-occupying party based on "occupational rent" (namely a half share of a notional rent of the property), or order the occupying party to pay interest on the non-occupying party's share of capital.

[154] The High Court has observed[166] that s 18B has to be considered in light of s 1N which sets out the principles which are to guide the achievement of the purpose of the Act:

> **1N Principles**
>
> The following principles are to guide the achievement of the purpose of this Act:
>
> (a) the principle that men and women have equal status, and their equality should be maintained and enhanced:
>
> (b) the principle that all forms of contribution to the marriage partnership, civil union, or the de facto relationship partnership, are treated as equal:
>
> (c) the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners arising from their marriage, civil union, or de facto relationship or from the ending of their marriage, civil union, or de facto relationship:
>
> (d) the principle that questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.

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[165] *Little v Little* [2002] NZHC 601 at [120] and [121].
[166] *Chong v Speller* [2005] NZFLR 400.

[155] The Court has a wide discretion to direct compensation be paid to a spouse or not. The overriding consideration is whether an award under s 18B is just.

[156] In this case there are four separate and distinct periods of occupation of the property. The issue is more complicated because the nature of the property is not just that it provides a home to live in, but also a source of income given the ability to rent the other rooms or, indeed, the whole house:

(a) Firstly, and given my finding that the date of separation was 19 April 2020, the first period of occupation and/or rental income was from 20 April 2020 until Ms [TW] returned to New Zealand and resumed occupation at the end of July, ie: 3 months. The evidence about the rental income earned in that period is unclear and Ms [SD] herself was living and working in [town A]. I decline to award occupation rent for this period.

(b) Secondly, Ms [TW] lived in the house from the end of July 2020 until the end of July 2021, i.e: 12 months, but did not advise that she had moved out until 6 October 2021. The evidence is that Ms [TW] collected and retained rent from tenants amounting to $5,700 between September and December 2020. My understanding is that Ms [SD] received some tenants' rental herself, but again the evidence about that is unclear. Ms [TW] then lived in the property herself, without tenants or rental income, between January and July 2021. Ms [SD] paid the rates and insurance for the property in that period of time. I offset Ms [SD]'s claim for occupation rent from Ms [TW] in this period, and for reimbursement of her share of the rates and insurance, against Ms [TW]'s claim for spousal maintenance.

(c) Thirdly, the house was left empty for approximately 6 months after Ms [TW] gave notice on 6 October 2021 and until it was rented through the management company in April 2022. Ms [TW] is seeking occupation rent from Ms [SD] for this period of time but given that

there was no rental income received and neither party lived there, I do not consider it fair or just to order occupation rental.

(d) Fourthly, the house has been rented since April 2022 which is, obviously, more than 2 years now. From Exhibit "I" (Ms [LZ]'s ANZ bank statements) and according to my analysis and calculation, rental of $82,288.61 has been paid into that account between 1 April 2022 and 10 April 2024 inclusive. (Counsel will want to check this figure). Ms [SD]'s evidence was that the existing tenants are paying $970 per week, but the management company will be deducting a fee from that gross rental.

From the gross rental the rates and insurance that Ms [SD] has paid for the period since 1 April 2022 (only) needs to be calculated and deducted. Counsel will be able to advise the appropriate figure. I order that 20% of the net rental income be paid to Ms [TW] pursuant to s 18B as her share of that post-separation relationship income. That is the portion of that relationship property that Ms [TW] is entitled to. Ms [TW]'s entitlement to 20% of the net rental income will cease at the time she receives her lump sum relationship property entitlement.

Past maintenance

[157] The next issue is that Ms [TW] seeks a lump sum of $20,000 for past spousal maintenance pursuant to s 63 of the Family Proceedings Act and her application filed at the outset of the proceedings on 21 May 2021.

[158] As I understand the claim it relates to the period that she returned to New Zealand at the end of July 2020 and until she obtained full-time employment in July 2021, 11 months later. Essentially the claim is that she was not able to meet her reasonable needs in that period of time, due to the fact that she was still studying [details deleted] and had been dependent on Ms [SD] for financial support while she was doing that.

[159] Spousal maintenance is, again, a discretionary remedy and, for the following reasons I exercise my discretion to decline the application for past maintenance:

(a) There is a lack of supporting evidence and disclosure to support the claim. Ms [TW] filed an affidavit of financial means and their sources dated 20 May 2021, but it is clear that at least some of the information is inaccurate. For instance, the annual expenses claimed included insurance of $3,721 and rates of $7,217, whereas the evidence has established that Ms [TW] did not pay any rates or insurance while she was in occupation of the house following her return from China post-separation.

(b) Ms [TW] advised in her oral evidence that she commenced an internship in April 2021, which had not been disclosed previously.

(c) In my assessment the claim for spousal maintenance is offset by other counter-claims/issues:

(i) Ms [TW] has acknowledged that she retained rental income of $5,760 between September and December 2020.

(ii) As noted earlier, Ms [TW] had exclusive occupation of the property from January 2021 to October 2021 and has not been required to pay occupation rent.

(iii) Nor am I requiring her to reimburse Ms [SD] for rates and insurance she paid in the period (14 months in total) that Ms [TW] was in occupation.

(iv) In lieu of the claim for spousal maintenance I will not require Ms [TW] to account to Ms [SD] for the $4,000 that she withdrew from the joint account post-separation to fund her airfares back to New Zealand.

Costs

[160] I note Ms Marsden's advice in closing (oral) submissions that a large amount of costs have been incurred in the course of these proceedings. I can appreciate that is the case given the length of time, the volume of applications and evidence filed and the complexity of the proceedings.

[161] I will reserve the issue of costs because I acknowledge, in particular, that I am not aware of any without prejudice or Calderbank offers that may have been exchanged, but as a steer to counsel (and the parties) my provisional view is that costs should lie where they fall. I say that because each party has been both successful and unsuccessful:

(a) While Ms [TW] has succeeded in defending the resulting trust claim and has succeeded in establishing that [address 1] (and the Lexus car) is relationship property, she has been only partially successful given the s 13 finding and award of 20% of relationship property when 50% was sought. Along the way Ms [TW] has been unsuccessful seeking spousal maintenance and with separate interlocutory applications (and hearings) to oppose expert evidence and to admit without prejudice correspondence.

(b) Ms [SD] has also been only partially successful. She has failed on the resulting trust claim which she supported but has been successful under s 13.

(c) Mr [HD] and Ms [LZ] have been unsuccessful with their application for a resulting trust, but their evidence was pivotal in terms of the findings of extraordinary circumstances and that equal sharing would be repugnant to justice. I am conscious that in all likelihood it will be Mr [HD] and Ms [LZ] who will fund the lump sum that will be paid to Ms [TW] and, in the absence of matters that I am not aware of, I am not minded to make an order for costs against the interested parties.

Orders and directions

[162] For the reasons articulated above, the following orders and directions are now made:

(a) The property at [address 1], the Honda and Lexus cars, the joint ANZ bank accounts and Ms [SD]'s and Ms [TW]'s personal bank accounts in China are all declared to be the relationship property of Ms [SD] and Ms [TW].

(b) The debt of $29,000 owed jointly to Ms [SD] and Ms [TW] by [CK] at the date of separation is also relationship property.

(c) Pursuant to s 13 of the PRA I find that there are extraordinary circumstances, and that equal sharing of the relationship property would be repugnant to justice. I order that the relationship property is to be divided on the basis of 80% to Ms [SD] and 20% to Ms [TW].

(d) Ms [SD] has 60 days from the date of this judgment to account to Ms [TW] for her 20% of the relationship property pool. Within 21 days the parties are to jointly instruct a registered valuer to value the [address 1] property. If the parties cannot agree on a valuer they shall each engage their own independent valuers, and an average of the two valuations is to be used as the market value. If only one (joint) valuation is obtained the estimated market value will be the value for settlement purposes.

(e) The Lexus car is to be valued at $25,000 and the Honda car at $3,000.

(f) The value for the ANZ joint bank accounts is $15,700. For Ms [SD]'s Chinese bank account the value is $1,615 and Ms [TW]'s Chinese bank account is $2,546. (Ms [TW] has already received $7,500 on account of her share of the joint account, which was more than the 20% share that I have found she is entitled to. The necessary adjustment is to be factored into the final division).

(g) At the date of settlement and pursuant to s 18B Ms [SD] is to account to Ms [TW] for 20% of the rental income earned since 1 April 2022, up to and including the date of settlement, less 20% of the rates and insurance paid by Ms [SD] for the same period.

(h) Leave is reserved for counsel to seek further orders or directions to give effect to the terms of this decision. Memoranda may be filed and referred to me in chambers on not less than 72 hours' notice to all other counsel.

(i) Costs are reserved but noting [161] above.

A final word

[163] I am conscious that no party (or counsel) will be entirely happy with what I have decided. Each party will inevitably think that I have got some things right and some things wrong. I realise that Mr [HD] and Ms [LZ], in particular, will likely be confused by what I have decided.

[164] I can assure all parties that I have read, listened to and considered all of the evidence very carefully. I am very well aware that these proceedings have been hard fought and will have taken a considerable toll on all parties emotionally and financially.

[165] I have endeavoured to do what I consider is "just" between all parties. My hope is that all parties will now be able to put this matter behind them and get on with their lives. What has been reassuring is that it has been clear that each party is a good person in their own right. Each conducted themselves in the courtroom and in the witness box with dignity.

____
Judge P W Shearer
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhenga: 20/05/2024