[2020] UKPC 22

Privy Council Appeal No 0013 of 2019

JUDGMENT

Webb (Appellant) v Webb (Respondent) (Cook Islands)

From the Court of Appeal of the Cook Islands

before

Lord Wilson

Lord Carnwath

Lady Black

Lord Briggs

Lord Kitchin

JUDGMENT GIVEN ON

3 August 2020

Heard on 20 and 21 January 2020

Appellant	Respondent
Sean Owen McAnally	Isaac Hikaka Tim Mullins Benjamin Marshall Laura Clews
(Instructed by Keegan Alexander Barristers & Solicitors)	(Instructed by Little & Matysik PC)

LORD KITCHIN: (with whom Lord Carnwath, Lady Black and Lord Briggs agree)

Introduction

1.
This is an appeal in a dispute between spouses about the matrimonial property available for division between them after their relationship has come to an end. It raises many issues concerning the relevance of a tax debt incurred by the husband in New Zealand and whether it is enforceable in the Cook Islands, the validity of two trusts established by the husband and which hold assets said by the wife to be matrimonial property, and the approach to be taken to the assessment and valuation of

matrimonial property where a financially dominant spouse fails to disclose relevant documents and information.

2.
The appellant, Mr Webb, and the respondent, Mrs Webb, were married in New Zealand on 2 December 2005 and made their home there. They are both New Zealand citizens. They have a daughter, Bethany, who was born on 4 December 2006. Mr Webb also has a son, Sebastian, from a previous marriage. Sebastian was about three years old when Mr and Mrs Webb married.

3.
Mr Webb is an entrepreneur who has managed his business affairs and assets through a complex structure of companies and trusts. His ventures have not always been successful. He was declared bankrupt on 26 July 2000 and discharged a few years later. Nevertheless, for the first nine years of their marriage, Mr and Mrs Webb enjoyed a relatively high standard of living which was apparently funded by Mr Webb's business activities. One of Mr Webb's business associates was Mr Andrew Tauber and together they operated through a group of companies called the Honk Group and an associated trust called the Honk Land Trust.

4.
Shortly after Mr and Mrs Webb were married, Mr Webb established a family trust, the Arorangi Trust, for the purpose of acquiring land in the Arorangi area of Rarotonga in the Cook Islands and other assets in that jurisdiction. As settlor, he appointed himself as trustee and nominated himself and Sebastian as beneficiaries. In February 2006, the Arorangi Trust acquired a leasehold interest in a property in Arorangi known as the Arorangi Property. Later that year the Arorangi Trust acquired an interest in an adjacent property and Mr Tauber was appointed as another trustee and his children were added as beneficiaries. Yet further property has since been acquired by the Arorangi Trust, including an interest in a property known as the Terepai Arihii Property.

5.
In August 2013 Mr and Mrs Webb and Bethany moved from New Zealand to the Cook Islands, where they lived in the Arorangi Property. By this time the relationship between Mr Webb and Mr Tauber had soured. In 2014 Mr Tauber retired from his position as trustee of the Arorangi Trust and his children were removed as beneficiaries. One of the Arorangi Trust properties (though not the Arorangi Property or the interest in the Terepai Arihii Property) was sold and the proceeds were paid to the Honk Land Trust.

6.
Meanwhile, in 2011 the New Zealand Inland Revenue Department (the IRD) began an investigation into Mr Webb's business affairs. It focused on payments made to him by the Honk Group over many years and it led to the issuance of default assessments, including shortfall penalties, by the Commissioner of Inland Revenue for the 2001-2009 tax years. A challenge by Mr Webb to those assessments was rejected by the Taxation Review Authority by decision dated 7 October 2016. As of 15 September 2017, the sum of income tax, penalties and interest which remained unpaid was in excess of NZ$ 26m.

7.
Mr and Mrs Webb separated in April 2016. Mrs Webb and Bethany continued to live in the Arorangi Property. Mr Webb returned to New Zealand with Sebastian and there he began a relationship with a Ms Brenda Dixon. Mr Webb thereupon arranged for the establishment of a new trust, the Webb Family Trust, and he and Ms Dixon were appointed as trustees. The settlor was a Mr Leslie Ellison. Mr Webb,

Sebastian and Bethany were named as beneficiaries. Mr Webb also arranged for the Arorangi Trust to transfer some of its assets to this new trust for a nominal consideration.

8.
In May 2016 Mrs Webb issued these proceedings in the High Court of the Cook Islands for matrimonial property orders pursuant to sections 23 and 25 of the Matrimonial Property Act 1976 of New Zealand as that Act applies in the Cook Islands by virtue of the Matrimonial Property Act 1991-92. I will refer to the Act as incorporated into Cook Islands law as the 1976 Act. Various amendments have since been made to the New Zealand Act, which is now called the Property (Relationships) Act 1976 (NZ) but these have not been adopted in the Cook Islands. I will refer to the New Zealand Act as the 1976 Act (NZ).

9.
The basis of Mrs Webb's application was that her relationship with Mr Webb had progressively deteriorated, that they were irreconcilable and that they had been unable to agree upon a division of the matrimonial property.

The decisions of the courts below

10.
The proceedings came on for hearing before Potter J in May 2017. Mrs Webb contended that the Arorangi Trust and the Webb Family Trust were invalid because, among other deficiencies, they lacked the irreducible core of obligations necessary for a trust to exist; they were shams; and the settlor of each trust did not intend to relinquish control of the beneficial interest in the trust property. She also argued that the assets available for division under the 1976 Act comprised, among other things: the leasehold interest in the Arorangi Property; the interest in the Terepai Arihii Property; moneys in bank accounts in the name of the Arorangi Trust; and shares in companies called Solar 3000 Ltd, Fleet Lease Ltd, and Kuru Investments Ltd.

11.
Mr Webb took issue with most of Mrs Webb's case. He argued, among other things, that the Arorangi Property, the interest in the Terepai Arihii Property and various other assets were all the property of the Arorangi Trust, and that the shares in Solar 3000 Ltd, Fleet Lease Ltd, and Kuru Investments Ltd were all held by the Webb Family Trust and, in the case of the shares in Kuru Investments Ltd, were acquired after the parties' separation. He also argued that if any of this property was matrimonial property in his hands then the value of such property available for division would necessarily be reduced, indeed wholly extinguished, by his unsecured personal debts including his debt to the IRD. This last contention was vigorously opposed by Mrs Webb on the basis that Mr Webb's debt to the IRD was not one that could be enforced in the Cook Islands and so did not constitute a debt owed by Mr Webb within the meaning of the 1976 Act. For that reason, she submitted, the debt to the IRD should not be brought into account.

12.
Mr and Mrs Webb gave evidence at the hearing before Potter J. Mr Webb's evidence was directed at, among other things, the dealings and administration of the Arorangi Trust and the Webb Family Trust, and the relationship of these trusts to his personal business ventures and activities. Potter J gave her judgment on 23 August 2017. She found Mrs Webb to be an honest witness who gave her evidence carefully but had little knowledge or understanding of Mr Webb's business affairs or the operation of the trusts. Mr Webb's evidence, by contrast, was vague, evasive, at times contradictory and generally

unreliable. Moreover, the documentary evidence as to the administration of the trusts contained what the judge described as disappointing gaps.

13.
Nevertheless, Potter J dismissed the claim. She rejected Mrs Webb's attacks on the Arorangi Trust and the Webb Family Trust and found them to be valid. She went on to consider Mr Webb's assets. She found that there was a real likelihood that Mr Webb would have to pay the debts he owed to the IRD, and that they constituted personal debts which had to be brought into account and which, even if the trusts had been invalid, would have exhausted any matrimonial property, leaving nothing available for division.

14.
An appeal by Mrs Webb to the Court of Appeal came on for hearing before Fisher, White and Grice JJA in November 2017. In a judgment of the court, given on 24 November 2017, the appeal was allowed. The court held that Mr Webb's tax debt to the IRD should not be brought into account because it was unlikely to be enforceable in the Cook Islands. On the second critical issue, namely the validity of the Arorangi Trust and the Webb Family Trust, the court held that these were invalid because the trust deeds failed to record an effective alienation of the beneficial interest in the assets in question.

15.
It only remained to determine the value of the matrimonial property available for division. Mrs Webb contended for a value of about NZ$ 8.1m, including NZ$ 2.83m in respect of the interest in the Arorangi Property. Mr Webb argued for a value of only about NZ$ 4m. Three matters accounted for most of the difference between the parties: a debt of about NZ$ 3.3m which Mr Webb said he owed to the Honk Land Trust; a dispute as to the value of Mr Webb's shareholding in Solar 3000 Ltd; and a dispute as to the value of Mr Webb's interest in Kuru Investments Ltd, and whether it should be brought into account at all.

16.
The Court of Appeal rejected Mr Webb's case in relation to the debt to the Honk Land Trust, finding that it was not genuine but rather the product of an ineffective tax avoidance scheme. As for Mr Webb's shares in Solar 3000 Ltd, Mrs Webb contended they were worth approximately NZ$ 3.3m whereas Mr Webb argued for a value only about NZ$ 30,500. The court acknowledged that Mrs Webb's assessment was speculative and that it had inadequate evidence to support a conventional valuation. But, in the court's view, Mr Webb had brought this on himself by providing inadequate disclosure and it was therefore appropriate to draw adverse inferences against him. Doing what it described as the best it could on the sparse material available, the court adopted a value of NZ$ 2m. That left only the interest in Kuru Investments Ltd. Here, notwithstanding Mr Webb's deficient disclosure, the court found that Mrs Webb had failed to establish that any matrimonial property was used in its acquisition.

17.
The Court of Appeal came finally to the order it should make. Mrs Webb made clear that if the Arorangi Property was allocated to her, she would forego any claim against the other matrimonial assets. The court being satisfied that the agreed value of the Arorangi Property was less than half that of the matrimonial assets as a whole, it directed that the interest in this property should vest in her.

This appeal

18.

Mr Webb now appeals to Her Majesty in Council with leave granted by orders of the Court of Appeal dated 13 February and 17 December 2018. He contends, as he did in the courts below, that there is no matrimonial property to divide because the value of any such property in his hands is completely extinguished by his debt to the IRD, and that the assets otherwise in issue in these proceedings are owned by either the Arorangi Trust or the Webb Family Trust.

19.
More particularly, Mr Webb argues that his liability to the IRD is an unsecured personal debt within the meaning of section 20(5)(b) of the 1976 Act and so it must be deducted from the value of any matrimonial property in his hands. He says that it is a personal debt, irrespective of whether or not it is enforceable by the IRD in the Cook Islands, which he submits it is.

20.
As for the trusts, Mr Webb contends that the High Court and the Court of Appeal were right to reject the arguments advanced by Mrs Webb that they were shams and that they lacked the irreducible core of obligations required of a valid trust. But he argues that the Court of Appeal fell into error in finding that the terms of the trusts were such that he had effectively retained beneficial control of the trust assets. This, he says, involved a misinterpretation of the trust deeds.

21.
Turning to values, Mr Webb argues that the Court of Appeal was right to describe Mrs Webb's valuation of Solar 3000 Ltd as speculative, and says that so too was the Court of Appeal's estimate of that value as NZ$ 2m. He contends that the Court of Appeal failed properly to analyse the facts and ignored evidence that indicated the value was a good deal less.

22.
Mrs Webb invites the Board generally to uphold the decision of the Court of Appeal. She contends that the Court of Appeal was right to find that Mr Webb's debt to the IRD was unenforceable in the Cook Islands and it should not be brought into account.

23.
As for the trusts, Mrs Webb again supports the conclusion of the Court of Appeal that the Arorangi Trust and the Webb Family Trust are invalid. She says that the trust deeds failed to record an effective alienation of the beneficial interest in the assets in question, as the Court of Appeal held; but that the court ought also to have found that each trust was a sham. She also contends that the dispositions by Mr Webb to each trust were ineffective by operation of section 44 of the 1976 Act and that the trusts are void because they offend against the common law rule against perpetuities.

24.
Finally, Mrs Webb argues that in light of the manifest failures by Mr Webb to provide adequate disclosure the Court of Appeal cannot be criticised for approaching the issue of valuation of the matrimonial property in the way that it did. However, she argues that the Court of Appeal ought to have found that the interest in Kuru Investments Ltd was acquired using matrimonial property and so it ought to have been brought into account.

25.
The issues on this further appeal therefore fall into three parts: first, the issues concerning Mr Webb's liability to the IRD; secondly, the issues concerning the validity of the trusts; and thirdly, the issues concerning the valuation of the matrimonial assets.

Part I

The 1976 Act

26.
The purpose of the 1976 Act is, among other things, to recognise the equal contribution of the spouses to the marriage partnership and to provide for the just division of matrimonial property between the spouses when the marriage ends. The Act therefore provides that, subject to certain exceptions, each spouse is entitled to an equal share in the wealth created during the course of the marriage partnership. It is, I think, essentially for these reasons that the 1976 Act and the 1976 Act (NZ) have been described as social legislation (see, for example, Clayton v Clayton [Vaughan Road Property Trust] [2016] NZSC 29; [2016] 1 NZLR 551, para 38; Fisher on Matrimonial Property, 2nd ed (1984), para 15.6).

27.
Assessment of the matrimonial wealth necessarily requires the debts generated by the marriage partnership to be taken into account. In this regard section 20 of the 1976 Act provides, so far as relevant:

“(5) The value of the matrimonial property that may be divided between husband and wife pursuant to this Act shall be ascertained by deducting from the value of the matrimonial property owned by each spouse:

(a) Any secured or unsecured debts (other than personal debts or debts secured wholly on separate property) owed by that spouse; and

(b) The unsecured personal debts owed by that spouse to the extent that they exceed the value of any separate property of that spouse.

(6) Where any secured or unsecured personal debt of one spouse is paid or satisfied (whether voluntarily or pursuant to legal process) out of the matrimonial property, the Court may order that -

(a) The share of the other spouse in the matrimonial property be increased proportionately:

(b) Assets forming part of that spouse’s separate property be deemed matrimonial property for the purposes of any division of matrimonial property under this Act:

(c) That spouse pay to the other spouse a sum of money by way of compensation.

(7) For the purposes of this section, ‘personal debt’ means a debt incurred by the husband or the wife, other than a debt incurred -

(a) By the husband and his wife jointly; or

(b) In the course of a common enterprise carried on by the husband and the wife, whether or not together with any other person; or

(c) For the purpose of improving the matrimonial home or acquiring or improving or repairing family chattels; or

(d) For the benefit of both the husband and the wife or of any child of the marriage in the course of managing the affairs of the household or bringing up any child of the marriage.”

28.

The general scheme of these provisions is not in dispute. The value of the matrimonial property available for division is to be determined by deducting from the value of the matrimonial property owned by each spouse any debts owed by that spouse other than personal debts or debts that are secured on separate property. If the debt owed by the debtor spouse is secured then the creditor will be able to look to that security without needing to resort to the debtor's matrimonial property.

29.
Similarly, a creditor must look to a spouse's other property to meet the unsecured personal debts of that spouse. There is, however, an exception if a debtor spouse is unable to meet his or her personal debts from any such separate property. In these circumstances, by operation of section 20(5)(b), the creditor may look to the matrimonial property of the debtor spouse for satisfaction.

30.
If secured or unsecured personal debts of one spouse are paid out of matrimonial property then, under section 20(6), the court may make an order adjusting the share of the matrimonial property that each spouse is to receive or deeming one spouse's separate property to be matrimonial property for the purpose of division or ordering one spouse to pay to the other a sum of money by way of compensation. No such order has been sought in these proceedings.

31.
Mr Webb's liability to the IRD is undoubtedly a debt incurred by him. What is more, it is a judgment debt. On 26 November 2018 his defence to a claim by the IRD in the Auckland District Court was struck out and judgment was entered against him. Mr Webb says and I accept, the debt does not fall within any of the exceptions in section 20(7). It necessarily follows, he continues, that it is a personal debt for the purposes of this section. Mrs Webb responds, and the Court of Appeal agreed, that the matter is not so straightforward and depends upon whether the debt is enforceable in the Cook Islands. This gives rise to the foreign tax issue to which I now turn.

The foreign tax issue

32.
It is a long-standing principle of the common law that the courts will not collect taxes of a foreign state for the benefit of the sovereign of that foreign state. The history of the principle, which I will call the foreign tax principle, as did the Court of Appeal, was explored by the House of Lords in Government of India v Taylor [1955] AC 491. As Viscount Simonds observed at p 504, it was already well established when Lord Mansfield CJ repeated the formula: "for no country ever takes notice of the revenue laws of another" in a series of cases in the 18th century: Planché v Fletcher (1779) 1 Doug 251, 253; Holman v Johnson (1775) 1 Cowp 341, 343; and Lever v Fletcher (1780) unreported. A persuasive explanation for the principle, provided by Lord Keith of Avonholm in Government of India at p 511, is that the enforcement of a claim for taxes is an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one state within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties.

33.
The foreign tax principle of course applies to direct enforcement. But it also extends to indirect enforcement and, in particular, to a claim or defence raised by a party to vindicate or assert the claims of a foreign state. A few examples will suffice to illustrate its scope.

34.

Peter Buchanan Ltd v McVey [1955] AC 516, a decision of Kingsmill Moore J in the High Court of Eire, affirmed on appeal by the Supreme Court of Eire and approved in Government of India at p 508 by Viscount Simonds (with whom Lord Morton of Henryton and Lord Reid agreed) and at p 510 by Lord Keith of Avonholm, concerned a company, registered in Scotland and put into liquidation by the revenue authorities there under a compulsory winding up order, in respect of a large claim for unpaid taxes. The defendant, a director of the company and the owner of the beneficial interest in all of its issued shares, realised the assets of the company, satisfied its liabilities other than to the revenue and decamped to Ireland with the balance. In these proceedings the company, directed by the liquidator, sought to recover this balance. The judge dismissed the claim on the basis that the action, though in form an action by the company to recover the assets, was in substance an attempt to enforce indirectly a claim to tax by the revenue authorities of another State.

35.
In Rossano v Manufacturers' Life Insurance Co [1963] 2 QB 352, 376, 377 a Canadian insurance company sought to avoid its liability to pay to the claimant policy holder, an Egyptian national, moneys due under two endowment policies of insurance. The company contended that as garnishee orders had been served on its branch in Egypt by the Egyptian authorities in respect of tax due by the claimant, payment to the claimant of the moneys claimed would expose them to penalties or the risk of having to pay the money twice. McNair J rejected the defence, holding that recognition of the garnishee orders would offend against the well-settled principle that English courts will not recognise or enforce directly or indirectly a foreign revenue law or claim.

36.
Brokaw v Seatrain UK Ltd [1971] 2 QB 476 concerned a consignment of household effects shipped in a United States vessel from Baltimore to London, via Southampton. When the ship was on the high seas the United States Treasury served on the shipowners a notice of levy in respect of unpaid taxes by the consignors and, when the ship docked at Southampton, claimed possession of the goods under that notice. The claimants, the consignees and one of the consignors, thereupon brought these proceedings against the shipowners seeking return of the goods and damages for their detention. The shipowners took out an interpleader summons bringing in the United States Government as claimants. The Court of Appeal (Lord Denning MR, Salmon and Phillimore LJJ) dismissed an appeal by the United States Government against the decision of the Master that the claim was unmaintainable because the United States Government had not taken the goods into their possession and were seeking the aid of the English courts to collect tax, albeit indirectly. Lord Denning MR cited with apparent approval the decision of McNair J in Rossano and, at p 483C-D, continued:

"… it appears to me that the United States Government are seeking the aid of these courts. They come as claimants in these interpleader proceedings. By so doing they are seeking the aid of our courts to collect tax. It is not a direct enforcement (as it would be by action for tax in a court of law), but it is certainly indirect enforcement by seizure of goods. It comes within the prohibition of our law whereby we do not enforce directly or indirectly the revenue law of another country. If the position were reversed, I do not think that the United States courts would enforce our revenue laws. For no country enforces the revenue laws of another."

37.
In Damberg v Damberg [2001] NSWCA 87; (2001) 52 NSWLR 492, a decision of the Court of Appeal of New South Wales, an issue arose as to whether the proceeds of the sale of two properties located in Germany and placed by a father in the name of his two children were held on their own account or on resulting trust for him. The father, contending for a resulting trust, maintained that he intended to

retain the beneficial interest in the properties and his purpose in transferring them was to avoid German capital gains tax on their sale. The children argued that it was their right to prevent the resulting trusts from being recognised by reason of the father's non-compliance with German law, or that relief should only be granted to the father on terms that he pay the tax, interest and penalties due to the German government. They also contended that, in the circumstances I have described, the foreign tax principle did not apply. Heydon JA, with whom Spigelman CJ and Sheller JA agreed, rejected the submission that the foreign tax principle did not apply. As he explained at paras 166-169, it was enough that execution of German revenue law was indirectly involved. Given that no condition amounting to the indirect enforcement of German tax law could be imposed, the question which remained for decision was whether the resulting trusts should be recognised unconditionally or not at all. Heydon JA addressed this issue at paras 171-176. He held that the husband was entitled to relief, assuming his conduct had been contrary to German law and notwithstanding an inability to impose terms overcoming the wrongdoing.

38.
That is not to say the principle is without limits, however. Thus, whilst a court will not entertain an action by a foreign state directly or indirectly to enforce that foreign state's exchange control legislation, a court may properly recognise a foreign revenue law where necessary to do so. So, for example, a court declined to prevent trustees of a foreign trust from remitting moneys to comply with the exchange control legislation of the foreign state whose law was the proper law of the trust, where the trustees were obliged to obey that law and where their failure to do so might have serious penal consequences: In re Lord Cable, decd [1977] 1 WLR 7.

39.
There can in my view be no doubt that the foreign tax principle, if applicable, would preclude any attempt by the IRD, a receiver or a trustee in bankruptcy (called the Official Assignee in New Zealand) to enforce the judgment debt against Mr Webb's assets in the Cook Islands. An attempt by a receiver or the Official Assignee to enforce the debt against those assets would in those circumstances amount to indirect enforcement, just as it did in Peter Buchanan. This provides the foundation for Mrs Webb's argument for, as the Court of Appeal explained, if an unsecured creditor would not be able to execute a judgment against the assets in question there would no longer be any rationale for allowing the debtor spouse to set off that debt against those assets. However, Mr Webb advances two main arguments to the contrary. The first, which I have foreshadowed, turns on the proper interpretation of the expression "personal debt" in section 20(5) of the 1976 Act. The second is founded upon the historical relationship between New Zealand and the Cook Islands, in the light of which, so the argument goes, it may be assumed that the courts in the Cook Islands will enforce a debt to the IRD. I will deal with them in turn. I will then address the suggestion that Mr Webb is engaging with the IRD, that the IRD has taken steps to appoint a receiver over his assets and that the IRD could apply for a bankruptcy order against him.

Personal debt?

40.
Mr Webb contends that the expression "personal debt" is defined by section 20(7) of the 1976 Act for the purposes of the section as a whole. He says, correctly, that his liability to the IRD is a debt incurred by him, indeed it is now a judgment debt; further, it does not fall within any of the exceptions in section 20(7). It necessarily follows, he continues, that it is a personal debt for the purposes of the section. Turning to section 20(5), he argues that, in ascertaining the value of the matrimonial property available for division, any unsecured personal debts of a spouse must be deducted from the value of

the matrimonial property held by that debtor spouse to the extent that they exceed the value of any of his or her separate property. Importantly, he continues, section 20(5) does not limit the unsecured personal debts that are to be deducted to those enforceable against particular assets. It follows that there is no room for the foreign tax principle. Put another way, it does not matter whether the debt to the IRD is enforceable in the Cook Islands, it is enforceable against him. It is then a matter for the creditor, here the IRD, to explore all enforcement options available to it without a court in matrimonial property proceedings, to which it is not a party, addressing its enforcement rights.

41.
Attractively though this argument is presented, I do not accept it. It is not necessary for the purposes of this appeal to explore the precise meaning of all of the terms used in section 20 but only the word “debts” and the expression “personal debts”. As we have seen, the general scheme underpinning section 20(5) and (7) is that spouses should share the burden of the unsecured debts they have incurred in the context of their relationship, but not the burden of unsecured personal debts unless they exceed the value of that debtor spouse’s separate property. To the extent that the unsecured personal debts of either spouse do exceed the value of that debtor spouse’s separate property then the spouses must share that burden too, subject to an order of the court under section 20(6). In my opinion it is plainly inherent in this scheme that for any unsecured debt to be a personal debt for the purposes of section 20 it must be enforceable or likely to be paid. It would make no sense to allow a debtor spouse to deduct from the value of any matrimonial property unsecured personal debts which are both unenforceable and unlikely to be met. Indeed, the manifest injustice which would flow from such an interpretation can readily be appreciated from the circumstances of this case, as the Court of Appeal explained. If Mr Webb were permitted to deduct the judgment debt from the value of the matrimonial assets he holds in the Cook Islands there would be nothing left to share with Mrs Webb. But if the IRD cannot enforce its judgment against those assets, Mr Webb can keep them all for himself. That cannot have been the intention behind section 20(5). In my view the expression “personal debts” does not extend to those debts which are both unenforceable and unlikely to be paid and I believe the Court of Appeal was entirely correct in saying, at para 34:

“The sole reason for allowing a personal debt to impact on the matrimonial property division under section 20(5)(b) is to protect a debtor spouse’s unsecured creditors. But if, for whatever reason, an unsecured creditor would not be able to execute a judgment against the assets in question there would no longer be any rationale for allowing the debtor spouse to set off that debt against his or her matrimonial property assets.”

42.
Support for this approach to the interpretation of section 20(5) is to be found in two authorities. The first is Government of India. There the government sought to prove in the voluntary liquidation of an English company in respect of an amount of tax due from the company under Indian law arising from the sale of certain undertakings in India. It was said that under section 302 of the Companies Act 1948 the “liabilities” which the liquidator was bound to discharge included the tax due to a foreign state. As Viscount Simonds explained at p 508, all therefore turned on the meaning of the word “liabilities” in that section. The House of Lords rejected the contention that it extended beyond obligations enforceable in the English courts so as to include a liability for foreign tax in respect of which the company might have been sued in a court of the country imposing it.

43.
The second is the decision of Somers J in the High Court of New Zealand in Livingstone v Livingstone (1980) 4 MPC 129. There the parties had lived in New Zealand for three years before their separation.

In proceedings under the 1976 Act (NZ), the husband sought to bring into account in assessing the value of his matrimonial property a tax liability to the Canadian revenue authorities. The judge found that the husband had no intention of paying any tax to the Canadian authorities and that it was unlikely those authorities would ever recover the money they claimed. So, while the debt existed, it could for practical purposes be disregarded. The judgment contains no detailed discussion of the issues raised before the Board but demonstrates a pragmatic and purposive approach to the legislation and the nature of the debts of which account is to be taken in ascertaining the value of the matrimonial property available for division.

44.
I have had the benefit of reading the judgment of Lord Wilson of Culworth. He considers that the overall purpose of the 1976 Act is to set firm rules for the division of the matrimonial property, irrespective of the overall financial position in which each spouse is left as a result of their application.

45.
I respectfully disagree. This is, as I have said, social legislation and in my opinion the word “debts” and the expression “personal debts” must be interpreted in a manner that reflects that statutory context. The essential aspect of the context relevant for present purposes is the recognition of the equal contribution of the spouses to the marriage partnership and an appreciation that, subject to certain exceptions, each spouse is entitled to an equal share of the matrimonial assets available for division once the matrimonial debts have been taken into account. Moreover, the process of balancing the shares of each of the spouses in the benefits of the partnership necessarily involves a consideration of their final positions. If this was as far as it went, there would be no justification for allowing one party to bring into account personal debts which are by definition incurred outside the matrimonial partnership. But the context goes a little further in the case of such personal debts that are not secured. In the case of these debts the object of the 1976 Act extends to the protection of the unsecured creditors, as I explain further below.

46.
I also respectfully disagree with Lord Wilson that this construction confers on the word “debts” in section 20(5)(b) a meaning different from the same word in subsection (5)(a). The word “debts” has the same meaning in both parts of the subsection. In neither case does it include debts which are both unenforceable and unlikely to be paid. So, debts which are incurred by a spouse in the course of the matrimonial partnership and which are enforceable against the matrimonial property or which the debtor spouse intends to pay should be brought into account. But such matrimonial debts which are both unenforceable against the matrimonial property and which neither spouse has any intention of paying should not. Were it otherwise, the spouse in whose name the matrimonial property lies could set off the matrimonial debts against the value of that property, thus reducing or even eliminating the pool available for division, yet that property would never be used to discharge the debts.

47.
The position in relation to personal debts is just the same. Unsecured personal debts owed by a spouse (assume the husband) should be brought into account to the extent they exceed the value of his separate property and where he intends to pay them using matrimonial property in his name. So too should his unsecured personal debts which exceed the value of any of his separate property and which are enforceable against the matrimonial property in his name. But his personal debts which are not enforceable against the matrimonial property in his name and which are unlikely to be paid should not be brought into account. Were it otherwise the matrimonial assets available for division would be

reduced or (as here) eliminated and yet those debts would never be paid. The husband would be able to retain all the matrimonial assets in his name for himself; they would neither be surrendered to meet his debts, nor would they be available for division.

48.
I understand the learned editor of Fisher (cited at para 26 above) to have arrived at essentially the same conclusion. In considering the meaning of the word “debt” in section 20(5), it is observed, at para 15.6:

“… in the present context it seems probable that a debt is intended to qualify if a spouse has an existing legal liability to pay either immediately or at some time in the future a sum of money either certain or capable of estimation which liability is likely to be satisfied by the debtor-spouse or is actionable with a real prospect of recovery on the part of the creditor.” [Footnotes omitted]

The relationship between New Zealand and the Cook Islands

49.
Mr Webb contends that if enforceability in the Cook Islands is a relevant consideration, as I would hold it is, there can be no doubt that, in light of the longstanding relationship between the Cook Islands and New Zealand, claims for taxes made in New Zealand are enforceable in the Cook Islands and so there is no room for the foreign tax principle. Mr Webb points to various aspects of that history, the most material of which for present purposes are these. By Order in Council made under section 1(1) of the Colonial Boundaries Act 1895 (UK), the boundaries of New Zealand were extended to include the Cook Islands as from 11 June 1901. In 1907 New Zealand became a dominion within the British Empire and in 1947 it adopted the Statute of Westminster of 1931. From that time until 1965 the New Zealand Parliament legislated for the Cook Islands; the Governor General, acting by and with the advice and consent of the Executive Council, exercised executive authority over the Cook Islands; and there lay an avenue of appeal to the Supreme Court of New Zealand from final judgments of the High Court of the Cook Islands in the exercise of its criminal and civil jurisdictions.

50.
It may be the case that, as Mr Webb asserts, the relationship between the Cook Islands and New Zealand as it existed until 1965 was such as to exclude any justification for the application of the foreign tax principle. However, on 4 August 1965 the Cook Islands Constitution Act 1964 (NZ) came into force and from that time the Cook Islands became self-governing and the Constitution of the Cook Islands, set out in the Schedule to the 1964 Act, became the constitution and supreme law of the Cook Islands. The Constitution made provision for, among other things, the appointment of a High Commissioner of the Cook Islands; the appointment of a Cabinet of Ministers presided over by a Premier and with control of the executive government of the Cook Islands; the establishment of an Executive Council of the Cook Islands consisting of the High Commissioner and the members of the Cabinet; the appointment of a Legislative Assembly of the Cook Islands with the power to make laws for the peace, order and good government of the Cook Islands and, subject to certain conditions, to amend the Constitution; a restriction on the power of the Parliament of New Zealand to legislate for the Cook Islands; and the establishment of a High Court with a right of appeal, subject to conditions, to the Supreme Court of New Zealand.

51.
The Constitution of the Cook Islands has been amended from time to time. The position of High Commissioner has now been replaced by that of the Queen’s Representative, that is to say the representative of Her Majesty the Queen in the Cook Islands; the Legislative Assembly has been

replaced by a sovereign Parliament for the Cook Islands and the Premier with a Prime Minister; and there has been established a Court of Appeal of the Cook Islands as a superior court of record and with a right of appeal to Her Majesty the Queen in Council with the leave of the Court of Appeal or, if such leave is refused, with the leave of Her Majesty in Council.

52.
The Joint Centenary Declaration of the Principles of the Relationship between the Cook Islands and New Zealand, signed by the Prime Minster of each country on behalf of their respective governments on 11 June 2001, affords a helpful insight into the status and nature of the relationship at that time. It recorded that all issues affecting the two countries should be resolved on a cooperative and consultative basis; that Cook Islanders did and would retain New Zealand citizenship; that Her Majesty the Queen as Head of State of the Cook Islands was advised exclusively by Her Cook Islands Ministers in matters relating to the Cook Islands; that in all matters affecting the Realm of New Zealand, of which the Cook Islands and New Zealand were part, there would be close consultation between the signatories; that in the conduct of its foreign affairs, the Cook Islands was interacting with the international community as a sovereign and independent state; and that any action undertaken by New Zealand in respect of its constitutional responsibilities for the foreign affairs of the Cook Islands was undertaken with the authority and at the request of the Cook Islands.

53.
Mr Webb recognises the developing nature of the relationship between the Cook Islands and New Zealand and the evolution of the Cook Islands into a sovereign state but contends that this relationship is still so close that any rules or principles affecting the enforceability of debts, such as the foreign tax principle, do not apply. As Mr Webb accepts, the Cook Islands have no reciprocal enforcement of judgments regime but there is in place between the Cook Islands and New Zealand a system whereby memorials can be filed and judgments enforced and it is upon this that he focuses next.

54.
Section 173(1) of the Cook Islands Act 1915 provides that any person in whose favour any judgment whereby any sum of money is made payable has been obtained in the High Court of New Zealand or in a District Court in New Zealand in civil proceedings may cause a memorial to be filed in any office of the High Court of the Cook Islands. Section 173(4) provides that every memorial so filed shall thenceforth be a record of such judgment, and that execution may issue with the leave of the High Court, and subject to such terms and conditions as the High Court may think fit to impose. Mr Webb relies heavily on this mechanism and contends that the only inquiry contemplated by section 173(4) relates to the terms and conditions to be imposed before leave is given to execute. He continues that the court’s discretion, except perhaps in a residual sense, does not extend to whether or not the judgment can be executed at all.

55.
The Court of Appeal was not persuaded by these submissions, in my opinion rightly so. The Cook Islands are now a distinct sovereign state. They have their own parliament and they have their own government. They make their own laws and they control their own constitution. In these circumstances and on the materials before us, I think that the better view is that the general common law principle that the courts of one country will not enforce the penal and revenue laws of another country is one that now applies to the Cook Islands. Furthermore, as Lord Keith explained in Government of India, the rationale underpinning this principle is that enforcement of a revenue law amounts to an extension of the sovereign power which imposed the taxes, and that an assertion of

sovereign authority by one state within the territory of another is contrary to the concept of independent sovereignties. In my opinion this rationale is entirely apposite in the present context and that enforcement, absent a treaty, would run counter to the concept of the Cook Islands as a separate sovereign state. The Court of Appeal observed that enforceability might be tested in proceedings between the Commissioner and Mr Webb on a future occasion, perhaps with the assistance of the Solicitor General of the Cook Islands, and if that were to occur it was possible that a fresh approach to the foreign tax principle might be taken. However, the assessment of rights under the 1976 Act should be based upon the most likely outcome. That, as it seems to me, was a perfectly proper approach and in my view, in agreement with the Court of Appeal and for the reasons I have given, the most likely outcome is that Mr Webb's New Zealand tax debt is not enforceable in the Cook Islands.

56.
In this connection it is relevant to note a number of other matters. In 2009 New Zealand and the Cook Islands entered into two agreements: the first provided for the exchange of information with respect to taxes, and the second concerned the allocation of taxing rights with respect to certain income of individuals and established a mutual agreement procedure in respect of transfer pricing adjustments (both are scheduled to the Double Tax Agreements (Cook Islands) Order 2010/148). By contrast, the Parliament of New Zealand has enacted the Trans-Tasman Proceedings Act 2010 which minimises impediments to the enforcement of certain Australian judgments and regulatory sanctions in New Zealand. It expressly provides, in section 68, that no New Zealand court may refuse to enforce an Australian judgment on the ground that Australian tax is payable under it. The difference between the broad scope of the Trans-Tasman Proceedings Act and the limited scope of the agreements the subject of the Double Tax Agreements (Cook Islands) Order is striking and entirely consistent with the continued application of the foreign tax principle in the Cook Islands.

57.
Moreover, I do not accept that the power conferred on the High Court under section 173 of the Cook Islands Act 1915 is as limited as Mr Webb contends. I can see no justification for interpreting it in such a restrictive way. In my view it is clearly of sufficient scope to permit a court of the Cook Islands to refuse to enforce a revenue law, just as it would permit such a court to refuse to enforce a penal law.

Will Mr Webb co-operate with the IRD?

58.
Potter J observed that Mr Webb has taken steps to engage with the IRD and that "there is a real likelihood that [he] will have to pay or satisfy the Inland Revenue Department's claim". She gave no reasons for this opinion. It may be inferred from the judgment of the Court of Appeal that it did not share her confidence. Nor do I. Indeed, for the following reasons, I have reached a clear view to the contrary.

59.
First, Mr Webb vigorously challenged the default assessments issued against him by the Commissioner of Inland Revenue for the 2001-2009 tax years. The assessments were issued on the basis that Mr Webb had suppressed income by failing to return amounts paid to him and on his behalf by his employer as a condition of his employment; by arranging management fees for services he had performed to be paid to trusts he controlled; and by arranging for his services to be remunerated by loan payments either made to himself or his family trusts. The investigation was complex and took a number of years and Mr Webb took an obstructive position. Shortfall penalties were imposed on the

basis that he had evaded the assessment or payment of tax; that he had taken an abusive tax position; and that he had exhibited gross carelessness. His challenges were dismissed and the assessments confirmed.

60.
Secondly, in the context of these proceedings, Mr Webb has shown himself to be far from candid about his business affairs. As has been mentioned, he was found by Potter J to be an unsatisfactory witness and his evidence was evasive and generally unreliable. Indeed, later in this judgment I must describe the paltry disclosure that Mr Webb has given concerning important elements of the matrimonial property and their value.

61.
Thirdly, the Board has been provided with no details of the form of his engagement with the IRD or how and when he proposes to meet his personal liabilities or, indeed, why it should be assumed he will even remain in New Zealand. He has at every stage displayed a determination to ensure that, so far as possible, he retains the fruits of his business activities irrespective of the claims of the IRD.

62.
Fourthly, it is important to keep in mind that the particular issue with which we are concerned is not whether Mr Webb may pay some of his debt to the IRD using his property in New Zealand but whether he will use for this purpose the matrimonial property in his name in the Cook Islands. In that connection it is striking that he has never pledged that property to the IRD. Further, in response to a question from the Board at the oral hearing, his counsel made clear that he reserved the right to adopt a different position in the context of enforcement proceedings from that which he has adopted in these proceedings. In other words, Mr Webb was reserving the right to argue in enforcement proceedings that the debt to the IRD was not enforceable against the Cook Islands property, and that he might do so.

63.
For all of these reasons I find myself quite unable to accept that, in so far as the matrimonial property is out of reach of his creditors, Mr Webb will ever voluntarily apply it to meet his debts.

Receiver and bankruptcy

64.
As I have mentioned, the Board was informed by counsel during the course of the hearing that the IRD has taken steps in New Zealand to appoint a receiver over Mr Webb's assets and that it could petition for his bankruptcy. It was also suggested that were he to be made bankrupt, the New Zealand Official Assignee could take steps to gather in and realise the estate with a view to satisfying the claims of the IRD and other creditors.

65.
The Board has been given no details of any steps a receiver has taken or could take to gather in Mr Webb's assets, let alone assets that require enforcement steps in the Cook Islands. Nor has the Board been given any details of how the New Zealand Official Assignee could take control of Mr Webb's assets, whether in the Cook Islands or elsewhere were there to be bankruptcy proceedings. Indeed, there appears to be some doubt as to whether the New Zealand Official Assignee would be recognised in the Cook Islands at all, for the Board was informed that there is no personal bankruptcy in the Cook Islands and the position of Official Assignee does not exist in that jurisdiction. Moreover and in any event, the foreign tax principle applies to the direct and indirect enforcement of the revenue laws of

another state, as I have explained above. In this connection counsel were unable to point to any case since 1965 in which the IRD has, directly or indirectly, sought to enforce a tax judgment against property in the Cook Islands.

66.
There was also some discussion before the Board about section 655(1) of the Cook Islands Act 1915 which states that: “Bankruptcy in New Zealand shall have the same effect in respect to property situated in the Cook Islands as if that property was situated in New Zealand.” However, for my part and for the reasons given in the immediately preceding paragraph and the further reasons which follow, I feel unable to attach any significant weight to this provision in the context of these proceedings. First, it was not drawn to the attention of Potter J or the Court of Appeal and it formed no part of Mr Webb’s written case on appeal to Her Majesty in Council. Secondly, there appeared at the hearing to be some doubt as to whether it is in force in the Cook Islands. Thirdly, counsel were unable to assist the Board as to how it would be given effect in the Cook Islands after their emergence as a sovereign and independent state. Fourthly, it may be subject to the foreign tax principle. Finally and importantly, counsel for Mr Webb made clear that Mr Webb relied on it only as “part of the context”, and he accepted that no bankruptcy proceedings were presently on foot. In the end, I understood Mr Webb’s position to be that he did not rely on what the IRD was doing in New Zealand in respect of the debt and the Board should place no weight upon it. As for the context, I have addressed this at paras 49 to 57 above and I am not persuaded that section 655 adds materially to it.

67.
In respectful agreement with the Court of Appeal, I would therefore hold that the New Zealand tax debt should not be taken into account in determining the value of the Cook Islands matrimonial property available for division. On the materials before the Board, the stronger argument is that the debt is unenforceable in the Cook Islands.

Part II

Validity of the Arorangi and Webb Family Trusts

68.
It was common ground before the Court of Appeal that the Arorangi Trust and the Webb Family Trust stood or fell together. Generally speaking, that remains the position on this further appeal. Most of the arguments arising on this further appeal can therefore be considered in relation to the Arorangi Trust alone. The material clauses of the deed establishing this trust are set out in the appendix to this judgment.

69.
Mrs Webb mounted four attacks on the trusts at trial. She contended first, that they lacked what Millett LJ described in Armitage v Nurse [1998] Ch 241, 253G-254A as the irreducible core of obligations owed by trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust; secondly, that the settlors never intended to relinquish control over the beneficial interest in the assets the subject of the trusts; thirdly, that the trusts were shams; and fourthly, that the Webb Family Trust was invalid for uncertainty of objects.

70.
Potter J rejected all of these attacks. The first was based largely upon clause 19 of the Arorangi Trust and its equivalent in the Webb Family Trust which, so it was said, limited the rights of the beneficiaries to call for accounts from the trustees. Potter J held that, although this clause appeared to

impede the beneficiaries' rights to call for accounts, it did not oust or even purport to oust the court's inherent jurisdiction to facilitate the flow of such information or to ensure that accounts were disclosed when appropriate, or to supervise and intervene in the trusts' administration where necessary.

71.
Potter J addressed the second and third attacks together because, as she understood it, the argument in relation to them, as developed on Mrs Webb's behalf, really amounted to one point: the trusts were invalid because neither the settlors nor the trustees intended to create the rights and obligations of a trust. Potter J recognised that Mr Webb had operated the Arorangi Trust in a cavalier manner, but she was not persuaded that Mr Webb intended it to be a sham when it was established in 2005. She came to much the same conclusion in relation to the Webb Family Trust. Ms Dixon may have been naïve as to the scope of her duties as a trustee but it had not been established that Mr Ellison, as settlor, or Mr Webb or Ms Dixon, as trustees, intended that the Webb Family Trust should not operate as a trust at all but rather as a vehicle for Mr Webb's personal use of the trust assets.

72.
The final attack, on the Webb Family Trust alone, was founded upon what Potter J described as the sloppy drafting of clause 2 of the trust deed which identified as beneficiaries Mr Webb, Sebastian, Bethany and "discrencerny beneficeries", plainly a mis-transcription of "discretionary beneficiaries". The judge rejected the submission that this rendered the trust invalid, holding that it did not refer to an unidentified class of further beneficiaries but was descriptive of the status of the three identified beneficiaries.

73.
On appeal, Mrs Webb challenged all of these findings. The Court of Appeal saw the key question as being whether, on an objective analysis of the powers reserved to Mr Webb in the trust deeds, Mr Webb had evinced an intention irrevocably to relinquish his beneficial interest in the trust property. In the court's view this required careful consideration of the trust deeds and was best tested by asking what would have occurred if Mr Webb had attempted to recover the property he had ostensibly settled on the trusts. It continued, at para 56:

"If a critical step in such an attempt would have required the assent of a truly independent person, or would have been subject to an enforceable fiduciary duty on his part, it could not be said that the purported settlement on the trust was ineffective. Conversely if, on an objective view of the deed, [Mr Webb] had retained for himself the uncontrolled power to recover the property it could not be said that he had divested himself of his beneficial ownership of the property. The latter situation might usefully be described as 'objective nullity' to distinguish it from 'sham'. A sham turns on the subjective intent of the parties involved."

74.
The Court of Appeal went on to examine the terms of the trust deeds before concluding on this issue, at para 65:

"the two deeds of trust fail to record an effective alienation of the beneficial interest in the assets in question. The powers retained by [Mr Webb] meant that at any time he could have recovered, and still could recover, the property which he had purported to settle on the trusts. The trusts are therefore invalid."

75.

The Court of Appeal turned next to the other grounds of appeal and dismissed them in short order. It held at para 66 that, on the factual findings of the judge, the trusts were not shams, and that while the provision for absolute non-disclosure to beneficiaries under clause 19.1 might have been ineffective, it would not have invalidated the trusts as a whole. The court did not specifically address the issue of whether the Webb Family Trust was invalid for uncertainty of objects.

76.
On this further appeal, Mr Webb does not challenge the proposition that there can be no valid trust if, on the proper interpretation of a trust deed, the settlor has in fact retained beneficial ownership of the property purportedly settled on the trust. However, he contends that the Court of Appeal adopted an unduly literal interpretation of the trust deeds and that, had it adopted a purposive and contextual approach to their interpretation, it would or ought to have found each of them to be effective and valid. He also argues that he did not retain for himself the uncontrolled power to deal with the settled property as he wished. He emphasises that he was and remains a trustee of both trusts and, in that capacity, has always had fiduciary obligations, among other things, to act honestly and in good faith, to observe the terms of the trusts and to act in the best interests of all the beneficiaries.

77.
It has long been recognised that a completely general power of appointment, such that the holder of the power can appoint the subject matter of the power to himself, may be tantamount to ownership. As Lord Collins of Mapesbury explained in giving the opinion of the Judicial Committee of the Privy Council in Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd [2011] UKPC 17; [2012] 1 WLR 1721 ("TMSF"):

"41. ... even apart from express legislative intervention general powers have been regarded as giving rise to property rights. In Clarkson v Clarkson [1994] BCC 921 (a decision on the definition of property in the Insolvency Act 1986, section 283(4)) Hoffmann LJ referred to In re Mathieson and said, obiter, at p 931:

'I think that even at the time this was quite a remarkable decision. Lord St Leonards [ie Sugden] in his book on Powers, 8th ed (1861) said: "To take a distinction between a general power and a limitation in fee is to grasp at a shadow while the substance escapes".'

42. So also in In re Triffitt's Settlement [1958] Ch 852, 861, Upjohn J said that 'where there is a completely general power in its widest sense, that is tantamount to ownership'. That was in the context of the question, discussed below, whether a power could be delegated.

43. As Thomas, Powers (1998) puts it (at para 1-08), the fundamental distinction between the concepts of power and property has not been preserved in all contexts and for all purposes. A donee of a truly general power can appoint the subject matter of the power to himself. He therefore has an 'absolute disposing power' over the property, citing Sugden, Powers, 8th ed (1861), p 394. Consequently, for many purposes, the law regards the donee as the effective owner of that property."

78.
TMSF concerned two trusts established by a Mr Demirel in the Cayman Islands. Mr Demirel, his wife and children were discretionary beneficiaries and Mr Demirel, as settlor, had a power of revocation. TMSF, effectively a judgment creditor, sought the appointment of receivers by way of equitable execution with a view to reaching the power of revocation and thereby reaching the funds in the trusts. The issue was whether the power of revocation was a property right that Mr Demirel could be required to delegate to the receivers. The Board concluded that the power of revocation was such that

in equity Mr Demirel had rights tantamount to ownership. The power could not be regarded as a fiduciary power and the only discretion Mr Demirel had was whether to exercise it in his own favour. He could and should be required to assign his rights to the receivers. In the circumstances it was unnecessary to decide the further question, canvassed in argument, whether the court had jurisdiction to order Mr Demirel to revoke the trusts, with the result that he would have substantial assets of which the receivers could take possession.

79.
The reasoning of the Board in TMSF was applied by the Supreme Court of New Zealand in Clayton v Clayton cited at para 26 above. The appeal concerned a declaration of trust (the Vaughan Road Property Trust or VRPT) executed by Mr Clayton in the course of his marriage to Mrs Clayton. The discretionary beneficiaries included Mr Clayton (as “Principal Family Member”), Mrs Clayton and their two daughters. The final beneficiaries were their two daughters. After their divorce, Mr and Mrs Clayton embarked on proceedings under the 1976 Act (NZ). The Supreme Court held that the combination of powers conferred upon Mr Clayton as Principal Family Member, trustee and discretionary beneficiary amounted in effect to a general power of appointment in relation to the assets of the VRPT and that this constituted property and relationship property for the purposes of the 1976 Act (NZ) with a value equal to the net assets of the VRPT.

80.
I must now consider the deeds in issue in this appeal and for this purpose I can focus on the Arorangi Trust. The terms of this deed are concise and clear and have a number of aspects which merit emphasis at the outset. First, Mr Webb is appointed as sole trustee (the Trustee) and the trust is established for just two beneficiaries, Mr Webb and his son Sebastian (clause 2).

81.
Secondly, the deed provides for the appointment by the Trustee of a consultant (the Consultant) whose role is to assist the Trustee in the administration and management of the Trust and to advise the Trustee on all matters relating to the Trust’s investments (clause 5); who is empowered, at his absolute discretion and without giving reasons, to remove the Trustee and appoint a replacement (clause 6.2); who may request with any nominated beneficiary the early vesting of the property of the Trust (clause 9.1); and who is empowered to consent to a variation by the Trustee of the trust deed (clause 18.1). Mr Webb could and did appoint himself as Consultant at the outset and so reserved to himself all of these powers.

82.
Thirdly, the Trustee, Mr Webb, is permitted to act as trustee and to exercise all the powers and discretions conferred upon him by the deed notwithstanding that his interests may conflict with his duties to the funds of the Trust or any beneficiary (clause 14.1(c)).

83.
With these points in mind it is convenient to consider next various ways in which it is said that Mr Webb can exercise these powers to secure the benefit of the trust property to himself. The first and most important is through the exercise of the power conferred by clause 10. This reserves to Mr Webb as settlor the power to nominate himself as sole beneficiary in place of the existing beneficiaries and in that way to become settlor, Trustee, Consultant and sole beneficiary. It is important to note that Mr Webb enjoys this power as settlor and not as Trustee and that, as settlor, he is not subject to any fiduciary duty, irrespective of the operation of clause 14.1(c).

84.

Another is conferred by clause 1.1 of the General Terms and Conditions. This, so it is said, confers on Mr Webb, as sole Trustee and in his uncontrolled discretion, the power to pay and apply the whole of the capital and income of the Trust for his personal use and advancement as a beneficiary and to the exclusion of any other beneficiary. Further, he is not obliged to preserve the assets or the income generating capacity of the Trust. The Court of Appeal considered that any breach of duty the exercise of this power would otherwise entail is negated by clause 14.1(c). I do not agree. Clause 14.1(c) confers on Mr Webb an entitlement to act notwithstanding that his duty as Trustee may conflict with his duty to the trust fund or to any beneficiary. However, he remains a fiduciary and must exercise the powers conferred on him in a manner which is consistent with his fiduciary duties. Clause 14.1(c) does not exonerate him from all possible breaches of trust.

85.
The third is for Mr Webb to exercise the powers conferred on him as Trustee by clause 12.1 to resettle the assets of the Trust upon the trustees of any trust anywhere provided that other trust includes among its beneficiaries one of the beneficiaries of the Trust (of which Mr Webb is one); and, by clause 18.1, with the prior written consent of the Consultant (again, Mr Webb), to vary the terms of the Trust deed; in either case in such a way as to ensure that all of the assets of the trust vest in him. However, clause 14.1(c) would not exonerate Mr Webb from a breach of trust in this context any more than it would in respect of the exercise of the power conferred by clause 1.1 of the General Terms and Conditions.

86.
I turn then to consider Mr Webb’s contentions that interpretation of the deed in this way would be inconsistent with the finding of Potter J that he intended to create valid trusts, and that he did so primarily for the benefit of his children. He also argues that the exercise of the powers in the various ways described in paras 83-85 above would be inconsistent with his fiduciary duties as trustee.

87.
There is, however, no inconsistency between the finding by Potter J, upheld by the Court of Appeal, that the trusts are not shams and a conclusion that Mr Webb’s attempts to create the trusts have failed or are defeasible. Acceptance that Mr Webb intended to create trusts does not in any way preclude a finding that he reserved such broad powers to himself as settlor and beneficiary that he failed to make an effective disposition of the relevant property. Moreover, and as I have explained, the powers of clause 10 are conferred on Mr Webb as settlor, not in his capacity as Trustee or Consultant. These powers were therefore amply sufficient for Mr Webb to arrange matters in such a way that he alone would hold the trust property on trust for himself and no-one else, with the consequence that the legal and beneficial interest in all of that property would vest in him.

88.
The purported settlor of the Webb Family Trust was, as I have mentioned, Mr Ellison, a business colleague of Mr Webb. I am wholly unpersuaded this makes any material difference, however. The point was not taken before the Court of Appeal and rightly so. Mr Ellison purported to settle in trust only NZ$ 10 and it was plainly intended by Mr Webb that this would operate as a vehicle into which he could at a later stage transfer matrimonial property, including property held by the Arorangi Trust. Indeed, the deed expressly records that the trustees, Mr Webb and Ms Dixon, would endeavour to retain and purchase, among other things, the Arorangi Property, the Arorangi Trust’s shares in Solar 3000 Ltd and a substantial shareholding in Fleet Lease Ltd, a rental car business. In fact, the shares in Solar 3000 Ltd were transferred and Potter J found that many of the vehicles owned by Fleet Lease Ltd were previously owned by the Arorangi Trust. Further and as we have seen, Mr Webb and Ms

Dixon were appointed as the trustees; Mr Webb was appointed as Consultant and the beneficiaries named in the deed were Mr Webb, Sebastian and Bethany. Mr Webb has given no satisfactory evidence as to the circumstances in which Mr Ellison came to settle the trust and why he did not do so himself. Mr Ellison swore an affidavit in the proceedings but when notice was given that he was required to attend at the trial for cross-examination, reliance on this evidence was withdrawn. In these circumstances I feel quite unable to place any weight on the fact that Mr Ellison was named as settlor. To the contrary, it is a reasonable inference that Mr Ellison's activities, such as they were, in connection with this trust were carried out by him under the direction and control of Mr Webb and as his nominee.

89.
The Court of Appeal considered, correctly in my opinion, that the powers reserved to Mr Webb under the trust deeds may be analysed in two different ways. One is to consider whether those powers were so extensive that Mr Webb can be said never to have disposed of any of the property purportedly settled on or acquired by the trusts. In this connection one might also ask whether the trusts lacked the irreducible core of obligations owed by trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. The other is to ask whether the powers reserved to Mr Webb were so extensive that in equity he can be regarded as having had rights which were tantamount to ownership. The Court of Appeal recorded, at para 55, the parties' agreement that in this case it can make no difference to the outcome which of these two analytical routes is taken. I will therefore confine myself to the substantive question whether Mr Webb's powers under each of the trust deeds were such that, in equity and in all of the circumstances of this case, he can be regarded as having had rights in the trust assets which were indistinguishable from ownership. In my view he plainly can. Mr Webb had the power at any time to secure the benefit of all of the trust property to himself and to do so regardless of the interests of the other beneficiaries. In my opinion, for the reasons set out at para 87 above, the Court of Appeal was plainly entitled to find as it did that the trust deeds failed to record an effective alienation by Mr Webb of any of the trust property. The bundle of rights which he retained is indistinguishable from ownership.

Other grounds of invalidity

90.
In these circumstances it is not necessary to consider separately whether the trust deeds were ineffective for the further reason that, by operation of clause 19 of the Arorangi Trust deed and its equivalent in the Webb Family Trust deed, the beneficiaries were not entitled to require the trustees to account for their management of the trust property. Nor is it necessary to consider whether the Webb Family Trust was invalid for uncertainty of objects. These are second order issues which can have no bearing on the outcome of this appeal.

91.
I would, however, say a word about the allegation that the trusts were shams. Potter J in the High Court was not persuaded that they were. It is common ground that she directed herself correctly by reference to the decision of the Supreme Court of New Zealand in Ben Nevis Forestry Ventures Ltd v Comr of Inland Revenue [2008] NZSC 115; [2009] 2 NZLR 289. In the context of this case she was required to consider whether Mr Webb did not at any time have any intention of respecting the formalities of the trust deeds, and whether he intended instead to give a false impression to third parties and, at the end of the day, the court of his rights and obligations. As I have noted above, Potter J found that Mr Webb operated the Arorangi Trust in a cavalier fashion. She also found Ms Dixon was naïve about her duties as one of the trustees of the Webb Family Trust. But she was not prepared to

find that Mr Webb set up the Arorangi Trust or the Webb Family Trust as a pretence, that is to say a screen which would conceal his personal use of the trust assets; nor was she prepared to find that, in the case of the Webb Family Trust, Ms Dixon or Mr Ellison had any such intention. These were findings of fact which I believe the judge was entitled to make. The Court of Appeal did not think it right to interfere with them and it cannot be criticised for taking that course.

Section 44

92.
Section 44 of the 1976 Act provides that where the court is satisfied that a disposition of property has been made in order to defeat the claims of a person under the Act, the court may, subject to certain exceptions, order a person who has received the property other than in good faith and for valuable consideration to transfer the property to such person as the court directs.

93.
The case advanced by Mrs Webb at trial concerned the transfers into the Webb Family Trust of the shareholding in Solar 3000 Ltd and, indirectly through Fleet Lease Ltd, the fleet of vehicles. The shareholding and the vehicles were previously held by the Arorangi Trust. In the event, Potter J found the Arorangi Trust valid and she did not deal separately with this aspect of Mrs Webb's case, apparently on the basis that the disposal of the assets by the Arorangi Trust to the Webb Family Trust did not defeat any claim by Mrs Webb.

94.
If, as I would hold, the trust deeds were not effective there is still no need to consider Mrs Webb's case under section 44. I would, however, observe that the circumstances are highly suspicious. As I have mentioned, Mr and Mrs Webb's relationship came to an end in April 2016. The Webb Family Trust was purportedly settled on 19 May 2016. By deed dated 6 February 2017 Mrs Webb was removed as a beneficiary of the Arorangi Trust and Ms Dixon and a Mr Riley were appointed as additional trustees. At trial Mr Webb was asked about the transfer of assets into the Webb Family Trust and it was suggested to him that its purpose was to defeat Mrs Webb's claims under the 1976 Act. He denied that was so and said, at one point, that he wanted "to separate the trading entities away from the Arorangi Trust". In another answer he said that his concern was to escape a liability of the Arorangi Trust to the Honk Land Trust. I do not find either of these explanations convincing. Had it been necessary to do so, I would have been minded to find that Mrs Webb had made out this aspect of her case. As it is, I will express no final view upon it.

Perpetuity

95.
Mrs Webb sought and has been granted permission to raise before the Board an argument that the Arorangi Trust and the Webb Family Trust are void because they breach the rule against perpetuities. In the Cook Islands the common law rule against perpetuities applies. The rule is straightforward. All future equitable interests must vest within the perpetuity period. The perpetuity period at common law is a life or any number of lives in being at the date of creation of the trust, plus 21 years, plus any actual periods of gestation. The rule is applied at the date of creation of the trust.

96.
The argument Mrs Webb was given permission to raise may be summarised as follows by reference to the Arorangi Trust deed. Clause 9.1 provides that the trust is to continue for a maximum period of 21 years and shall be determined, and the fund and all property distributed to the nominated beneficiary

or beneficiaries, not later than the end of this period. Mrs Webb says that this offends the rule because the shares the beneficiaries will take is not known at the date of creation of the trust.

97.
If this argument were correct it would mean that, although, within the perpetuity period, the trustee must distribute the remaining capital and income of the trust to one or more of the beneficiaries in such shares as he in his discretion shall decide, the trust nevertheless offends against the rule. That may be thought a rather surprising conclusion. However, the Board had the benefit of only limited argument on the point and I express no final view about it for it is not necessary to do so.

98.
Shortly before the hearing before the Board, a further point emerged. It was contended for Mrs Webb that the Webb Family Trust plainly offended the rule because, unlike the Arorangi Trust which, as I have said, had a maximum trust period of 21 years, this trust was expressed to continue for maximum period of 60 years. Unsurprisingly, Mr Webb objected to this point being taken so late. His counsel told the Board that he had not had time properly to consider it or take instructions upon it. I have great sympathy with this submission. It is, however, a point of law and a relatively simple one. Moreover, it is, in my view, unanswerable. It is perfectly clear that, at the date of the deed, there was a very real possibility that a future interest might vest outside the perpetuity period. It was therefore immediately void at common law.

Part III

The value of the Solar 3000 Ltd shares

99.
This is another important issue. As the Court of Appeal recorded, it was not disputed that Mr Webb owned shares in Solar 3000 Ltd, a Cook Islands company, and that those shares were matrimonial property. Mrs Webb contended they were worth approximately NZ$ 3.3m. Mr Webb countered that they had a value of only NZ$ 30,544.

100.
Mrs Webb found herself in a difficult position. Mr Webb had produced no disclosure and very little information relating to value. However, she did have a draft “Investor Update” for Solar 3000 Group Ltd, the New Zealand based parent company. She also had the last page of the final version of this document which was signed by Mr Webb as Solar 3000 Group Ltd’s Chief Executive Officer. On this page, under the heading “Investment Offering and Process”, it was stated that “Under this Capital Raising Round 2” investors would receive 10% of the total share capital in the Solar 3000 Group Ltd in return for a capital investment of NZ$ 1m. Prospective investors were invited to lodge their expressions of interest.

101.
The figures on the last page of this Investor Update suggested an overall value of the entire share capital of Solar 3000 Group Ltd of NZ$ 10m. The Court of Appeal accepted that this figure was speculative, as necessarily was Mrs Webb’s estimate of NZ$ 3.3m as the value of Mr Webb’s shareholding in the trading subsidiary Solar 3000 Ltd. However, the court continued, there was insufficient evidence on which to carry out a conventional valuation and Mr Webb had brought this on himself. The court considered that, since the relevant documents and information were in Mr Webb’s exclusive possession and control, it was appropriate to draw adverse inferences against him. Doing

what it described as the best it could on the sparse material available, the court arrived at the figure of NZ$ 2m as the value of Mr Webb's shareholding.

102.
Mr Webb now contends before the Board that just as Mrs Webb's figure of NZ$ 3.3m as the value of his shareholding was speculative, so too was the figure of NZ$ 2m arrived at by the Court of Appeal. That, he says, was not permissible. Any process of assessment had to be logical and the outcome based on proven facts. But, he continues, the Court of Appeal undertook no analysis of the facts and ignored evidence inconsistent with its conclusion. He points, in particular, to the lack of any evidence that the capital investment sought in the Investor Update was ever realised; to the description of prospective business units in a number of other countries but which never came to fruition; to the lack of any relevant correlation between the value of a shareholding in a subsidiary and the share capital of its parent; and to the description of the anticipated profit from the group business in the Cook Islands as being only around NZ$ 6m over a 20 year period. For her part, Mrs Webb argues that the figure arrived at by the Court of Appeal is too low and it had no justification for departing far, if at all, from the figure of NZ$ 3.3m.

103.
I would accept that it is not permissible for a court to convert open-ended speculation by one party into findings of fact against the other; there must be a reasonable basis for some hypothesis in the evidence or the inherent probabilities before a court can draw useful inferences from a party's failure to rebut it. In Prest v Petrodel Resources Ltd [2013] UKSC 34; [2013] 2 AC 415, para 44, Lord Sumption adopted with only minor modification this statement of Lord Lowry in R v Inland Revenue Comrs, Ex p T C Coombs & Co [1991] 2 AC 283, 300:

"In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party may be either reduced or nullified."

104.
The minor modification concerned the drawing of adverse inferences in claims for ancillary financial relief in matrimonial proceedings. Such proceedings, Lord Sumption explained, at para 45, have some important distinctive features. First, there is a public interest in the proper maintenance of the wife by her former husband, particularly where the interests of children are engaged, and partly for this reason the proceedings have an inquisitorial element. Secondly, the family finances will commonly have been the responsibility of the husband, so that though technically a claimant, the wife is in reality dependent upon the disclosure and evidence he gives. The concept of the burden of proof cannot be applied in the same way to proceedings of this kind. These considerations are still not a licence to engage in pure speculation. But, in Lord Sumption's view and I would respectfully agree, they have the consequence that judges exercising this jurisdiction are entitled to draw on their experience and to take notice of the inherent probabilities in deciding what an uncommunicative husband is likely to be concealing. Lord Sumption referred to the husband because the husband is usually the economically dominant spouse, but he explained and I would reiterate that of course the same applies to the economically dominant spouse, whoever it is.

105.
The circumstances of the present case do, in my opinion, call for a similar approach. Mrs Webb is entitled to a share of the matrimonial property. But she is essentially dependent upon the disclosure and evidence given by Mr Webb as the economically dominant spouse. This is a matter to which the Justices of Appeal were entitled to have regard and it was permissible for them to draw upon their experience and to take notice of the inherent probabilities in deciding what Mr Webb was likely to be concealing.

106.
That is what the Court of Appeal proceeded to do. It founded its analysis on an important piece of evidence to which Mrs Webb had access: the last page of the final investor statement bearing Mr Webb's signature. It may be the case that all of the investment sought was not forthcoming. I recognise too that the pages of the draft plan describe business activities in countries other than the Cook Islands and that it is possible that these never came to fruition. I am also conscious of what might be described as the relatively modest scale of the business in the Cook Islands described in the pages of the draft. However, Mr Webb did not disclose the information or documents that would allow the court to look into these matters fully or to quantify their impact. The court therefore had to make a broad estimate of the deduction they called for. It no doubt drew upon its experience and the inherent probabilities in so doing. I therefore feel unable to accept the criticisms made by Mr Webb of its approach. It did the best it could in all the circumstances and it arrived at a realistic figure. If Mr Webb thinks it was unduly generous to Mrs Webb, he has only himself to blame. Nor can I accept the criticisms advanced by Mrs Webb. A deduction of some kind had to be made and I think the result reached by the Court of Appeal was certainly not unduly generous to Mr Webb.

The shares in Kuru Investments Ltd

107.
This is a short point. Mrs Webb argues that the Court of Appeal was wrong to find that the shares in Kuru Investments Ltd did not form part of the matrimonial property. It is said that Mr Webb's evidence on this issue was far from convincing and that the court ought to have found that these shares were purchased with money taken from the matrimonial property pool. I am not persuaded that this was so. The Court of Appeal reviewed the evidence given by Mr Webb and Ms Dixon and came to a rational and entirely reasonable conclusion. It is not one with which this Board should interfere.

Implementation of the division

108.
The Court of Appeal explained that in the normal course it would need to arrive at precise values for all of the relevant assets and to award to each party half of the total. But in this case it was not necessary to do that because Mrs Webb had indicated that if the Arorangi Property were allocated to her, she would forego any claim against the other assets in Mr Webb's possession or for an equalisation payment. The Court of Appeal was satisfied that the agreed value of the interest in the Arorangi Property was less than half of the total value of the matrimonial property and it followed that this interest should be awarded to Mrs Webb. I have addressed and rejected the challenges made by Mr Webb to that conclusion and I see no other reason to interfere with it.

Conclusion

109.

For all of these reasons I would humbly advise Her Majesty that this appeal should be dismissed.

APPENDIX

The material provisions of the Arorangi Trust Deed

Deed made the 9th day of December 2005

I, **PAUL WEBB** ("the Settlor")

HEREBY SETTLE IN TRUST the sum of ten dollars ($10.00) and such further moneys and/or property (if any) as I may subsequently settle upon this Trust,

AND as the Settlor **I APPOINT** to act as the Trustee of this Trust, **PAUL WEBB** ("the Trustee") upon the terms of trust herein recorded, namely:

…

2. The Trust is established for the benefit of the following person or persons as Beneficiaries subject to the removal or subsequent replacement of such Beneficiaries in accordance with the provisions of this deed:

PAUL WEBB

SEBASTIAN PAUL WEBB

…

3.2 Interpretation: In this deed:

(a) the interpretation of this deed in cases of doubt is to favour the broadening of the powers and the restricting of the liabilities of the Trustee;

…

5. APPOINTMENT OF CONSULTANT TO TRUSTEE

5.1 To assist the Trustee in the administration and management of the Trust, the Trustee may appoint by letter of appointment a Consultant ("the Consultant") who shall signify his acceptance of the appointment by signing at the foot of the said letter.

The Consultant (if any) shall be empowered to advise the Trustee upon all matters affecting the conduct of the Trust's investments, and upon such further matters as may be elsewhere specified in this deed provided that any such advice shall not be binding on the Trustee.

6. RETIREMENT AND REMOVAL OF TRUSTEES

6.1 In the event that the Trustee shall withdraw from service as Trustee, or shall die, or for any reason shall become incapacitated to so serve, then but not otherwise, the person to be appointed to replace the then Trustee of the Trust shall be determined as the Trustee alone may direct, save and except that in the event of the Trustee's death or mental incapacity without having made a prior determination of a replacement trustee, but not otherwise, the direction for reappointment of a trustee to the Trust shall be referred to me as Settlor.

6.2 Notwithstanding the provisions of subclause 6.1 of this deed, the Consultant (if any) shall have power during the Trust Period at his absolute discretion and without giving reasons therefore by notice in writing given to the Trustee to remove the Trustee and to appoint one or more other persons or companies (wherever resident) to be the replacement trustee or trustees.

…

9. TRUST PERIOD

9.1 The Trust is to continue for a maximum period of 21 years (the Trust Period), and shall be determined and the Trust Fund and all property of the Trust distributed to the nominated beneficiary or beneficiaries not later than upon the expiry of the Trust Period, or in the alternative shall be determined and distributed to the nominated Beneficiary or Beneficiaries at such earlier time as shall be specified upon the request to so determine and distribute made by both the Consultant (if any) and by the nominated Beneficiary or Beneficiaries.

10. NOMINATION AND REMOVAL OF BENEFICIARIES

10.1 The Beneficiaries named in clause 2 of this deed and any subsequent Beneficiaries shall remain as the Beneficiaries until replaced by any Beneficiary nomination lodged by me with the Trustee. Any such Beneficiary nomination which is legally valid shall, immediately upon being lodged with the Trustee, replace the current Beneficiaries.

…

12. RESETTLEMENT OF TRUST FUND

12.1 The Trustees may at any time resettle by deed all or any part of the Trust Fund upon the trustees of any trust (whether in the Cook Islands or elsewhere) which includes for the time being among its beneficiaries (contingent or otherwise) any one or more of the Beneficiaries then living or in existence.

…

14. TRUSTEE’S CONFLICT OF INTEREST

14.1 **Negation of Conflict**

THE Trustee shall be entitled to act as such and to exercise all of the Trustee’s powers and discretions notwithstanding that:

…

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

…

18. TRUST DEED MAY BE VARIED

18.1 The Trustee may at any time or times during the Trust Period, with the prior written consent of the Consultant, and without infringing the rule against perpetuities, by deed vary all or any of the provisions of this deed provided that no variation will adversely affect the benefits which have vested in Beneficiaries shall be made.

19. NON DISCLOSURE

19.1 For the avoidance of doubt, it is hereby declared that no Beneficiary hereunder nor any third party shall have any claim, right or entitlement to call for accounts (whether audited or otherwise) from the Trustee in relation to the Trust Fund and the income thereof, or to obtain any information of any nature from the Trustee in relation to the Trust Fund and the income thereof or in relation to the trusts and powers hereof.

Schedule

…

The following General Terms and Conditions of the Trust shall apply to and govern the conduct of the Trust provided that in the event of any contradiction, or conflict, or other difficulty in interpretation, the provisions of clauses 1 to 20 inclusive of this deed shall take precedence and apply to the exclusion of any provision contained in the Schedule, or implied or imposed by law, to the extent that the law shall permit me as Settlor and/or the Trustee to contract out of any such implication or imposition.

The General Terms and Conditions under which the Trust is to be conducted are as follows:

1. APPLICATION OF TRUST CAPITAL/INCOME

1.1 Until the date for distribution provided in this deed to pay apply or appropriate the whole or any portion of the capital or income of the Trust as the Trustee shall in its uncontrolled discretion think fit in discharge of such debts and obligations of the Trust fund or of the Trustee as may exist from time to time and for or towards the personal use support benefit maintenance education or advancement in life of such of the beneficiaries as may from time to time be living and of any one or more to the exclusion of the other or others as the Trustee in his sole uncontrolled discretion shall think proper without the Trustee being obliged to preserve the income generating potential of the Trust assets, nor to preserve the capital of the Trust.

…

[Signed by Paul Webb as Settlor]

[Signed by Paul Webb as Trustee]

LORD WILSON: (dissenting)

110.
Albeit reluctantly, I would have advised Her Majesty to allow the husband’s appeal. The broad justice of the case may well be reflected in the Court of Appeal’s order but I, for my part, am driven to conclude that it should have dismissed the wife’s appeal. Family lawyers in England and Wales are presently in energetic discussion about whether legislation for the judicial determination of issues of matrimonial finance should continue to allow it to be conducted by reference to discretionary factors or should subject the conduct of it to the application of rigid criteria. For them, section 20 of the 1976 Act (“the Act”), which, according to the author of “Fisher on Matrimonial Property”, 2nd ed (1984), para 15.5, was widely criticised when it was part of the law of New Zealand, may be an example of the difficulties which subjection to rigid criteria can generate.

111.

I respectfully agree with everything set out in Parts II and III of the Board's judgment. I disagree with it only in relation to its treatment in Part I of the husband's debt to the Commissioner of Inland Revenue in New Zealand ("the Commissioner").

112.
The evidence referable to the tax debt is as follows:

(a)
The husband did not file tax returns in New Zealand for the eight years from 2001 to 2008 inclusive.

(b)
He resided in New Zealand throughout that period and, at any rate latterly, in a property in Remuera, Auckland.

(c)
He married the wife in 2005.

(d)
Thereafter they enjoyed what the trial judge found to be a high standard of living.

(e)
In 2011 the Commissioner began to investigate the husband's tax affairs.

(f)
In 2012 he was convicted of aiding and abetting the wife to obstruct the Commissioner's lawful search of the home in Remuera by hiding two hard drives.

(g)
In about 2012 the Commissioner issued substantial default assessments against him, inclusive of interest and penalties.

(h)
In particular she contended that he had falsely represented that income earned by him during those eight years had been loans or owed to trusts rather than to himself.

(i)
In 2013 the Commissioner obtained a freezing order which enabled her to enter a caveat against dealings in the title to the home in Remuera.

(j)
In 2016, shortly after his separation from the wife, the husband, by counsel, challenged the assessments before the Taxation Review Authority. But Judge Sinclair dismissed the challenge and confirmed the assessments.

(k)
The husband sought judicial review of Judge Sinclair's determination but presumably the application failed.

(l)
At the hearings in 2017 before Potter J ("the trial judge") and the Court of Appeal the debt, inclusive of interest and penalties, was taken to be about NZ$24m.

(m)

In 2017 the Commissioner sought judgment against the husband in the Auckland District Court. She included a claim for unpaid tax referable to five further years, from 2010 to 2014, so the total claim rose to about NZ$26m.

(n)
Following a hearing in that court in 2018, which the husband attended in person, Judge Cunningham struck out his defence and entered judgment for the Commissioner in the sum claimed.

(o)
In his judgment Judge Cunningham noted that the Commissioner was proposing to take bankruptcy proceedings against the husband.

(p)
At the hearing before the Board in January 2020 Mr McAnally on behalf of the husband stated on instructions that the Commissioner had issued proceedings in the High Court of New Zealand for the appointment of receivers of his client's property situated both in New Zealand and in the Cook Islands.

113.
Before the trial judge Mr McAnally argued that part of the husband's tax debt was not a personal debt and so fell within section 20(5)(a) of the Act, set out in para 27 of the Board's judgment above. For he argued, seemingly with some support in the book written by Mr Fisher (as he then was) and cited in para 110 above, at para 15.7, that part was referable to income which had been used for the benefit of all three members of the family in the course of managing the affairs of the household and so, by virtue of section 20(7)(d), fell outside the ambit of personal debt. Before the Court of Appeal, however, Mr McAnally conceded that the whole debt should be taken to be a personal debt. Since any property owned by the husband was clearly to be classified as matrimonial property within the meaning of section 8 of the Act rather than as his separate property, Mr McAnally will confidently have concluded that his claim to deduct the debt would be unaffected by whether it was treated as being entirely a personal debt under section 20(5)(b) or partly a non-personal debt under section 20(5)(a). That conclusion would, however, be fatally undermined if the Court of Appeal were to attach to the word "debts" in section 20(5)(b) a meaning different from its meaning in section 20(5)(a).

114.
In the light of Mr McAnally's concession, the question before the Court of Appeal became whether, pursuant to section 20(5)(b), the tax debt fell to be deducted from the value of the matrimonial property (in particular of the home in Arorangi) which that court correctly found to be owned by the husband. If so, and in the absence of any matrimonial property owned by the wife, there would be nothing available for division under the Act.

115.
It is important to understand the reasoning of the Court of Appeal in concluding that the tax debt was not deductible. It is incomplete to describe it as having been that the debt was unlikely to be enforceable in the Cook Islands. Its reasoning was more focused: it was that the debt was not enforceable against the matrimonial property owned by the husband because the property was situated in the Cook Islands where the debt was unenforceable. In para 34 of its judgment the Court of Appeal reasoned as follows:

"The sole reason for allowing a personal debt to impact on the matrimonial property division under section 20(5)(b) is to protect a debtor spouse's unsecured creditors. But if, for whatever reason, an

unsecured creditor would not be able to execute a judgment against the assets in question there would no longer be any rationale for allowing the debtor spouse to set off that debt against his or her matrimonial property assets."

116.
It would be wrong to disagree with the local court's understanding of the rationale behind section 20(5)(b) of the Act. Family lawyers in other jurisdictions might at first sight wonder whether its purpose is to counter, at least in part, the residual injustice of enabling one spouse to leave the marriage with substantial assets and the other with substantial debts. But, if so, they would misunderstand the overall purpose of the Act, which is to set firm rules for the division of matrimonial property irrespective of the overall financial position in which, in the light of any difference in the amount of their separate property, each spouse is left as a result of their application.

117.
But a rule is not firm unless it is taken to mean what it says.

118.
To say that the word "debts" in subsection (5)(b) of section 20 means "debts enforceable against the debtor's matrimonial property" is, as Mr Hikaka on behalf of the wife bravely conceded, to put a gloss on the word. The Act could have used those words. But it did not do so.

119.
The Court of Appeal did not suggest that the word "debts" in subsection (5)(a) of section 20 also meant "debts enforceable against the debtor's matrimonial property". On the contrary, the court explained its construction of the word in subsection (5)(b) by saying that the rationale of the subsection was different from that of subsection (5)(a). No doubt non-personal debts deductible under subsection (5)(a) will usually be enforceable against the debtor's matrimonial property. But the subsection does not mandate inquiry into their enforceability against any particular assets. It follows that, by favouring a construction of the word "debts" in subsection (5)(b) different from the word in subsection (5)(a), the Court of Appeal departed from a conventional canon of construction that words in the same Act (and surely all the more when found in the same section) are presumed to have the same meaning: "Bennion on Statutory Interpretation", 7th ed (2017), para 21.3.

120.
The Court of Appeal's construction also has, I respectfully suggest, the curious and inconvenient consequence of requiring a court, confronted with a claim to deduct a debt under section 20(5)(b), to determine, without assistance from the creditor, whether the debt is enforceable against specified assets. The present case offers a perfect example. Into the determination of a modest dispute about the division of matrimonial property under the Act the Court of Appeal insinuated a massive issue, on which there is no authority and which has substantially generated the appeal to the Board: whether a debt, now a judgment debt, owed by the husband to the Commissioner is enforceable in the Cook Islands. The issue falls to be determined in the light of the unique relationship, past and present, between New Zealand and the Cook Islands; and without a contribution from the Commissioner, who would surely have been able to assist the court, and now the Board, in relation to it with greater authority than either of the spouses.

121.
The Board concludes, in my view boldly, that the Commissioner would be unable to enforce in the Cook Islands the judgment which she had obtained in New Zealand, whether directly or by seeking a

replicate judgment there with a view to its enforcement. But, even if so, section 655(1) of the Cook Islands Act 1915 in New Zealand, not brought to the attention of the Court of Appeal, provides:

“Bankruptcy in New Zealand shall have the same effect in respect to property situated in the Cook Islands as if that property was situated in New Zealand.”

Parliament in New Zealand has repealed many sections of the 1915 Act but not section 655. In para 66 of its Advice the Board seems to suggest that the Cook Islands might now decline to afford to a New Zealand bankruptcy order the effect for which the law of New Zealand continues to provide. But there is no material to support that surprising suggestion. Indeed in my view it would be equally fanciful to consider that, if otherwise obliged to recognise the right of the Official Assignee in New Zealand to assert title to the debtor’s property in the Cook Islands, the court there could decline to recognise it by reference to the identity of the Commissioner as the petitioning creditor behind the bankruptcy.

122.
Had I regarded it as necessary to ask whether the husband’s tax debt is enforceable against his matrimonial property in the Cook Islands, my answer would have been that it is enforceable, at any rate indirectly through bankruptcy even if not directly.

123.
How then should the Court of Appeal have approached the meaning of the word “debts” in section 20(5)(b) of the Act? The trial judge considered, in my view rightly, that assistance was to be found in the analysis of that word in Mr Fisher’s book, cited in para 110 above, at para 15.6 as follows:

“To qualify under section 20(5) a proposed deduction must constitute a ‘debt’ … it seems probable that a debt is intended to qualify if a spouse has an existing legal liability to pay … a sum of money either certain or capable of estimation which liability is likely to be satisfied by the debtor-spouse or is actionable with a real prospect of recovery on the part of the creditor.”

Note that nowhere in his book did Mr Fisher distinguish between the meaning of the word “debts” in subsection (5)(a) and in subsection (5)(b); nor did he cite any authority which supports the Court of Appeal’s construction of the word when found in subsection (5)(b).

124.
There is no doubt that the tax debt reflects an existing legal liability. The situation is far removed from, for example, that occasionally encountered by family lawyers, in which the husband’s wealthy father makes payments to him during the marriage to enable him to meet day-to-day expenditure; in which on divorce the husband contends that they were loans which he has a legal liability to repay; and in which the divorce court usually rejects the contention.

125.
Is, then, the husband’s tax liability actionable with a real prospect of recovery on the part of the creditor? In support of that part of his definition Mr Fisher cited the case of Livingstone, addressed by the Board in para 43 above. The parties lived in Canada until 1972 and then in Scotland and New Zealand until 1977, when the husband left the wife and returned to Scotland. At the hearing in 1980 the husband produced a letter sent to him in 1973 by the Department of National Revenue in Canada in which it claimed unpaid tax of Can$28k. The judge ruled that it was not deductible as a debt under the Act as it then applied in New Zealand. He found at p 132 that the husband had no intention of paying the tax, had avoided returning to Canada after 1972 and had been at pains to remove all his

assets from Canada; and thus he held that, while the debt existed, it could for practical purposes be disregarded.

126.
In my view it is impossible in the present case to conclude that for practical purposes the husband's tax debt can be disregarded.

127.
Look, first, at the facts. We know that the liability is actionable because action has already been taken in relation to it; and the Commissioner must have a real prospect of recovery of at least a substantial part of the debt. For

(a)
the husband is a citizen of New Zealand;

(b)
from 2005 he resided with the wife in the home in Remuera until they moved to the Cook Islands in 2013;

(c)
in 2016, after he left the Cook Islands, he resumed residence in the home in Remuera;

(d)
he still resides there;

(e)
in the absence of evidence it is reasonable to assume that he is again generating income in New Zealand;

(f)
he regarded it as in his interest to challenge the Commissioner's assessments to the fullest possible extent; and

(g)
the Commissioner has taken active, and no doubt expensive, steps to secure and enforce the liability, first by obtaining a freezing order, then by obtaining a judgment against the husband and now by applying for the appointment of receivers of his property.

128.
Look, second, at the trial judge's findings. After listening to the extensive cross- examination delivered to the husband, she found as a fact that there was a "real likelihood" that he would have to pay or satisfy the debt. In para 58 above the Board claimed that "she gave no reason for this opinion". With respect, I disagree. In the immediately preceding sentence she had said that the husband was resident in New Zealand and that the Commissioner was in the process of enforcing the claim; and it was on that express basis that the judge contrasted the present case with the Livingstone case in which the debt had for practical purposes been disregarded.

129.
In the same paragraph the Board proceeds to "infer" that the Court of Appeal did not share the judge's confidence that the debt was likely to have to be paid or satisfied. Unfortunately I myself see no basis for drawing that inference. Indeed, if an appeal court were to consider it proper to override a trial judge's finding that an event was really likely, it would say so in terms.

130.
Also in the same paragraph the Board states that, for four reasons which it sets out in paras 59 to 62 above it has reached a clear view that the trial judge's finding was wrong. But what do the four reasons show? The Board's conclusion at para 63 is that they serve to refute any suggestion that "in so far as the matrimonial property is out of reach of his creditors, [the husband] will ever voluntarily apply it to meet his debts". But why does it follow from that conclusion that the debt is not enforceable at all?

131.
In short I agree with the Board at para 41 above that the tax debt is deductible under section 20(5)(b) of the Act only to the extent that it is enforceable or likely to be paid. My respectful disagreement with it lies in its conclusion that, if (which I do not accept) it is not enforceable against the husband's matrimonial property even through bankruptcy, the debt is not enforceable at all. On my analysis it is indeed, including on a practical level, enforceable.