IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA231/2020
[2021] NZCA 450

BETWEEN	TERENCE PATRICK MILLS Appellant
AND	PAULINE CLARE LABOYRIE, WAYNE FRANCIS MILLS AND MARY DIANNE GEMMELL AS TRUSTEES OF THE GALWAY TRUST Respondents

CA420/2020

BETWEEN	PAULINE CLARE LABOYRIE Appellant
	WAYNE FRANCIS MILLS Second Appellant
	MARY DIANNE GEMMELL Third Appellant
AND	TERENCE PATRICK MILLS Respondent

Hearing:	16 June 2021
Court:	Brown, Brewer and Davison JJ
Counsel:	M D Branch and K F Shore for Appellant in CA231/2020 and Respondent in CA240/2020 S W B Foote QC and K B Arthur for Respondents in CA231/2020 and Appellants in CA420/2020
Judgment:	8 September 2021 at 10.30 am

JUDGMENT OF THE COURT

A **The appeal in CA231/2020 is dismissed. Accordingly the appeal in CA420/2020 is also dismissed.**

B **The appellant in CA231/2020 must pay the respondents one set of costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.**

C **The appellant is personally liable for the award of costs and disbursements.**

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REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] Four siblings, Pauline, Wayne, Mary[1] and Stephen, settled the Galway Trust (the Trust) to acquire and own their late mother's Hamilton home (the Property). The objectives of the Trust were to provide secure accommodation for Stephen for his lifetime and ultimately to afford benefits to the siblings' children and grandchildren. However, unbeknown to the respondents, the Property was registered solely in Stephen's name. On his death in 2017 the Property was left to the appellant in CA231/2020 (Terry) who was another brother and the executor of Stephen's estate. Terry maintained that Stephen was both the legal and beneficial owner of the Property which Terry duly inherited.

[2] In proceedings brought by the respondents Edwards J ruled that Terry held the Property on trust for the respondents, in their capacities as trustees of the Trust, and made an order that it be transferred into their names.[2] An alternative claim by the respondents in their personal capacities for shares in the Property proportionate to their individual contributions to the purchase price was dismissed. In a subsequent costs judgment Edwards J awarded the respondents costs on a sch 2B basis with an uplift of 25 per cent for all steps taken after 3 September 2019.[3] The Judge directed that the estate was liable for costs in the first instance with Terry personally liable for any shortfall.[4]

[3] Terry appeals both the substantive and costs judgments in CA231/2020. In the event that Terry's appeal is successful, Pauline, Wayne and Mary appeal in CA420/2020 against the dismissal of their claim in their personal capacities.

Factual context

[4] Stephen had lived with his mother at the Property for his entire adult life. At the time of her death in July 2004 he was 43 years old, suffering from multiple sclerosis and wished to continue living in the Property.

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1 We will refer to Pauline, Wayne and Mary as the respondents even though they are also appellants in CA420/2020.
2 *Laboyrie v Mills* [2020] NZHC 700 [High Court judgment].
3 The date of a third (generous) *Calderbank* offer.
4 *Laboyrie v Mills* [2021] NZHC 2557 [Costs judgment].

[5] In October 2004 Stephen, accompanied by Pauline and Mary, approached the ASB Bank (the Bank) for a loan to assist in the purchase of the Property from his mother's estate. Bank documentation relating to the application recorded:

> Customer is wanting to apply for a $58k home loan to assist him purchasing family estate. He has $60k saved up in PSIS and is having $108k from inheritance …

It appears that the loan application, which was made in Stephen's name alone, was approved by the bank on or about 2 November 2004.

[6] On 2 November 2004 Stephen entered into an agreement for the sale and purchase of the Property with the Public Trust as the executor of his mother's estate for $200,000, conditional on finance, for settlement on 19 November 2004. The purchaser was recorded in the agreement as "Stephen John Mills and or Nominee".

[7] About this time Pauline, Wayne, Mary and Stephen reached an agreement whereby the Galway Trust would be established to purchase the Property in which Stephen would continue to reside. A Trust Deed bearing the date 5 November 2004 was executed by all four in their capacities as both settlers and original trustees. At the same time all four signed a document entitled "Memorandum of Guidance for Galway Trust" which recorded their objectives as follows:

> 1.1 The objective of the documentation of our wishes is to give present and future Trustees of our **Galway Trust** a clear indication of our intent and wishes when we established the Family Trust for the benefit of Stephen and our family in future years.
>
> 1.2 The philosophy we are endeavouring to establish for Stephen and our family now and in future years is to ensure that Stephen has security for his future and to maximise income from the capital we have established and continue to establish and to endeavour to increase this position (inflation adjusted) and thereafter to assist future generations.
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> 1.3 It is our intention to ensure that both Stephen, present and future members of our family have as much financial security as possible for the future. We see this security coming from returns earned on investments, rather than eroding the capital base itself except where the use of capital is necessary.
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> …

[8] So far as the Property was concerned the Memorandum of Guidance stated:

> 3.1 We are purchasing the family property in the name of the Trust situated at 48 Galway Ave, Hamilton secured at this time by unconditional agreement with the Public Trust.
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> …
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> 3.3 The purchase of 48 Galway Ave has been contributed by Stephen, Mary, Wayne and Pauline retaining their share from their mother's estate, Stephen contributing $60,000.00 and Stephen arranging a mortgage of $58,000.00 to be paid by himself. Benefits therefrom accruing to Stephen in the shareholding outlined in clause 2.2.
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> …

[9] Clause 4, which was headed "Standards we wish to adhere to", recorded as the primary standard the provision of security for Stephen during his lifetime and in particular to provide an adequate level of income in his retirement, including health care. Other "standards" included educating family members, assisting with mortgages for modest housing needs, assisting with sound business opportunities, providing health assistance, and assisting in the event of financial difficulties.

[10] On 10 November 2004 Mr Booth, the siblings' solicitor, wrote to the Bank stating:

> We confirm Stephen Mills is purchasing the property in the name of the Trustees of The Galway Trust and enclose a copy of the Trust Deed for your information.
>
> Please arrange for new mortgage documents to be forwarded to our office for settlement on Friday 19 November 2004.

On the same day Mr Booth wrote to the Public Trust confirming that the finance condition in the agreement had been satisfied and enclosing a copy of the Trust Deed.

[11] The proposed acquisition by the Trust was reflected in the records of the Bank, an entry dated 18 November 2004 noting that the original application was being withdrawn because there was to be a change in loan structure. A further entry dated 19 November 2004 recorded:

> Application #87882 approved previously by PCU. Resubmitting as customer has decided to purchase the property under The name of The Galway Trust.

By letter dated 19 November 2004 the Bank instructed Mr Booth to prepare and attend to execution of the financing documentation.

[12] At about this time Stephen met with Mr Booth and the two of them agreed that only Stephen's name would appear on the title. Mr Booth explained:

> 22. Sometime shortly before the settlement date, Stephen Mills came to my office. I do not recall whether he turned up alone or not. I remember that it was usual for Stephen to have someone with him when he came to my office. During this meeting, Stephen told me that he wanted to have the property in his own name and to have the mortgage in his name. He was quite emotional. He told me that he wanted to have something in his life that he did himself.
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> 23. I knew that Stephen suffered from multiple sclerosis and was a sickness beneficiary. I understood that Stephen had lived with his mother his whole life. So I understood his desire to have something that he could call his own. I wanted to find a way for Stephen to have the sense of independence that he wanted. But he still had to be able to fund the purchase of the property and needed his siblings' (Wayne, Mary and Pauline's) financial help with that. Also he above all wanted security that his siblings could not ask him to pay them out at any moment or force a sale of the Property. He wanted to know that as long as he met the mortgage, he could stay in his home until he died, or chose to leave. In addition, the Bank naturally wanted security over the whole property from all owners of the property.
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> 24. Therefore, I told Stephen that he could have his name on the certificate of title and he could have the mortgage in his own name, but the Trust had to sit behind as it recorded the ownership of the property.

[13] Mr Booth proceeded to arrange execution of the financing documentation which he sent to the Bank under cover of a letter dated 1 December 2004. The documents enclosed included:

(a) a mortgage signed by Stephen;

(b) a loan agreement signed by Stephen as customer and signed by all four siblings as guarantors in their capacities as trustees of the Galway Trust;

(c) a guarantee and indemnity schedule signed by all four siblings as trustees of the Galway Trust; and

(d) a trustee certificate signed by all four siblings as trustees of the Galway Trust.

The documents were all dated 26 November 2004. That was the date of initial disclosure recorded in Mr Booth's solicitor's certificate to the Bank.[5]

[14] Settlement took place on 3 December 2004 and the certificate of title was issued in Stephen's name alone. The purchase price and legal fees were funded as follows:

(a) Wayne, Mary and Stephen contributed their 11 per cent share of their mother's estate (equivalent to $22,000 each).

(b) Pauline contributed a 10 per cent share of her mother's estate (being $20,000).

(c) The Bank mortgage in the sum of $58,000.

(d) Contributions from Stephen in the sum of approximately $57,300. This sum comprised the repayment of a loan by another sibling and Stephen's savings.

[15] Subsequent events were summarised by the Judge in this way:[6]

> [18] A deed of acknowledgement of debt (Deed of Debt), and a deed of forgiveness of debt (Deed of Forgiveness) between Stephen in his personal capacity, and the four siblings as trustees of the Trust, was signed a short time later. Under the Deed of Debt, the trustees acknowledged that they were indebted to Stephen in the sum of $57,300. The sum of $27,000 was forgiven under the Deed of Forgiveness. These transactions were recorded in the minutes of the first meeting of the Galway Trust signed at the same time.
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> [19] Stephen continued to live in the Property until his death on 14 April 2017. He did not pay rent to the Trust, but made all payments for the mortgage, rates, insurance and maintenance.
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> [20] Stephen's last will was a will kit prepared by his caregiver in 2017. It was not executed by Stephen, but an order of this Court declared it to be Stephen's last valid will. Terry was nominated the executor of the Estate under

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5 In accordance with the Credit Contracts Act 1981.

6 High Court judgment, above n 2 (footnotes omitted).

> the will. All Stephen's assets, including the Property (which was listed as "solely held"), was left to Terry. There was no mention of any liabilities, including the mortgage over the Property which had not been repaid at that date.

[16] The dispute concerning beneficial ownership of the Property arose soon after the funeral. In their trustee capacity the respondents claimed that they were the beneficial owners of the Property by way of an express trust, a common intention constructive trust or a *Pallant v Morgan*[7] equity.[8] In the alternative, in their personal capacities each claimed an individual share in the Property based on their respective contributions to it. Terry maintained that Stephen was both the legal and beneficial owner of the Property. He also advanced various affirmative defences and, in the event the respondents were found to be the beneficial owners, counterclaims for unjust enrichment, trustee indemnity and a debt due to the estate.

The High Court judgment

[17] Having dismissed the express trust claim, the Judge turned to consider the distinctly pleaded constructive trust and *Pallant v Morgan* equity causes of action. As she considered there was an overlap between the two types of claim she proceeded to address them together.[9] In doing so she made several factual findings.

[18] While there was no dispute that the four siblings' original intention was for the Property to be owned by the Trust, Terry contended that such intention changed at the meeting between Stephen and Mr Booth.[10] Rejecting that proposition Edwards J considered that the evidence supported the respondents' contention that the Trust remained as the effective owner of the property rather than Stephen owning it outright, reasoning as follows:

(a) The change in intended legal owner from the Trust to Stephen was really intended to be a matter of form and not substance.[11]

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7 *Pallant v Morgan* [1953] Ch 43.
8 A proprietary estoppel cause of action was withdrawn at trial.
9 High Court judgment, above n 2, at [57].
10 At [12] above.
11 High Court judgment, above n 2, at [26].

(b) Steps taken subsequent to the meeting between Stephen and Mr Booth were consistent with that intention, in particular the Deed of Debt, the Deed of Forgiveness, and the Trust minutes in respect of those debts signed by the four siblings soon after settlement.[12]

(c) The guarantee of Stephen's loan to the Bank, executed on 26 November 2004 subsequent to the meeting between Stephen and Mr Booth, was consistent with the Trustees retaining an interest in the Property.[13]

(d) Similarly consistent was the fact that liability under the guarantee was limited to the assets of the Trust.[14]

[19] The Judge held that the change in legal ownership was a unilateral change effected by Stephen, on Mr Booth's advice, and that the respondents were not informed of and did not agree to that course. All three said they were surprised when, following Stephen's death, they discovered that they were not on the title as trustees.[15] Mr Booth's evidence, that the respondents had agreed to this change, was rejected as being unreliable (although honestly given) and was possibly prompted by his erroneous perception that there had been a change in borrower.[16] The Judge recognised that Stephen was always going to be the borrower from the Bank and that did not change. Terry's argument that the fact the mortgage document was in Stephen's sole name was evidence of a fundamental change in the transaction structure was rejected. Thus, notwithstanding Stephen's unilateral change, the intention that the Property would be dealt with in accordance with the Trust Deed remained unaltered.[17]

[20] The respondents were held to have acted to their detriment, most obviously by agreeing to contribute their shares of their mother's estate to the purchase of the Property via the Trust structure[18] but also by executing a guarantee of Stephen's borrowing without which the Bank may not have loaned Stephen the money for the

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12 At [27].
13 At [32].
14 At [33].
15 At [48].
16 At [45]–[47].
17 At [86].
18 At [88].

purchase.[19] Because it would have been unconscionable to allow Stephen's estate to assert ownership of both the legal and beneficial interest in the Property the requirements for an institutional constructive trust were made out.[20]

Issues on appeal

[21] It is useful to commence by recognising the parties' distinctly different perspectives. The respondents contended that common intention constructive trusts (CICT) and the *Pallant v Morgan* equity are "monikers" for particular types or examples of reasonable expectation constructive trusts (RECT), but that the same equitable principle applies: a constructive trust will be recognised when it is unconscionable for the owner of property to deny an interest in that property to another.

[22] Terry rejected that proposition, arguing that the two bases of claim are separate causes of action which are not available at law in a property dispute between family members. In Terry's view the appeal involved two questions:

> (a) Whether there is a stand-alone CICT in New Zealand which does not require contribution, and, if there is such a trust, has a common intention been established; or
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> (b) Whether, the Respondents can, in a family property matter, call in aid the Pallant Equity and, if so, have the elements of that cause of action been satisfied.

Hence in their outline of oral argument counsel for Terry suggested that the appeal could be disposed of without any real need to consider the facts

[23] However on the basis of the argument we heard we consider that central to Terry's appeal is an attack on two of the Judge's primary findings of fact, namely common intention and contribution. We frame the issues on the appeal against the substantive judgment in a different form and sequence from those proffered by the parties:

> (a) Did the Judge err in finding that the respondents made contributions?

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19 At [90]–[91].
20 At [96].

(b) Did the Judge err in finding that the original common intention of the trustees was unchanged?

(c) Did the Judge err in her approach to the CICT and *Pallant v Morgan* equity causes of action?

(d) Did the Judge err in rejecting Terry's counterclaims for unjust enrichment, trustee indemnity and in debt?

Did the Judge err in finding that the respondents made contributions?

[24] After noting that upon settlement on 3 December 2004 the Public Trust applied "the Respondents' personal funds (their inheritances) to the purchase price", Terry's submissions stated:

> 31 Crucially, the Respondents accept they made no contribution to the Property. They do not plead any contribution and, indeed, after initially pleading a RECT, they withdrew that claim.

(Footnote omitted.)

From that point Terry's submissions proceeded on the footing that there had been no contribution by the respondents. There was no direct attack on this aspect of the judgment.

[25] The Judge addressed the issue of contribution at two points. First, in the course of her discussion of Stephen's intentions, the Judge stated:[21]

> [29] It is correct that there is no record of any formal advance by the siblings to the Trust in respect of their shares of their mother's estate. It is nevertheless clear that all parties were working on the assumption that the siblings were leaving their share "in" the Property, and there was no uncertainty about that. The fact that the siblings' respective shares were not formally documented as advances to the Trust does not mean that their intention changed so that Stephen was to be both legal and beneficial owner of the Property.

[26] Subsequently in addressing questions of reliance, detriment and advantage the Judge said:

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[21] High Court judgment, above n 2.

> [88] The most obvious detriment was that rather than taking their share of their mother's estate, the Trustees agreed to contribute those shares to the purchase of the Property via the Trust structure. That not only allowed Stephen to complete the purchase of the Property, but it also afforded Stephen a degree of security of tenure.
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> [89] Mr Branch submits that any contribution to the purchase price was not made by the first plaintiffs as Trustees, and so they cannot claim any detriment on that basis. That is technically correct as the contributions made by each of the Trustees was not recorded as an advance to the Trust. But I do not consider the way in which the contributions were recorded should defeat the claim for a constructive trust. The maxim that equity looks on done that which ought to have been done has application in this case. The substantive point is that there was contribution made to the purchase price and it is clear that this contribution was intended to be through the Trust set up for that purpose. The fact that it was not recorded as such does not diminish the detriment suffered in fact.

[27] It is plain on the face of the documentation that Pauline, Wayne and Mary were each making a contribution to the purchase of the family home which was to be the property of the Trust. The method of doing so, as stated in cl 3.3 of the Memorandum of Guidance, was to by their "retaining their share from their mother's estate".[22] We consider that the reference to "retaining", while potentially confusing, was intended to convey that the siblings' interest in the family home was not to be distributed but "retained". That intended usage is signalled by the reference in cl 3.2 to "[t]he retention of the above assets".

[28] It was also the expression used by Mr Booth in his letter to the Public Trust of 10 November 2004, enclosing a copy of the Trust Deed, in which he said:[23]

> The Trustees have decided to retain their shares in this Trust for the benefit of Stephen. They will not be requiring pay out of a share from their mother's estate, but of course, we need to [quantify] each share. If Stephen, Pauline, Mary and Wayne retain their share in Trust, what will be the sum required to pay the Public Trust in order to pay out the children who have not decided to include their share for Stephens benefit.

That letter makes it clear that the siblings' shares were not to be distributed. This was in contrast to the sums which were to be paid out to the other siblings who had decided not to participate in the arrangement.

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22 At [8] above.
23 At [10] above.

[29] We agree with the Judge that such deficiencies as there may have been in documenting the siblings' contributions should not be permitted to defeat the claim to a constructive trust. Hence there was no error in the finding that contributions were made by the respondents.

Did the Judge err in finding that the original common intention was unchanged?

[30] The Judge rejected Terry's contention that there was a change from the four siblings' original intention that the property be owned by the Trust, essentially for the reasons summarised at [18] to [19] above. On this issue the judgment concluded:

> [42] Inferring that Stephen changed his mind as to both legal and beneficial ownership requires an inference that Stephen was reneging on the original agreement reached with his siblings. In other words, it must mean that Stephen decided to take his siblings' contributions towards the purchase price of the Property, but without giving them any interest in it at all. Neither party contended that Stephen would do such a thing. All agreed that he was a genuine and honest man who would not seek to take advantage of his siblings in this respect.
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> [43] Standing back and considering the evidence in its entirety, I am not persuaded that Stephen intended to fundamentally alter the arrangements agreed between the siblings when he met with Mr Booth in November 2004. Recording Stephen, as opposed to the Trustees, as legal owner of the Property on the certificate of title was a matter of form rather than substance and the Property was to be dealt with as if [it] was owned by the Trustees. There was no intention that Stephen take both the legal and beneficial ownership of the Property.

[31] Terry's challenge to that conclusion was based on the following propositions:

(a) A change in the loan documentation which recorded Stephen, and not the trustees of the Galway Trust, as the borrower was clearly inconsistent with the original common intention.

(b) A common intention at the date of purchase necessarily required that all trustees had such intention. However the Court accepted that, having made his unilateral decision, that was no longer Stephen's intention.

(c) The finding of a common intention at settlement of the purchase did not sit comfortably with the terms of the Trust.

[32] Although the initial overture to the Bank contemplated Stephen as the purchaser of the Property, as the internal bank records demonstrate the loan application was resubmitted following the decision that the purchase would be made in the name of the Galway Trust.[24] The Bank was advised of that change in Mr Booth's letter of 10 November 2004.[25] Consistent with that development, a letter to Stephen from the insurer of the Property recorded that as from 19 November 2004 the Galway Trust had been noted as the insured. This was all consistent with the contents of the Memorandum of Guidance.[26] There can be no doubt that at this time there was a shared common intention among Pauline, Wayne, Mary and Stephen that the Trust would be the owner of the Property.

[33] It is also apparent that Mr Booth bowed to Stephen's wishes to be registered as the proprietor of the Property. The Judge made a finding of fact that the respondents were not informed of this development and did not agree to that course.[27] There is nothing in the evidence which causes us to question that conclusion.

[34] The submissions for Terry in support of what was described as the "New Arrangement", namely that Stephen would be the legal and beneficial owner of the Property, placed emphasis on the fact that the loan documentation sent by the Bank to Mr Booth on 19 November 2004 recorded Stephen as the borrower, not the trustees of the Trust. However, as cl 3.3 of the Memorandum of Guidance recorded, it was Stephen who assumed the obligation to arrange a mortgage and it was to be his responsibility to repay it.

[35] That arrangement was consistent with the Bank term loan agreement dated 26 November 2004, signed by Stephen, which recorded Stephen as the customer and the four siblings, as trustees for the Trust, as the guarantor. Similarly consistent was Mr Booth's solicitor's certificate to the Bank recording Stephen as the borrower in respect of the loan advance and the four siblings (as trustees for the Trust) as guarantors.

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24 At [11] above.
25 At [10] above.
26 At [8] above.
27 At [19] above.

[36] The important feature of these documents is that they are consistent only with a continued common intention that the Trust was to remain the beneficial owner of the Property. That understanding, both by Mr Booth and Stephen, is reflected in Mr Booth's evidence:[28]

> 24. Therefore, I told Stephen that he could have his name on the certificate of title and he could have the mortgage in his own name, but the Trust had to sit behind as it recorded the ownership of the property.

[37] That continuing state of affairs is reflected in the Deed of Acknowledgement of Debt dated 3 December 2004 and the Deed of Forgiveness of Debt dated 4 December 2004. It is also consistent with the minutes of the first meeting of the trustees dated 3 December 2004 which recorded the trustees' acceptance of a loan from Stephen of $57,300 (shown in the Deed of Acknowledgment of Debt) and the acceptance of a gift from Stephen of $27,000 by way of reduction of debt (shown in the Deed of Forgiveness of Debt). The minutes recorded a further resolution as follows:

> **THAT** for the purposes of Section 13E of the Trustee Act 1956 the Trustees have reviewed the assets acquired by the Trust and have determined that the present investments of the assets of the Trust are suitable, need not be diversified, and ought to continue.

[38] All these documents were signed by Stephen. Indeed the letter from Mr Booth to Stephen dated 7 December 2004 enclosing the documents indicates that Stephen was tasked with arranging for the execution by all the signatories. In that letter Mr Booth requested that Stephen "have the clan sign the documents" and return them to Mr Booth.

[39] The documentary record serves to corroborate the respondents' contention that there was no departure from the common intention that the Property was to be owned by the Trust, not by Stephen himself. There was no error in the Judge's conclusion on this issue.

[40] Terry mounted a further argument, in reliance on the terms of the Memorandum of Guidance. He submitted that, despite that document clearly contemplating that the

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[28] At [12] above.

individuals would own their relative shares, the wording of the Trust Deed destroyed those expectations because on his death Stephen ceased to be a beneficiary meaning his estate had no claim. If a common intention was to be gleaned from the Memorandum of Guidance, then Terry argued that the document must be considered in its entirety, emphasis being placed on cl 3.3.[29] From this perspective there was a common intention that Stephen would have the beneficial interest of 68 per cent of the Property, the equivalent of his contribution. As Terry's outline of oral argument expressed it, "in the final analysis it cannot be unconscionable for (effectively) Stephen Mills to hold on to the 68% that he contributed so as to distribute that [contribution] in accordance with his testamentary intentions".

[41] The respondents first raised the objection that there was no affirmative defence or claim pleaded by Terry in the High Court to the effect that Stephen personally held a 68 per cent share of the Trust and that the Trust was bound to pay his estate a certain share.

[42] That point aside, it is clear that the references to percentages in cl 2.2 of the Memorandum of Guidance record the identity of those contributing to the Trust and the percentages in which they made contributions. It is apparent from reading the Memorandum in its entirety that the percentages are not intended to confer on the contributors a proportionate beneficial ownership of the Trust property.

[43] Clause 4.1 of the Memorandum of Guidance, the first of the standards the trustees wished to adhere to, envisages that the Trust property will provide security for Stephen during his lifetime, including an adequate level of income in retirement. Consistent with that provision of security for Stephen, the family home was accorded a special status so far as asset retention is concerned. Clause 3.2 states:

> The retention of [the Property] is to be treated as a prudent investment in terms of the Trustee Act. In time to come however the Trustees may need to look at whether or not the return from those assets (excluding the family home) is adequate and if not whether those assets should be liquidated and new investments arranged. There is no obligation on the Trustees to carry out such a review during our lifetimes.

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[29] At [8] above.

[44] The objectives specified in the "standards" section do not differentiate among other family members. The equality of treatment of the settlors' children is reflected in cl 5.1 of the winding up provisions:

> The Trust should not be wound up before the survivor of us has died and you should consider winding up the Trust after the youngest of our children has attained the age of twenty five years. You should consider, as an alternative to the winding up of the Trust, resettling the Trust fund then remaining upon trust for our children and their families. In either case you should treat our children equally.

[45] While it is apparent that it was an immediate objective of the Trust that Stephen was to have the benefit of special treatment during his lifetime, in our view the proposition that he was to have a distinct beneficial interest of 68 per cent of the Property is entirely at odds with the Trust documentation. Nor does it derive any support from the evidence of Mr Booth.

Conclusion on factual challenges

[46] Our rejection of the challenges to the findings on both contribution and common intention is determinative of the essence of the appeal. As the Judge's finding of reliance by the respondents was not in dispute, the prerequisites for recognition of a CICT were established. We agree with the Judge's conclusion that it would be inequitable to allow Terry, as Stephen's executor, to claim both the legal and equitable interest in the Property for himself.

[47] Given the significance of these findings for the appeal, it is not strictly necessary for us to engage with the submissions of Mr Branch and Ms Shaw, counsel for Terry, on various points of legal principle. However it is generally accepted that a trial judge and even an intermediate appellate court should deal with all or at least most issues raised for consideration.[30] Hence we proceed to address, albeit reasonably succinctly, the principal contentions advanced on behalf of Terry concerning the causes of action of CICT and the *Pallant v Morgan* equity.

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[30] *Bristol-Myers Squibb Co v FH Faulding & Co Ltd* [2000] FCA 316, (2000) 97 FCR 524 at [59] per Finkelstein J.

Did the Judge err in her approach to the CICT and *Pallant v Morgan* equity causes of action?

[48] Ms Shaw, counsel for Terry, submitted that the two causes of action have different elements and should have been considered separately. The Judge was said to have erred in proceeding on the footing that there was an overlap between the two and hence considering them together.[31] According to Ms Shaw the correct approach for the Court to follow[32] was:

> (a) To consider whether a CICT is a separate type of institutional constructive trust;
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> (b) If the answer to (a) was yes, to then consider whether a CICT can be established without contribution; and
>
> (c) If the answer to (b) was no, to then consider the Pallant Equity.

Is the CICT a separate type of institutional constructive trust?

[49] Ms Shaw contended that this question was resolved in the negative by this Court in *Almond v Read*:[33]

> Where a contribution is made on the basis of a pre-existing common intention that the contributions will result in a proprietary interest, there will be no difficulty in establishing a reasonable expectation. …

This Court concluded that a CICT simply describes one type of situation in which a reasonable expectation will be found to exist.[34] Hence Ms Shaw submitted that all a proved common intention does is to establish two elements[35] of a RECT.

[50] Mr Foote, counsel for the respondents, responded that such labels[36] can be unhelpful if viewed as laying down prescriptive mandatory criteria for the operation of the general principle: whether it is unconscionable in the circumstances for the legal owner of property to deny the beneficial interest of another. Suggesting that the

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31 At [17] above.
32 Echoing the two questions at [22] above.
33 *Almond v Read* [2019] NZCA 26 at [69].
34 At [71].
35 Of the four elements specified by Tipping J in *Lankow v Rose* [1995] 1 NZLR 277 (CA) at 294.
36 He included common intention constructive trusts, reasonable expectation constructive trusts, the *Pallant v Morgan* equity and proprietary estoppel.

boundaries between the different "types" of constructive trust often overlap, he went on to submit:

> 23. "Common intention" constructive trusts are so labelled because the expectation is founded on a provable agreement or arrangement. … The expectation of the claimant is a reasonable one because it arises from the arrangement between the parties which a Court has found to exist. In that sense, as the Court of Appeal observed in *Almond v Read*, common intention constructive trusts can be described as a subset of what are called "reasonable expectation constructive trusts". …
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> (Footnote omitted.)

[51] In *Lankow v Rose* Gault J observed that the objectively determined reasonable expectations approach to the division of property bore close similarity to the common intention approach in England, while avoiding the artificiality of inferring common intention when the parties had not turned their minds to the issue.[37] However where the parties expressly address an issue and record a common intention, there is no call for further objective determination. As Cooke P observed in *Gormack v Scott*:[38]

> First, this case comes very close to one of express common intention. Where there has been an express common intention applicable to the circumstances that have arisen, it is unnecessary to fall back on reasonable expectations.
>
> Secondly, if (as the Judge thought here) the common intention was too vaguely expressed to receive implementation as such, the evidence bearing on common intention may still be relevant in considering the reasonable expectations of the parties.

[52] There are a variety of factual circumstances which will be recognised as sufficient to create a constructive trust. However we incline to the view that the taxonomy of the differently-labelled constructive trusts is a somewhat sterile exercise. To coin the observation of Tipping J in *Partridge v Moller*,[39] the roads all lead to Rome. Furthermore as Mark Bennett observed:[40]

> It would of course be odd to use the terminology of "reasonable expectations" where there were actual expressed intentions: reasonable expectations are used to ascertain the existence and content of equitable interests in the absence of expressed intentions.

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37 *Lankow v Rose*, above n 35, at 287–288.
38 *Gormack v Scott* [1995] NZFLR 289 (CA) at 293.
39 *Partridge v Moller* (1990) 6 FRNZ 147 (HC) at 153.
40 Mark Bennett "*Harvey v Beveridge*: Common Intention Constructive Trusts in New Zealand?" (2015) 46 VUWLR 959 at 976.

[53] We are not attracted to the proposition that a CICT is a "subset" of a RECT (if indeed that is what this Court contemplated in *Almond v Read*). We say that for two reasons. First we prefer the view of Cooke P that it is unnecessary to fall back on reasonable expectations if a common intention is apparent. Secondly, that analysis sits more comfortably with the fact that remedies may differ as between a constructive trust based on expectations and one based on common intention. In the former the remedy is strictly proportionate to reasonable expectations based upon contribution. In the latter the Court fulfils the common intention of the parties, notwithstanding that the intended rights may be disproportionate to contribution.[41]

[54] Hence we conclude that a CICT is not precisely the same as, but is a close relation of, a RECT. Either pathway provides the basis for the Court to recognise a constructive trust so as to prevent an unconscionable result. We record that we see no basis for the criticism of the final statement of the Judge in the following passage:[42]

> [76] The review of this case law demonstrates the danger in dismissing a case simply because it does not fit perfectly into a pre-defined category of constructive trust. Although the plaintiffs base their claim for an institutional constructive trust on an express common intention, the language of reasonable expectations could have just as easily been used without any substantive change to the cause of action. …

Can a CICT be established without contribution?

[55] As we have found that contributions were made by Pauline, Wayne and Mary, the improbable concept posed in question (b) of a constructive trust unsupported by any contribution is a hypothetical question. Suffice to say we share the doubts expressed by this Court in *Harvey v Beveridge* about the avoidance of the need for evidence of contribution as a rationale for the distinction between reasonable expectations and common intention constructive trusts.[43]

The Pallant v Morgan equity

[56] *Pallant v Morgan* concerned an informal agreement that, at an auction of a property which both wished to buy, Mr Morgan would bid while Mr Pallant would

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41 *Harvey v Beveridge* [2014] NZCA 72, [2014] NZAR 677 at [27].
42 High Court judgment, above n 2.
43 *Harvey v Beveridge*, above n 41, at [46].

not, but if successful they would share it in proportions to be derived from what turned out to be an unworkable formula.[44] Having been successful, Mr Morgan sought to keep the whole property for himself. Harman J ruled that Mr Morgan held the property on trust for the two men in equal shares (in default of an agreed workable share ratio).[45]

[57] The genesis of the discrete "equity" was explained by Lord Briggs of Westbourne in "Equity in business":[46]

> The *Pallant v Morgan* equity is one of the more recent additions to the library of legal key-phrases, even though the decision itself was made and reported as long ago as 1953, before I was born. The case contributed the label for a distinct equity only many years later (in 1974), through Megarry J. at an interlocutory hearing in *Holiday Inns Inc v Broadhead*. I suspect that the judge who decided *Pallant v Morgan*, Harman J., would be most surprised that this should have happened. He thought he was just following *Chattock v Muller*, reported in 1878, with the encouragement of the then leading textbook, *Fry on Specific Performance*, in an a fortiori case on the facts.

[58] Lord Briggs' detailed case study, which reviewed the milestones in "this tortuous story",[47] included reference to the five probanda of Chadwick LJ in *Banner Homes Group Plc v Luff Developments Ltd*.[48] Neither side in this appeal advanced argument to the effect that the *Pallant v Morgan* equity is not part of New Zealand law. Hence this judgment does not engage with that issue.

[59] The point taken by Mr Branch was that the *Pallant v Morgan* equity could have no application in the present case for two reasons:

(a) There needs to be a common intention which amounts to a bargain. The common intention to the extent established here was not sufficient.

(b) The equity is limited to commercial joint venture type arrangements.

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44 *Pallant v Morgan*, above n 7.
45 At 50.
46 Lord Briggs of Westbourne "Equity in business" (2019) 135 L Q Rev 567 at 569–570 (footnotes omitted).
47 At 574.
48 At 570–571, referring to *Banner Homes Group Plc v Luff Developments Ltd* [2000] Ch 372 (CA) at 397–399.

The former proposition hinged on Terry's challenge to the finding of common intention which we have rejected. However we consider that the second contention finds support in some of the English authorities.

[60] Uncertainty continues as to the breadth of application of the *Pallant v Morgan* equity. Concern about the potential for this equity to undermine commercial certainty surfaced in *Cobbe v Yeoman's Row Management Ltd*[49], with both Lord Scott[50] and Lord Walker clearly regarding the equity as confined to failed joint ventures.[51]

[61] The debate about the doctrinal basis of the equity split the English Court of Appeal in *Crossco No. 4 Unlimited v Jolan Ltd*, a case involving a negotiated demerger of a previously united family business.[52] As Edwards J noted in the judgment under appeal,[53] the majority in *Crossco* viewed the *Pallant v Morgan* equity lines of cases as examples of a particular type of CICT applied in the commercial field.[54] On Lord Briggs' analysis, the majority in *Crossco* viewed a *Pallant v Morgan* constructive trust as an institutional constructive trust established by common intention "but living and breathing in a business rather than a domestic context".[55]

[62] Mr Branch also drew attention to *London Borough of Brent v Johnson*, decided since the judgment under appeal, where Michael Green QC (sitting as a Deputy Judge of the Chancery Division) observed:[56]

> 197. … But what I think the debate highlights is that the cases in which a *Pallant v Morgan* equity has been found to exist seem to be commercial cases involving commercial parties who combine together in a proposed joint venture, thereby giving rise to some form of fiduciary relationship; whereas the common intention constructive trust cases are largely concerned with domestic, family purchases of property where the common intention has to be inferred from the facts or imputed to the parties. In those latter types of case, there is not normally any actual agreement reached as to beneficial interests; nor is there any sort of negotiation whether involving lawyers or not. On the face of it the two types of constructive trust therefore appear to be rather different creatures. …

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49 *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752.
50 Giving the speech with which the majority agreed.
51 Lord Briggs of Westbourne, above n 46, at 574.
52 *Crossco No. 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619, [2012] 2 All ER 754.
53 High Court judgment, above n 2, at [73].
54 The majority comprising of Arden and McFarlane LJJ.
55 Lord Briggs of Westbourne, above n 46, at 574.
56 *London Borough of Brent v Johnson* [2020] EWHC 2526 (Ch).

[63] Consistent with that approach we do not perceive the *Pallant v Morgan* equity, as defined by the five probanda in *Banner Homes*, as apt for the resolution of disputes of a domestic family nature. We consider that obligations among parties to such relationships are sufficiently catered for and should be regulated by the established reasonable expectation and common intention constructive trust concepts. Consequently, in our view, albeit obiter in the circumstances, the *Pallant v Morgan* equity was not an available cause of action in this case.

Did the Judge err in rejecting Terry's counterclaims?

Unjust enrichment

[64] Terry pleaded that if the trustees beneficially owned the Property then they obtained a benefit equivalent to the payments made by Stephen in respect of the mortgage, rates and insurance between 3 December 2004 and 14 April 2017. It was contended that it would be unjust for the trustees to retain that benefit without accounting to Stephen for it because Stephen made such payments in the belief that he was the owner of the Property.

[65] The Judge rejected that claim stating:[57]

> [109] … I am not satisfied that this cause of action can succeed. The allegation that Stephen believed he was the owner of the Property, and made the payments on that basis, cannot be sustained in light of my findings regarding the intentions of the parties. Stephen, together with his siblings, intended the Property to be owned by the Trustees, and dealt with on the terms set out in the Trust Deed. Although he was registered as the legal owner of the Property, the conversation with Mr Booth made it clear to him that the Trust would "sit behind" him in this respect. In other words, he knew that he was not the sole legal owner of the Property. The fact that a folder of Trust documents was found in Stephen's house corroborates that conclusion.

[66] The Judge had earlier found that the trustees' objective was to allow Stephen to remain living in the Property for the rest of his life without the anxiety that his siblings would demand their money back or force him to move. The Property was also to be an investment to benefit the siblings' children and grandchildren.[58]

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57 High Court judgment, above n 2.
58 At [22].

Although Stephen made the payments for the mortgage, rates and insurance, he did not pay rent to the Trust.[59]

[67] Mr Branch contended that as Stephen paid the expenses under the mistaken belief that he was the legal and beneficial owner of the Property, fairness dictated that his estate should be reimbursed for those expenses. Although numerous documents were said to have contributed to the formation of that belief, Mr Branch submitted the best evidence was his testamentary intentions, for Stephen clearly thought that he could deal with the Property and leave it to Terry.

[68] We do not accept that Stephen paid the outgoings under a mistaken belief as to the Property ownership. Further, as Ms Arthur submitted, if the arrangement had been that Stephen had paid rent to the Trust with the Trust paying the rates and insurance, the market rent would have been about twice the amount of the expenses Stephen actually paid. We agree that the arrangement whereby Stephen paid outgoings on the Property in which he lived rent free was both a practical and generous one. The Judge was correct to hold that Stephen's payment of the mortgage, rates and insurances was not an enrichment of the trustees that was in any way unjust.[60]

Trustee indemnity

[69] On the assumption that Stephen was a trustee holding the Property on trust for the Trust, Mr Branch contended that the default position is that Stephen should be indemnified for the expenses he incurred. It was submitted that neither the Trust Deed nor the Memorandum of Guidance were relevant to the indemnity issue, on Mr Branch's analysis this being a bare trust. Alternatively it was submitted that the Memorandum of Guidance contemplated that Stephen would personally benefit from his contributions to the mortgage, emphasis being placed on the final sentence of cl 3.3.[61]

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59 At [19].
60 At [112].
61 At [8] above.

[70] With reference to the indemnity claim the Judge stated:[62]

> [111] The claim based on the trustees' right of indemnity cannot be sustained either. I am not persuaded that these were payments made in Stephen's capacity as Trustee. The mortgage was always going to be Stephen's responsibility personally. And the payment of the rates and insurance premiums appear to be part of an informal arrangement by which he was allowed to live in the property rent-free.

[71] Mr Branch challenged the Judge's finding of an informal arrangement, arguing that there were no conditions placed on Stephen's occupation of the Property. However this state of affairs endured for some 12 years. The plain inference from both the Trust documentation and the parties' conduct is that the arrangement was well understood among the four siblings. We agree with the Judge's conclusion that the outgoings met by Stephen were not paid in his capacity as a trustee of the Trust.

Debt

[72] Terry claimed that the Trust owed a debt to Stephen's estate of either $136,000[63] or alternatively the amount advanced of $57,300. The respondents accepted they owed Stephen's estate the amount of $30,300, being the balance after deducting from the original debt of $57,300 the amount in the Deed of Forgiveness of Debt of $27,000.

[73] In the High Court Terry maintained that the deeds were not enforceable because, as the witness (Mr Booth) was not present when the deeds were signed, there was a failure of compliance with the statutory requirements in s 4(1) of the Property Law Act 1952. However the Judge considered that s 4(1) did not exclude the operation of an estoppel in respect of the requirement that a witness be present at the time a deed is signed.[64] She explained:

> [126] In terms of purpose, it is clear that the attestation requirement in s 4(1) is to ensure that signatures on deeds are authentic. It also serves to eliminate disputes about authenticity and the circumstances of signature. In most cases, allowing an estoppel to be advanced in the face of those statutory requirements will undermine the clear purpose and policy of the provision. However, that purpose and policy is not engaged in this case. There is no question that the

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62 High Court judgment, above n 2.

63 Comprising the outstanding balance of the mortgage ($56,700), Stephen's share of his mother's estate ($22,000) in addition to the funds that Stephen advanced to the Trust ($57,300).

64 High Court judgment, above n 2, at [125].

> signatures on the Deeds are authentic and there is no dispute about the circumstances in which the Deeds were signed. I am satisfied that an estoppel may be advanced in this case.
>
> [127] More than that, I am satisfied that an estoppel is made out. The evidence is clear that all parties, including Stephen, intended to be bound by the Deeds at the time they signed. The Trustees relied on the Deeds being enforceable, both in terms of the acknowledgement of the quantum of the debt owed, and the forgiveness of $27,000 of that debt. It would be inequitable to allow Terry, as Stephen's executor, to rely on a failure to be present at the time the Deeds were witnessed some 13 years later to escape being bound by those Deeds.

The Judge was satisfied that the respondents could advance an estoppel by way of defence to the counterclaim which was dismissed, save to the extent of the agreed debt of $30,300.

[74] The Judge referred to an analogous situation in *Shah v Shah*[65] where the attesting witness signed a deed shortly after the defendants had signed it but not in their presence. The defendants then delivered the deed to the plaintiff's solicitor. The English Court of Appeal held that the delivery of the document constituted an unambiguous representation of fact that it was a deed and there had been reasonable reliance on that representation.[66]

[75] Mr Branch attacked the Judge's finding at [127] of her judgment that the evidence was clear that all parties including Stephen intended to be bound by the deeds at the time they signed. He submitted that, unlike *Shah v Shah*, Stephen made no representations to the respondents about the deeds. He also submitted the documents were never explained to Stephen and there was no evidence that he understood what their effect was.

[76] In response Ms Arthur submitted that Stephen's clear and unequivocal conduct in signing the two deeds and the Trust minutes encouraged a belief or expectation in the respondents that the deeds recorded the legally binding obligations on the parties, including the amount of indebtedness. In our view that argument is fortified by the fact that Stephen was tasked with arranging for the execution of the documents by the

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65 *Shah v Shah* [2001] EWCA Civ 527, [2002] QB 35.
66 At [13].

other trustees.[67] Mr Booth's letter requested that Stephen have "the clan" sign the documents and return them to Mr Booth. Stephen's role as the vehicle for arranging the execution by all the siblings and for the return of the documents to Mr Booth is analogous with the *Shah v Shah* scenario. We reject the proposition that by this course of conduct Stephen made no representation that he would be bound by the documents. Consequently we agree with the Judge's view that it would be inequitable for Stephen not to be bound by the deeds and with her conclusion that an estoppel was made out.

Conclusion on counterclaims

[77] The challenges to the Judge's conclusions on Terry's counterclaims for unjust enrichment, trustee indemnity, and debt are rejected.

The costs appeal

[78] The costs judgment was said to be in error in:

(a) finding Terry personally liable for the balance of any costs the estate could not meet;

(b) applying a 25 per cent uplift in respect of the third *Calderbank* offer;

(c) the application of r 7.77(8) of the High Court Rules 2016; and

(d) disallowing a reduction in the award of costs to reflect the respondents' lack of success in the claim in their personal capacities.

Personal liability of Terry

[79] It was common ground that ordinarily the estate alone would be liable for costs. However the respondents contended that Terry should be personally liable for costs to the extent that they were unable to be met by the estate.

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[67] At [38] above.

[80] The Judge acknowledged the contrasting perspectives:[68]

> [29] It makes sense for the defendant to fund the litigation when it is considered that he stood to gain personally if successful at trial. He was the sole beneficiary under the will and the property was the most valuable asset of the estate. The defendant's personal interests, and those of the estate, were accordingly aligned. In addition, the defendant had complete control over the direction of the litigation from which he ultimately stood to gain. It would be unfair to allow him to shelter behind an insolvent estate in those circumstances. An order requiring the defendant to personally bear the costs of the proceeding sheets home the consequences of the litigation risks that the defendant chose to run.
>
> [30] On the other hand, the decision to defend the plaintiffs' claim was reasonable in all the circumstances. The property at the heart of the dispute was left to the defendant under Stephen Mills' last known will. That will was validated by an order of this Court. It was both necessary and reasonable for the defendant, in his capacity as executor of the estate, to defend the claim. As the defendant was sued in his capacity as executor of the estate, it is reasonable for the estate to be liable for any costs.

[81] Standing back she considered that an order that the estate should bear the costs in the first instance with Terry being personally liable for any residual shortfall struck a fair balance between the competing interests. In the Judge's view that reflected the capacity in which Terry was acting in defending the claim but also ensured that he was not immune from the consequences of the decisions taken in defending the claim which were ultimately for his personal benefit.[69]

[82] Ms Shaw submitted that once the High Court had accepted that Terry's actions were necessary and reasonable for an executor to take, then those actions must be viewed as within the ordinary run of proceedings involving an estate. She argued that the fact that Terry loaned the estate funds for legal costs and was also the sole beneficiary of the estate did not, and should not, convert his ordinary actions as an executor into conduct warranting a non-party costs award against him.

[83] However we accept the respondents' submission that only Terry, as the sole beneficiary of the estate, stood to benefit from the litigation. Although an executor, once he introduced his own capital to fund the litigation for the estate he could not avoid liability for costs by using the insolvent estate as a shield.

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68 Costs judgment, above n 4 (footnote omitted).
69 At [31].

[84] Ms Shaw further submitted that the filing of an interlocutory application is a fundamental step in respect of an application for non-party costs, relying on *Bassett-Burr v BPE Trustees (No 1) Ltd.*[70] In that case Mr Bassett-Burr, a director of a corporate trustee, was not given notice of the costs claim against him personally and was not represented at the hearing. The present case is distinctly different. Prior to the rejection of the third *Calderbank* offer the respondents gave notice of their intention to seek costs from Terry personally if their offer was rejected. It is apparent that Terry was well aware of the costs application against him and engaged in opposition to it. Hence there are no natural justice concerns here of the nature of those which concerned this Court in *Bassett-Burr*.

The costs uplift to reflect the third Calderbank offer

[85] The respondents made three *Calderbank* offers: on 10 October 2018, 9 August 2019 and 3 September 2019. While the Judge did not consider an uplift was justified for the first offer which was made prior to proceedings being filed, she considered the second and third offers fell into a different category. The Judge regarded the third offer as particularly generous, recognising that the estate and Terry would have been much better off had that offer been accepted.[71] She declined the uplift of 50 per cent sought by the respondents but directed an uplift of 25 per cent for steps taken subsequent to 6 September 2019.

[86] Citing *Sullivan Wellsford v Properties Ltd* Ms Shaw submitted that under r 14.6(3)(b)(v) of the High Court Rules the reasonableness of a party's rejection of an offer must be assessed at the time the offer was made and declined, not against the subsequent result.[72] She contended that Terry did not unreasonably reject the third offer having regard to the state of the pleadings at that time which did not include the pleading of the *Pallant v Morgan* equity. She argued that the Judge erred in assessing the impact of that amendment in stating:[73]

> [20] The defendant says that it was reasonable to reject this offer as the plaintiffs had not yet filed their amended statement of claim incorporating the *Pallant v Morgan* equity. I accept that the legal vehicle by which the claim

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70 *Bassett-Burr v BPE Trustees (No 1) Ltd* [2020] NZCA 457 at [12].
71 Costs judgment, above n 4, at [22].
72 *Sullivan v Wellsford Properties Ltd* [2018] NZHC 129 at [38].
73 Costs judgment, above n 4.

> might be established is relevant to the assessment of litigation risk. But in this case, the addition to the claim made very little difference to the assessment of the offer. An interest in the property based on an institutional constructive trust was a key plank of the plaintiffs' claim. The *Pallant v Morgan* equity amendment was put forward as a species of that particular trust. Although it was another vehicle by which the plaintiffs could establish their claim, it did not materially alter the merits. In this particular case, the state of the pleadings might affect the quantum of any uplift, but it does not mean an uplift should not be applied at all.

[87] In Ms Shaw's submission it was not unreasonable for Terry to have assessed that as at 6 September 2019 the claims were unlikely to succeed because:

(a) He considered that the express trust claim could not succeed, an assessment that proved to be correct.

(b) He relied on authority of this Court, namely *Almond v Read*,[74] which doubted the existence of a CICT as a separate category of institutional constructive trust.

(c) He assessed that the proprietary estoppel claim would not succeed because, in his view, the respondents had not contributed to the Property. That claim was withdrawn at the hearing.

Consequently, it was submitted that the *Pallant v Morgan* equity contention was important to the Judge's ultimate decision.

[88] For the reasons earlier explained,[75] in the circumstances of this case it is our view the *Pallant v Morgan* equity was a distraction. The Judge's description of it as making very little difference to the assessment of the offer stated the matter at its highest. The third *Calderbank* offer was indeed generous. There can be no complaint about an uplift subsequent to the date of that offer at a level of only 25 per cent.

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74 *Almond v Read*, above n 33.
75 At [63] above.

High Court Rules, r 7.77(8)

[89] Rule 7.77(8) of the High Court Rules provides that if an amended pleading is filed, the party filing it must bear all the costs of and occasioned by the original pleading and any application for amendment unless the Court otherwise orders.

[90] Three amended pleadings were filed by the respondents. Terry claimed $20,076.00 for costs incurred in responding to the amended pleadings. On this issue the Judge said:[76]

> [15] Some of the costs post-date receipt of the third *Calderbank* offer. For the reasons set out below, I consider that offer was effective. As counsel for the plaintiffs submit, costs cannot be claimed by a defendant who had the opportunity to avoid them. In addition, some of the claims are for defence pleadings to the same statement of claim, and for replies to amended defences to the amended counterclaims. Those are not steps made in response to the plaintiffs' amended pleading, but to the defendant's own amended pleading, and should be excluded from the total calculation.

The Judge considered that a broad-brush approach to quantification was warranted, allowing $10,000 to Terry for his costs and disbursements under r 7.77(8).[77]

[91] Ms Shaw submitted that the Judge was wrong to take the third *Calderbank* offer into account, submitting that the rule applies regardless of a defendant's lack of success in a proceeding. She maintained that Terry should not have been penalised a second time for rejecting the third *Calderbank* offer. She made the point that a significant number of the attendances related to the application for leave to amend the claim by adding a new cause of action after the close of pleadings date. She also submitted that the High Court ought to have approached any deductions by specifically identifying those which were disallowed.

[92] In response Ms Arthur submitted that some of the claims for costs were exaggerated and that not all of the steps taken were in response to the amended pleading. It was also noted that the respondents were successful on the major issue the subject of the application to amend the pleading, namely the *Pallant v Morgan* equity cause of action.

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[76] Costs judgment, above n 4.
[77] At [16].

[93] While we have reservations about the latter point given our conclusion on the *Pallant v Morgan* equity in the context of this case, we do not consider that the Judge erred in her reasoning at [15]. Furthermore in the exercise of the costs discretion we consider that the broad-brush approach adopted was warranted in all the circumstances.

Disallowing a reduction for the respondents' cross claim

[94] In the High Court Terry argued that the costs should reflect the fact that the respondents were unsuccessful on their alternative claim brought in their personal capacities. With reference to this contention the Judge said:

> [7] Furthermore, the causes of action were posited in the alternative. Those alternatives were premised on different constructions of the same set of facts. Success on one of those causes of action was enough to establish the claim, and meant that the other causes of action did not need to be considered. Contrary to the defendant's submission, there is no basis for halving the plaintiffs' costs on the basis that the second to fourth plaintiffs were running an argument that, on the first plaintiffs' case, could not possibly succeed. …

[95] Referencing r 14.7(d) of the High Court Rules, it was Terry's position that this is not a case where the causes of action were complementary. Rather Ms Shaw submitted that the claim was either a claim for a beneficial interest for the trustees or for Pauline, Wayne and Mary in their personal capacities. The need to address the inevitably contradictory arguments was said to have significantly increased Terry's costs.

[96] On this issue we agree with Ms Arthur's rejoinder that the claim by Pauline, Wayne and Mary in their personal capacities was a true alternative legal outcome arising out of the same factual matrix. It is not a true reflection of the result to say that the respondents "lost" that alternative claim; nor that Terry was successful in relation to it. Rather the alternative claim advanced in their personal capacities simply did not fall for determination in the circumstances where the claim as trustees succeeded.

Conclusion

[97] Each of the grounds of attack on the costs judgment fails. The appeal against that judgment is dismissed.

The appeal in CA420/2020

[98] In view of our conclusion on Terry's appeal, it is unnecessary to address the appeal brought by Pauline, Wayne and Mary.

Result

[99] The appeal in CA231/2020 is dismissed. Accordingly the appeal in CA420/2020 is also dismissed.

[100] The appellant in CA231/2020 must pay the respondents one set of costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

[101] The appellant is personally liable for the award of costs and disbursements.

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