

IN THE COURT OF APPEAL OF NEW ZEALAND

CA598/2009
[2011] NZCA 630

BETWEEN

BRONWYN CAROL TAYLOR, CALLUM
ROBERT IAN TAYLOR AND FORTUNE
MANNING TRUSTEE CO LTD, AS
FORMER AND/OR CURRENT
TRUSTEES OF THE C R AND B C
TAYLOR FAMILY TRUST
Appellants

AND

OFFICIAL ASSIGNEE IN
BANKRUPTCY OF THE PROPERTY OF
BRONWYN CAROL TAYLOR
Respondent

Hearing: 26 July 2011

Court: Chambers, Harrison and Wild JJ

Counsel: E St John and K P Giles for Appellants
G A D Neil for Respondent

Judgment: 9 December 2011 at 10:00 AM

JUDGMENT OF THE COURT

A The appeal is allowed.

B The High Court judgment dated 26 August 2009 requiring the appellants to pay \$227,771.80 and interest to the respondent is quashed.

C All the respondent's decisions to set aside the dispositions by the bankrupt other than the decision setting aside the 2006 gift are reversed.

D The High Court costs judgment dated 2 December 2009 is quashed. Costs in the High Court are to be redetermined in that Court in light of this judgment and the reasons therefor.

E The respondent must pay the appellants costs in this Court for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Chambers J)

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Introduction

[1] In 2000, Bronwyn and Callum Taylor, having obtained legal advice from their solicitor, Tony Fortune, a senior partner at Fortune Manning, set up the CRI

and BC Taylor Family Trust. The trustees were the Taylors and Fortune Manning's trustee company, Fortune Manning Trustee Co Ltd (FMT). The first asset transferred to the trust was the Taylors' family home in Mount Eden, Auckland. Over the next few years, the couple made gifts to the trust.

[2] On 20 November 2006, Mrs Taylor was adjudged bankrupt. Two creditors proved in her bankruptcy. They were the Commissioner of Inland Revenue for \$123,132.80 and Bronwyn Taylor Accounting Services Ltd (BTA) for \$84,639. BTA was the company through which Mrs Taylor ran her accountancy business. The two debts totalled \$207,771.80. The Official Assignee in Mrs Taylor's bankruptcy investigated her affairs. He noted the set-up of the trust and the dispositions to it. He decided to set aside all the dispositions Mrs Taylor had made to the trust. He contended the dispositions were voidable under s 60 of the Property Law Act 1952 because the dispositions had been made fraudulently. In the alternative, he contended some of the dispositions were voidable under s 54 of the Insolvency Act 1967. That section deals with gifts made by a bankrupt within nominated periods before his or her adjudication.

[3] The trustees challenged the Assignee's decisions. The High Court upheld the decisions.¹ Heath J agreed that the dispositions had been made fraudulently. He also found, in the alternative, that those dispositions the Assignee had contended were voidable under s 54 of the Insolvency Act were indeed voidable. He found that the fraudulent dispositions totalled \$269,150.² He ordered the trustees to pay to the Assignee the sum of \$227,771.80.³ Of that sum, \$207,771.80 represented the two debts proved in Mrs Taylor's bankruptcy.⁴ Both creditors were accordingly to receive 100 cents in the dollar. The balance of \$20,000 was reimbursement of what the Judge considered to be the "likely costs involved in the administration of the estate".⁵

¹ *Taylor v Official Assignee* HC Auckland CIV-2006-404-7115, 26 August 2009.

² At [119].

³ At [122(b)].

⁴ At [120].

⁵ At [121].

[4] The trustees have appealed. They contend that the Judge erred both in finding that the dispositions were fraudulent under s 60 of the Property Law Act and in concluding that some of the dispositions would have been voidable under s 54 of the Insolvency Act. The trustees also challenge the way in which the Judge calculated the relief.

Issues on the appeal

[5] Before we set out the issues on the appeal, it is important to set out a brief chronology of key events and dates so that the issues arising on this appeal are seen in their correct context.

[6] In **October 2000**, the Taylors settled the trust.

[7] On **1 December 2000**, the Taylors sold their family home in Mt Eden to the trust. Most of the purchase price was funded by a loan from the Taylors. The balance was funded by immediate gifts from the Taylors. These were intended to be the first gifts in a gifting programme in favour of the family trust. In addition, there was a forgiveness and release of the trustees from payment of \$1,350 payable to Mrs Taylor for her shareholding in companies described in minutes of the trust as “Tortis/Ozzy”.⁶ The Assignee contended these dispositions to the trust, which we shall call “the 2000 transactions”, were fraudulent in terms of s 60 of the Property Law Act.

[8] The next date of significance is **20 November 2001**. That was five years before Mrs Taylor’s adjudication. Under s 54(2) of the Insolvency Act, gifts made between two years and five years before an adjudication are voidable as against the Assignee “unless the party claiming under the gift proves that the donor was at the time of the making of the gift or at any time thereafter up to his adjudication able to pay all his debts without the aid of the property comprised in the gift”.

⁶ The details of this part of the transaction do not matter for reasons which will become apparent. We say no more about this aspect of the transaction.

[9] On **15 June 2002**, Mrs Taylor gifted \$27,000 to the trust by way of reduction of the debt the trust owed to her and her husband. This was the second gift in the planned gifting programme. The Assignee contended that the gift was fraudulent and in the alternative that it should be set aside under s 54(2).

[10] On **28 March 2003**, the trustees sold the Mt Eden property and bought another family home at Waimauku. They sold the Mt Eden property for \$509,000. The purchase price of the Waimauku property was \$620,000. The difference was funded by Mr and Mrs Taylor. They lent \$111,000 more to the trust. The Assignee contended that Mrs Taylor's share of that advance, \$55,500, was an alienation of her property caught by s 60. In the alternative, he contended the transfer was a gift in terms of s 54(2). The term "gift" means, for the purposes of s 54, "any disposition made otherwise than in good faith and for valuable consideration".⁷

[11] On **2 March 2004**, Mrs Taylor made the third of her regular gifts to the trust. She forgave and released the trust from a further \$27,000 of its indebtedness and, as before, filed a gifting statement with the Commissioner. This gift is challenged under both s 60 and s 54(2).

[12] The next date of significance is **20 November 2004**. This is two years before Mrs Taylor's adjudication. By s 54(1) any gift of property is voidable as against the Assignee if the donor is adjudged bankrupt within two years after the making of the gift.

[13] On **17 April 2006**, Mrs Taylor forgave and released the trust from a further \$27,000 of its indebtedness. This was the fourth gift in the gifting programme. Mrs Taylor accepts it was voidable under s 54(1).

[14] On **20 November 2006**, Mrs Taylor was adjudicated bankrupt.

[15] On **17 January 2007**, the trust bought a Jeep Cherokee for \$21,000. The Assignee asserts that the Taylors gifted the \$21,000 to the trust, which sum it then used to buy the Jeep. The Assignee asserted that half of the money advanced

⁷ Section 54(6).

(\$10,500) constituted a gift by Mrs Taylor which was caught by s 54(1). Mrs Taylor disputed she had gifted \$10,500 to the trust. In any event, there is an issue as to whether the advance, if there was one, would be caught by s 54(1), having been made after adjudication, not before. The Assignee also contended the gift was fraudulent in terms of s 60. We shall refer to this issue as “the Jeep purchase”.

[16] The timing of the transactions is crucial. They can be grouped as follows:

- (a) the 2000 transactions;
- (b) the 2002 gift;
- (c) the Waimauku transaction;
- (d) the 2004 gift; and
- (e) the Jeep purchase.

[17] There is no need to discuss the 2006 gift, as it is accepted it was voidable under s 54(1).

[18] With respect to each of the transactions, we need to determine whether Heath J was correct to find that Mrs Taylor was fraudulent in s 60 terms.

[19] Then, if with respect to any of transactions (b) to (e) we find Mrs Taylor was not fraudulent, we need to go on to consider whether they were voidable under s 54(2) (transactions (b) to (d)) or s 54(1) (transaction (e)).

[20] Finally, if we uphold the Judge’s findings in whole, we must deal with the argument advanced by Mr St John, for the trustees, that the Judge did not correctly calculate the relief. If we partly uphold the Judge’s findings, then it will be our responsibility to recalculate the relief based on our findings.

The 2000 transactions

The relevant law

[21] Messrs St John and Neil agreed with Heath J's analysis of the law under s 60. What is in issue is the Judge's findings of fact with respect to the issue of fraud. Because the law under s 60 was not in dispute, we can set it out very briefly.

[22] Section 60 of the Property Law Act provides:

60 Alienation with intent to defraud creditors

- (1) Save as provided by this section, every alienation of property with intent to defraud creditors shall be voidable at the instance of the person thereby prejudiced.
- (2) This section does not affect the law of bankruptcy for the time being in force.
- (3) This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intention to defraud creditors.

[23] Heath J considered whether, for the purposes of s 60, there was an irrefutable presumption that a person intended to defraud in circumstances where an alienation of property took place in contemplation of anticipated liabilities that could not be met without access to the transferred property (known as the rule in *Freeman v Pope*⁸). Consistent with this Court's decision in *Regal Castings Ltd v Lightbody*,⁹ Heath J was of the view that the rule in *Freeman v Pope* did not apply in New Zealand. Mr Neil did not seek to challenge the Judge's conclusion on this topic. In these circumstances, we are content to follow this Court's earlier decision on the point, notwithstanding the subsequent divergence of view in the Supreme Court.

⁸ *Freeman v Pope* (1870) LR 5 Ch App 538 (CA).

⁹ *Regal Castings Ltd v Lightbody* [2007] NZCA 396, [2008] 2 NZLR 153 at [55] and [91]. On the appeal from this decision, Elias CJ agreed with this Court's conclusion on the rule in *Freeman v Pope*: *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [9]. Tipping J took a different view: at [104].

[24] The concept of fraud under s 60 was discussed in detail in the Supreme Court's decision in *Regal Castings*.¹⁰ Blanchard and Wilson JJ said in their opinion:¹¹

[54] Whenever the circumstances are such that the debtor must have known that in alienating property, and thereby hindering, delaying or defeating creditors' recourse to that property, he or she was exposing them to a significantly enhanced risk of not recovering the amounts owing to them, then the debtor must be taken to have intended this consequence, even if it was not actually the debtor's wish to cause them loss. ...

...

[56] It is not necessary to show that the debtor was actually insolvent. A transaction can expose creditors to risk in circumstances where the debtor remains presently able to pay his or her debts as they fall due, but there is a high level of probability that this situation will not continue. A gift or a transfer of property at an undervalue in these circumstances may be with the intention of hindering, delaying or defeating creditors.

[25] The Court also considered the position where property is disposed of by a debtor at full value at the time of the disposition. Blanchard and Wilson JJ said:

[57] Of course, if property is disposed of at full value at the time of the disposition, the creditors will have what Brennan and McHugh JJ called in *Cannane* "an undepleted fund" against which to prove their debts. Such a transaction could not be characterised as involving a dishonest intent. But, as those Judges also said:¹²

"... [I]f property is sold for an undervalue or is given away, that fact is relevant to the intent to be attributed to the disponor in disposing of the property."

[26] Their Honours went on¹³ to endorse comments made by the late Professor Sutton that the crucial question in all cases is one of intent.¹⁴

[27] Relevant to an assessment of whether a disposition was done with intent to defraud is whether it was done in "circumstances of secrecy", described by Blanchard and Wilson JJ as "a well-recognised badge of fraudulent intent".¹⁵

¹⁰ *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433.

¹¹ On this point Elias CJ and McGrath J agreed with Blanchard and Wilson JJ: at [2] and [5]–[7] per Elias CJ and at [167] per McGrath J.

¹² *Cannane v J Cannane Pty Ltd (In Liq)* (1998) 192 CLR 557 at 567.

¹³ At [58].

¹⁴ Richard Sutton *The Law of Creditors' Remedies in New Zealand* (Butterworths, Wellington, 1978) at [5.20].

¹⁵ At [61]; to similar effect, see Elias CJ at [14], Tipping J at [126] and McGrath J at [165].

The evidence relating to the 2000 transactions

[28] Much of the evidence was not in dispute. It is common ground, for instance, that at all relevant times up to the settlement of the trust in 2000, Mrs Taylor was an accredited tax agent. She had traded through Bronwyn Taylor Accounting Services Ltd since 1995. (We shall call that company “BTA”.) Although Mr Taylor was a director and 50 per cent shareholder of BTA, he played no role in the company. Mrs Taylor ran it.

[29] In 1999, Mr Taylor and three other men set up a new IT consultancy business, Data 4 Ltd. Data 4’s accountant, Brian Pocock, advised the men to see their personal lawyers, as he said it was prudent business practice to consider asset protection when starting a new venture. Mr Taylor gave evidence that, in reliance on that advice, he approached their solicitor, Tony Fortune, a well-known Auckland lawyer. The Taylors saw Mr Fortune in March 2000. Mr Fortune, who gave evidence at the trial, recommended the establishment of a family trust. His evidence at trial, which was consistent with that of Mr and Mrs Taylor, was that the trust was established to protect assets in light of Mr Taylor’s new business venture. We shall return shortly to the Judge’s findings with respect to this part of the evidence.¹⁶ His rejection of the Taylors’ and Mr Fortune’s evidence on this point was a crucial aspect of his reasoning as to Mrs Taylor’s fraudulent intent.

[30] What is not in dispute is that Mr Fortune handled everything with respect to the settlement of the trust, its documentation and the transfer of property to it. It was Mr Fortune who advised that the Taylors should transfer their Mt Eden home to the trustees at market value, \$315,000. He advised that each of them should make an immediate gift to the trust in the sum of \$25,650. The balance of the purchase price, \$263,700, was lent by the Taylors to the trust and secured by second mortgage. (The first mortgage secured a loan from Westpac.) The trustees agreed to pay interest on the loan, if the lenders demanded it, “at a rate equivalent to the prime house lending rate charged by [the Taylors’] bank on first mortgages of owner occupied residential property in Auckland”. If the trustees made default in paying interest, the Taylors

¹⁶ At [33]–[37] below.

could “call up and compel payment of all principal, interest and other money for the time being owing under this contract, notwithstanding that the time or times otherwise appointed for payment thereof respectively may not have arrived”. Mr Fortune said that the advice he gave the Taylors, which they followed, was standard legal advice. He said there was nothing out of the ordinary in what he proposed or how it was implemented.

[31] The trust was finally settled in October 2000. On 1 December 2000 the Mt Eden property was transferred to the trustees (although the transfer was not registered until November of the following year) and the loan agreement was signed. The loan was due on 1 December 2030. Mr and Mrs Taylor also transferred shares, described in minutes of the trust as “Tortis/Ozzy” shares, to the trustees.

[32] For the year ended 31 March 2000, Mr Taylor had earned \$136,791. Mrs Taylor had earned \$65,000. In addition, BTA had made a small profit. The family income was accordingly in the vicinity of \$200,000. Apart from what was owing under their mortgage on the family home, the Taylors’ only debt at that stage was to the Commissioner. Mrs Taylor owed the Commissioner about \$4,800 in tax arrears. By the time the family home was transferred on 1 December 2000, Mrs Taylor’s debt had decreased to about \$3,000. She paid that sum off on 15 December 2000. No new arrears arose until 2002.

The Judge’s findings on fraud: evidence up to 31 December 2000

[33] The Judge found that the 2000 transactions were all undertaken with intent to defraud the Commissioner, who was at that time a creditor of Mrs Taylor. The Assignee had focused only on Mrs Taylor’s intent, but it is clear from the Judge’s reasoning that he considered Mr Taylor must have been party to Mrs Taylor’s fraudulent intent. The Taylors’ fraudulent intent thereafter affected all the other transactions the Assignee attacked. The Judge did not concentrate on those transactions, which must mean he saw them as merely steps in a plan the Taylors devised in early 2000. The Judge found all the impugned transactions tainted by fraud.

[34] The Judge, in forming his view that Mrs Taylor (or both the Taylors) had devised a fraudulent stratagem in 2000, relied significantly on what the Taylors did after 2002. He considered he could draw inferences from that as to what their intentions must have been in early 2000. We shall consider that evidence later. For the moment, we want to concentrate on the evidence from the Taylors and Mr Fortune as to what they said, did and thought in 2000.

[35] The Judge considered noteworthy the fact that in 2000 Mrs Taylor owed money to the Commissioner. He also considered that the Mt Eden property was the Taylors' only significant asset. He thought the Taylors transferred that asset to the trust on a non-commercial basis. In particular, he noted that the loan back was not payable for 30 years.

[36] Most importantly, the Judge did not believe the Taylors when they said that what had motivated them to approach Mr Fortune was Mr Pocock's advice to Mr Taylor that he should look to protect his personal assets in light of his new business venture. The Judge effectively found the Taylors were lying when they gave that evidence, as what had motivated them in fact, he thought, was Mrs Taylor's desire to defraud the Commissioner.¹⁷ This conclusion was inconsistent with Mr Fortune's evidence as to what the Taylors had told him was the purpose of setting up the trust, namely protection from creditors should Mr Taylor's business venture falter. The Judge accepted Mr Fortune's evidence that this is what he was told, but said the Taylors had misled him or that Mr Fortune was mistaken as to their intentions.¹⁸ In effect, the Judge found the Taylors had lied to Mr Fortune. This was all part of the fraudulent stratagem.

[37] It is not clear whether the Judge would have found the Taylors had a fraudulent intent had he considered only the evidence up to the end of 2000. He seems to have been significantly influenced by what later happened.

¹⁷ At [80].
¹⁸ At [81].

Our evaluation: evidence up to 31 December 2000

[38] Mr St John challenged the Judge's findings of fact. On an appeal such as this, we must come to our own view on the merits, whilst acknowledging the advantage Heath J had as trial judge in assessing the credibility of witnesses.¹⁹

[39] With great respect to the Judge, we are unable to support the inference he drew from the evidence. There are seven reasons which, taken together, lead us to conclude that the Taylors' and Mr Fortune's evidence was truthful and could be relied on.

[40] First, the Taylors had a net worth in early 2000 of at least \$150,000 and a combined income of about \$200,000 a year. Mrs Taylor's tax arrears were less than \$5,000 or less than three per cent of their net assets. This is a most unpromising platform from which to conclude that the setting up of the trust was the decisive first step of a plan to defraud the Commissioner.

[41] Secondly, if Mrs Taylor's intent was to defraud the Commissioner, it seems inexplicable why, by the time of the December transactions, she had reduced her debt to him to a little over \$3,000 and why, later that month, both she and BTA paid off their outstanding liability to the Commissioner. As we have already observed, no new arrears arose until 2002.

[42] Thirdly, we can see no satisfactory basis for concluding that the Taylors lied to Mr Fortune as to why they had come to see him for advice on asset protection. The Assignee's counsel did not put to them that they had given Mr Fortune a false reason for wanting asset protection. Nor were the Taylors challenged on their evidence that it was Mr Pocock who had suggested to Mr Taylor and his colleagues they should see their lawyers about asset protection.

[43] Fourthly, the form of the transaction was standard. Mr Fortune's evidence to that effect was unchallenged. Further, there is no suggestion that the Taylors had any input into the precise form of how Mr Fortune chose to set up the trust.

¹⁹ *Austin, Nichols and Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

[44] Fifthly, in any event, the Judge was not correct in holding “there was no commercial element to the transfer of the property”.²⁰ Although it is true the principal was not repayable until 2030, the Judge ignored the following factors in assessing the commerciality of the transaction. First, the property was transferred at market value. Secondly, the Taylors or any assignee of the debt or the Official Assignee in the event of the bankruptcy of Mr Taylor or Mrs Taylor could demand interest to be paid at commercial rates throughout the period of the loan.²¹ Thirdly, the loan was secured by mortgage. Fourthly, if interest was demanded and not paid, the holder of the debt could call up the principal and interest, notwithstanding the fact the principal was not otherwise payable until 2030. Fifthly, the Assignee has never suggested that the transfer of the property itself was a “dutiable gift” on which gift duty should have been paid under the Estate and Gift Duties Act 1968.

[45] Sixthly, the Judge saw significance in the fact that subsequently the value of the debt “was whittled away through the gifting programme undertaken”.²² In our view, that fact does not support an inference of fraud, as gifting programmes have been part and parcel of the strategy for virtually all family trusts and were treated by professional advisers as an essential element of such transactions under the legislation which applied before the abolition of gift duty on 1 October 2011.

[46] Finally, there was no evidence to suggest urgency on the Taylors’ part. If the trust was being set up and the 2000 transactions were being undertaken to defraud the Commissioner, one might have expected Mrs Taylor to be keen to pursue matters much more vigorously in 2000. The dispositions did not take place until almost nine months after the Taylors first went to see Mr Fortune.

[47] We accept, as a matter of principle, that evidence of fraud at a later time might permit an inference of intention to defraud at an earlier time. We are satisfied, however, that the later evidence in this case does not permit the drawing of an inference to defraud in 2000. Indeed, we consider that the Judge fell into error in

²⁰ At [83].

²¹ Heath J had noted that the loan potentially carried interest – at [20] – but seems to have ignored that factor when assessing the commerciality of the arrangements.

²² At [83].

this case because he looked at what the Taylors ultimately did and then reasoned they must always have intended so to act.

[48] In our opinion, the Assignee did not establish that the 2000 transactions were tainted by fraud and, with respect, Heath J was wrong to find that they were. It is possible His Honour misunderstood the evidence with respect to one matter. One of the reasons the Judge gave for his finding of fraud was that he thought that “from the time of transfer of the home, Mrs Taylor was reliant on the trustees to advance money to meet any personal debts that fell due”.²³ He thought “she did not have personal income from which to meet her debts”. That is not correct, as Mr Neil acknowledged in his oral submissions. Had that been true, it would have been a powerful factor in support of the Assignee’s case, but it is not accurate.

[49] The 2000 transactions should not have been voided under s 60.

The 2002 gift

The Judge’s findings in terms of s 60

[50] The Assignee voided this gift under both s 60 and s 54. We deal first with the Judge’s findings under s 60.

[51] Heath J made no specific findings with respect to Mrs Taylor’s state of mind in 2002. That was because he had found the Taylors had embarked on a fraudulent stratagem to defraud the Commissioner in early 2000. Because we have not upheld his finding with respect to Mrs Taylor’s state of mind in 2000, we must evaluate for ourselves what her state of mind was at the time of the 2002 gift as it is of course possible that, even if what was done in 2000 was not fraudulent, a fraudulent intent to defraud the Commissioner later developed.

²³ At [84].

Was Mrs Taylor fraudulent in making this gift?

[52] Before embarking on our evaluation, we make this observation. Both the Judge's views and ours, not only on the 2002 gift but also on the 2004 and 2006 gifts, have become rather academic. That is because, although the Judge confirmed the voiding of all three gifts, he did not order the trustees to pay anything to the Assignee with respect to these dispositions. The effect of his decision, therefore, was that the trustees remained bound to pay Mrs Taylor the amount of the loan as if these three gifts had not been made. The trustees, however, are not bound to pay anything to Mrs Taylor until 2030. Even if Heath J's decision were to stand, therefore, there would be plenty of time between Mrs Taylor's discharge from bankruptcy²⁴ and 2030 in which to gift to the trust the whole of the balance still owing, if that were her wish. Indeed, this exercise would now be much easier to effect given the abolition of gift duty,²⁵ which removes the need for a gifting programme limited to gifts of \$27,000 a year.

[53] There was little evidence of the circumstances surrounding the 2002 gift. The gift statement was prepared by Fortune Manning and sent to the Commissioner. The gift was part of the gifting programme Mr Fortune told the Taylors about when advising on the establishment of the trust in 2000. At the time of this gift, Mrs Taylor was not indebted to the Commissioner.

[54] It is of some significance, we think, that the Taylors and Fortune Manning never hid the existence of the trust from the Commissioner. The trust had an IRD number. All the gift statements were sent to the Commissioner. This is one of the ways in which the facts of this case differ from the facts in *Regal Castings*.

[55] In our view, the Assignee did not establish that this gift was tainted by fraud. It should not have been voided under s 60.

²⁴ We do not know whether that has yet occurred.

²⁵ By s 245 of the Taxation (Tax Administration and Remedial Matters) Act 2011, with effect from 1 October 2011.

The relevant law on s 54

[56] We now turn to the alternative argument the Assignee successfully pursued in the High Court. This turned on s 54 of the Insolvency Act. For convenience, we set out the relevant subsections of that section:

54 Voidable gifts

(1) Any gift of property shall be voidable as against the Assignee if the donor is adjudged bankrupt within 2 years after the making of the gift.

(2) Any gift of property shall, if the donor is not adjudged bankrupt within 2 years after the making of the gift but is adjudged bankrupt within 5 years after the making of the gift, be voidable as against the Assignee, unless the party claiming under the gift proves that the donor was at the time of the making of the gift or at any time thereafter up to his adjudication able to pay all his debts without the aid of the property comprised in the gift, and that if the gift was a settlement, the interest of the settlor in the property passed to the trustees of the settlement on the execution thereof.

...

(6) In this section **gift** means any disposition made otherwise than in good faith and for valuable consideration.

(7) The Court may, if it thinks it just and equitable in all the circumstances, take into account past consideration and treat it as being valuable consideration.

[57] It was common ground that the 2002 gift was a “gift” as defined. The issue was whether Mrs Taylor was in June 2002 “able to pay all [her] debts without the aid of the property comprised in the gift”.²⁶

[58] Heath J, when determining this issue, applied the test for “inability to pay debts” first set out with such clarity by Richardson J in *Re Northridge Properties Ltd* in 1977.²⁷ At [104] of his judgment, Heath J set out the summary of Richardson J’s test that Davison CJ had given in *Re Universal Management Ltd*.²⁸

²⁶ Under s 54(2), the trustees could save the gift if they could establish Mrs Taylor was solvent either at the time of the making of the gift “or at any time thereafter up to [her] adjudication”. We do not need to consider the latter time period, as it is common ground that Mrs Taylor’s financial position was on a downward trajectory from about 2002 until her adjudication. The only dispute is as to when she tipped over from being solvent to being insolvent.

²⁷ *Re Northridge Properties Ltd* SC Auckland M46/75, 13 December 1977.

²⁸ *Re Universal Management Ltd* (1981) 1 NZCLC 98,238 (HC) at 98,246.

I am indebted to Richardson J for his examination in *Re Northridge Properties Ltd* ... of the principles to be applied in considering whether or not a company is unable to pay its debts as they become due from its own money and I adopt these principles. In summary they are these:

(a) The expression covering the ability to pay debts is concerned with the position of the debtor at the time when the charge or payment is made or other specified act takes place. The concern is with the present, but in considering the present position regard may properly be had to the recent past – whether the debtor has in recent weeks been unable to pay debts as they become due.

(b) In determining ability to meet debts as they become due, account must be taken of outstanding debts.

(c) The words “as they become due” means, as they become legally due.

(d) The reference to payment “from his own money” has not been interpreted strictly to require a debtor to keep sufficient cash on hand at all times for that purpose. It is a matter of striking a balance. It is not a matter simply of measuring assets against liabilities, and it is not a matter of whether if given sufficient time assets could be realised and debts paid. The section is concerned with solvency so that there must be a substantial element of immediacy in the ability to provide cash from non cash assets.

(e) If, as is well established, convertibility of non cash assets on hand may be taken into account in determining solvency, so too must debts becoming due while that conversion takes place. Moreover the words “as they become due” involve consideration of a debtor’s position over a period not at an instant of time.

(f) The test of solvency is an objective one.

[59] Both sides before us accepted the accuracy of that summary of the law. We would add three points of relevance to the present case.

[60] First, what we must assess is whether Mrs Taylor “was ... able to pay all [her] debts”, not whether she was “able *and willing* to pay all [her] debts”.²⁹ There is in the present case no doubt that Mrs Taylor did not pay the Commissioner from 2002 on, but it does not follow from her conduct that she was unable to pay the debt. As we shall explore, there may be another explanation for the failure to pay.

[61] Secondly, it is well established that a person is not insolvent or unable to pay his or her debts if the person is able to borrow on deferred payment terms or

²⁹ *Re Stirling, ex parte Webb Ross and Co* [1990] 1 NZLR 569 (HC) at 575.

otherwise such that the lender itself is not a creditor whose debt cannot be repaid as and when it becomes due and payable.³⁰

[62] Thirdly, if it is established that an unsecured creditor is not making demand for its debt and does not intend to demand repayment in the immediate future, the debt to that creditor should not be regarded as due and payable.³¹

[63] We have already made the point that, at the time of this gift, Mrs Taylor was not indebted to the Commissioner. The only debt she almost certainly had was to BTA by way of her shareholder's current account. How great that debt was, however, is unclear because by this stage Mrs Taylor was no longer running BTA properly. She was not keeping proper books. She was simply drawing money out of the company, as and when she needed it. She did not turn her mind at that time to whether the drawings should be classified as salary or loans. The company accounts back to 2001 effectively had to be reconstructed in 2005.

[64] So why was the company not being properly run? The fact – and it is a key fact for a proper understanding of this case – is that Mrs Taylor was not at all well between the latter part of 2000 and 2004. Heath J recorded the details of Mrs Taylor's illness at [28]–[31] of his judgment. The evidence on this topic was, as the Judge recorded, “uncontested”.³² Mrs Taylor had “four years of excessive stress in her life”. The stress began with the breakdown of her business partnership with Virginia Gomes, a qualified accountant. Mrs Taylor described the breakdown as “acrimonious”. Then in April 2001 Mrs Taylor was diagnosed with “acute depression”. Her doctor prescribed Prozac. Mrs Taylor was on that drug from April 2001 to September 2004. Mrs Taylor gave evidence that the impact of the medication was to give her “a feeling of well being and that everything was fine”. Her ability to work was affected. She continued to front with clients but contracted the actual work to one Maureen Maserow. The effect of the drugs meant she just did not worry about the mess BTA's accounts were getting into or the debt she started running up with Inland Revenue from 2002.

³⁰ *Lewis v Doran* [2005] NSWCA 243, (2005) 219 ALR 555 at [107]–[109]; *Regal Castings*, above n 10, at [65].

³¹ *Lewis v Doran* at [112].

³² At [28].

[65] On top of all this, in January 2002, Mrs Taylor contracted hepatitis A and was, she said, very sick. The effect of these problems was to generate, she said, “a sort of perfect storm” in her personal life. The decision to move to the country in 2003 was in large part a result of the stress she was under at that time.

[66] We see no reason to disbelieve that evidence. We accept that Mrs Taylor’s depression - described as “major depression” by Mrs Taylor’s general practitioner - and the medication prescribed for it simply meant Mrs Taylor was not thinking completely rationally.

[67] It was not until 2005, when Mrs Taylor was feeling better, that she started trying to reconstruct BTA’s books from 2001 and started trying to sort out the mess into which her, her husband’s and BTA’s tax affairs had got.

[68] We emphasise the fact of this mental disorder as, in our view, it provides the principal explanation for what went wrong in the Taylors’ affairs. The debilitating effects of this disorder meant, among other things, Mrs Taylor could not handle stress. She stopped running the company properly. Her earnings dropped but family expenditure did not. The ultimate result was her bankruptcy. Heath J mentions the illness in the four paragraphs we have noted, but it is thereafter ignored save that he accepted, at [78] of his judgment, she had been “under some stress before and for a year or so after the trust was formed”. In our respectful view, his Honour significantly underestimated both the severity of the illness and its longevity.

[69] We are satisfied Mrs Taylor was solvent at the time of this gift. While Mrs Taylor almost certainly did owe money to BTA in June 2002, neither she nor it would have been able to quantify the debt at that stage. Even today, it is not clear what the debt in truth was. Indeed, it is probably indeterminable. In any event, it is clear that Mrs Taylor, in her capacity as a director of BTA, was not seeking to have any debt repaid. For the reasons given above, therefore, the debt to BTA (if any) should be ignored when assessing her ability to pay her debts.³³ In addition, the trust (of which she was a beneficiary) had substantial assets. Mr Fortune made it clear that, later when Mrs Taylor accrued tax debts, the trust would have helped her – and

³³ See above at [62].

indeed did help her. Of course, there was no need to seek help as at June 2002, but we have no doubt help would have been forthcoming if required.

[70] In our view, the 2002 gift should not have been voided under s 54.

The Waimauku transaction

The evidence relating to the Taylors' state of affairs at the time of the Waimauku transaction

[71] In early 2003 the Taylors decided to move from Mt Eden to Waimauku. They took this step for family and lifestyle reasons. The trust sold the Mt Eden property for \$509,000 and bought the Waimauku property for \$620,000. Westpac, which had lent money to the Taylors on the security of the Mt Eden property, agreed to roll over its existing loan on the basis of a new security over the Waimauku property. The trust had to find \$111,000, being the difference between the sale price of Mt Eden and the purchase price of Waimauku. It had no income. What happened was that the Taylors borrowed a further \$200,000 from Westpac. They on-lent \$111,000 of that to the trust. It became a further advance under the 2000 loan agreement. The \$111,000, like the money previously lent, was not repayable until 1 December 2030. But it was potentially subject to interest demand.

[72] At this time, the Taylors had the following assets. They had their shares in BTA, but the evidence discloses they had limited value. They had a share in Mr Taylor's IT business, but there is no evidence of the value of that share. The evidence as to the value of the debt back is problematic. That is because both experts proceeded on an assumption that repayment was not due until 2030 and that interest could not be demanded. Obviously, if those assumptions were right, the debt back would have little value, but the second assumption was incorrect. As we have said, interest could be demanded annually and at a commercial rate. If the trust failed to pay, then principal and interest became payable. In those circumstances, it is obvious that the debt back had substantial value, particularly in view of the fact it was secured by mortgage.

[73] The Taylors' debts were as follows. According to Mrs Taylor, they owed Westpac \$262,000, but it was not, of course, immediately payable. The terms of the Westpac loan do not appear to be in evidence. What is in evidence are the terms of a new loan agreement the Taylors took out with Westpac at the end of the following year. Under that loan agreement, the Taylors could borrow up to \$410,000. The term of the loan was 30 years. Initial monthly payments under that loan, if the full amount were drawn down, were to be \$2,866. The 2004 loan replaced previous loan arrangements. Perhaps we can draw an inference that the earlier loan was also long term. Presumably monthly payments were lower, reflecting the lower amount borrowed. At the very least, we can draw an inference that Westpac was satisfied about the Taylors' ability to service a loan of this magnitude in March 2003.

[74] The evidence discloses the Taylors had two further debts. Mrs Taylor by this stage was in debt to the Commissioner again. The debt was about \$22,000. She and her husband were also indebted to BTA. According to the later reconstruction of the company accounts, the amount said to be owing at this stage was \$76,000. There is, however, no way in which the company could have claimed for that amount at that time as its affairs were in a state of disorder. In any event, BTA was not seeking payment of any debt payable to it.

[75] What we can be clear about is that Mrs Taylor drew from the company that year, in some form or other, about \$103,000. The evidence does not disclose Mr Taylor's income at this stage. All we can say is that the Taylors' combined income position seems to have been sufficiently good to persuade Westpac to lend further money to them.

The Judge's findings

[76] The Judge concluded that Mrs Taylor's share of the \$111,000 advance to the trust continued to be tainted by the fraudulent intent which he thought had existed right from the beginning of 2000. His Honour also considered, however, that the advance constituted a gift for the purposes of s 54 of the Insolvency Act. He held that the trustees had not proved that Mrs Taylor was at the time of the making of that

gift able to pay all their debts without the aid of the property comprised in the gift. As such, the gift was voidable.

[77] Mr St John challenged both findings.

Was Mrs Taylor fraudulent in advancing \$55,500 to the trust?

[78] We consider the position first under s 60 of the Property Law Act. We are not assisted in our determination by any relevant findings of the Judge, because, as we have already said, he viewed Mrs Taylor as fraudulent even in setting up the trust in the first place.

[79] We have concluded that Mrs Taylor's entry into the Waimauku transaction, and in particular the further loan from Westpac and on-lending to the trust, were not undertaken with intent to defraud the Commissioner. The key fact as at early 2003 was Mrs Taylor's state of health, and in particular her mental health. She knew that she had to try to reduce stress. She concluded that one of the ways in which she could reduce stress was to move to the country. That became a driving ambition. It did involve further borrowing, but she concluded that she and her husband would be able to cope with that. That was not an unrealistic conclusion: after all, it was shared by her husband and Westpac at that time.

[80] So what about the debt to the Commissioner which had arisen the previous year? There is no evidence to support an inference that an intent to avoid that responsibility figured at all in Mrs Taylor's decision to enter into the Waimauku transaction. There is no suggestion whatever that Mrs Taylor considered herself likely to go bankrupt at this time. On the contrary, she considered that she and her husband were in a very sound financial position, with hundreds of thousands of dollars of equity in their new property. We appreciate that, as a matter of law, the Waimauku property was no more *the Taylors'* property than the home in Mt Eden had been: Waimauku after all belonged to the trust. But the Taylors, like most people who have put the family home into a trust, did not see it as other than *their*

property. If the worst came to the worst, that property and the equity in it could be called upon. As we discuss further below, Mr Fortune confirmed this.³⁴

[81] This is not a case of having the cake and eating it. Our current focus is on Mrs Taylor's intent as at early 2003. In evaluating that intent, we must evaluate Mrs Taylor's actual intent, even if that intent was based to some extent on misconceptions. Further, while she may have been wrong in thinking of the family home as effectively hers and her husband's, she was not completely misguided as the debt back from the trust was still at this stage for a substantial sum.

[82] It seems from the evidence that Mrs Taylor, in so far as she was able to focus at all on her obligations to the Commissioner, thought that she would be able to negotiate a satisfactory outcome. The debt was increasing – indeed, rather rapidly, as a result of compounding interest and penalties. Mrs Taylor appeared to think that she would be able to negotiate her way out of at least some of the interest and some of the penalties. She had undertaken similar exercises in the past, she said, on behalf of clients. As it turns out, the Commissioner proved less than accommodating in that regard. But that is by the by. Again, what is important is not whether Mrs Taylor's thinking was based on a misconception as to how the Commissioner might react to settlement proposals; rather, what is important is that Mrs Taylor at that stage was very confident that, in due course, she would have negotiations with the Commissioner and would then pay him a negotiated amount. In so far as she turned her mind at all to where the money would come from, she was no doubt confident that the money would be found either from BTA when she returned to full capacity or from her husband or from the trust. The amount owing at that stage was not, after all, substantial when one considered the overall equity position of the Taylors and their family trust.

[83] The Waimauku transaction should not have been voided under s 60.

Section 54

[84] We now turn to the Assignee's alternative argument under s 54.

³⁴ At [102].

[85] The first thing Heath J had to determine was whether Mrs Taylor’s loan of \$55,500 was a “gift” for the purposes of s 54. In this regard, the Judge correctly observed that he had to be satisfied that Mrs Taylor did not receive “valuable consideration” for her share of the \$111,000 lent to the trust. His Honour referred to *Meo v Official Assignee*³⁵ in which this Court held a debtor had received no “valuable consideration” for a mortgage he had given in favour of two creditors just a couple of weeks before he was adjudicated bankrupt. The consideration for the mortgage was said to be a forbearance on the mortgagees’ part to require immediate repayment of the money the debtor owed. That forbearance to sue was held not to have “a real or substantial value”.

[86] Heath J applied the observations in that case to the present. He held that nothing of “real or substantial value” passed to Mrs Taylor in return for the loan to the trust.³⁶

[87] The Judge then went on to consider whether, at the time of the making of the gift, Mrs Taylor was able to pay all her debts without the aid of the property comprised in the gift. He concluded the trustees had not discharged the onus.³⁷

Was the loan a gift?

[88] We do not agree with the Judge that the loan to the trust was a “gift” for the purposes of s 54(2). Mrs Taylor received real and substantial benefits from making the loan. First, the trustees’ guarantee of her and her husband’s borrowing from Westpac and the trustees’ offer of security with respect to the Westpac loan enabled her to get the loan. Secondly, the trustees promised to pay interest at commercial rates on her loan if she demanded it. We distinguish *Meo* on the facts. There might have been an argument that the failure to demand interest amounted in due course to a gift of the interest foregone. But the Assignee has never so argued, presumably in light of *Re Marshall (deceased), Commissioner of Inland Revenue v Public*

³⁵ *Meo v Official Assignee* [1987] 2 NZLR 1 (CA).

³⁶ At [99].

³⁷ At [109].

Trustee,³⁸ which held that a failure to make demand for interest does not constitute a gift on which gift duty is payable.

[89] Because the loan was not a gift, s 54 has no application. The Judge was, with respect, wrong to consider the loan could be voided under s 54 as an alternative.

The 2004 gift

The circumstances of this gift

[90] On 2 March 2004, both Mr Taylor and Mrs Taylor made \$27,000 gifts to the trust. This was all part of the gifting programme Fortune Manning had prepared when the trust was established. Mrs Taylor gave evidence that the requisite documents to effect the gifts came to them from Fortune Manning. The Taylors signed the documents and then returned them to Fortune Manning. It seems clear that Mr Fortune at this time knew nothing of any financial difficulties the Taylors were having. The Taylors, for their part, appear to have given no consideration at all to whether they ought to be making these gifts. They simply did what their lawyer told them to do. Mrs Taylor was not cross-examined on her evidence as to the circumstances in which these gifts came to be made.

[91] The Assignee attacked Mrs Taylor's gift on the basis of both s 60 and s 54. Heath J found in the Assignee's favour on both heads. He did not however grant relief. It suits exposition if, on this occasion, we deal with s 54 first.

Was Mrs Taylor able to pay all her debts in March 2004?

[92] As with the 2002 gift, there was no dispute that the forgiveness of debt was a gift for the purposes of s 54(2). The only issue was Mrs Taylor's ability to pay her debts at this time.

³⁸ *Re Marshall (deceased), Commissioner of Inland Revenue v Public Trustee* [1965] NZLR 851 (CA).

[93] Heath J did not examine Mrs Taylor's financial position as at March 2004, as he had already concluded that she was insolvent by 2002.³⁹ We have respectfully concluded that that finding was wrong. Accordingly, we must undertake a new evaluation of solvency as at March 2004.

[94] We begin by considering the trading position of BTA. It is extremely difficult to get accurate figures as to how that company was performing at this time. We can, however, probably assume the company's revenue for the year ended 31 March 2004 was accurately recorded in the accounts ultimately prepared in 2005. The revenue was stated to be \$205,000, only \$7,000 down on the previous year.

[95] Costs, excluding money paid to the Taylors, came to just over \$100,000. We can also probably be fairly sure of that figure. If anything, it is likely to be inflated, as the accounts were being prepared essentially for the purposes of calculating what tax the company owed. What we can also probably be reasonably sure about is that the Taylors took out of the company about \$100,000. How that sum was divided between income and borrowing is less certain, as nothing was properly done in that regard at the time. But they were able to draw, in one way or another, about \$100,000.

[96] There is no evidence as to what Mr Taylor's income was for this year. What we do know is that later that year the Taylors increased their borrowing from Westpac, from which an inference can be drawn that Westpac was satisfied with their capacity to shoulder a larger loan. We also know that Mr Taylor has never gone bankrupt, so far as the evidence discloses.

[97] The Taylors did have a hiccup in their relationship with Westpac in December 2003. They got behind in their monthly payments. On 12 December 2003, Westpac made demand on them in respect of the arrears, which totalled on the various loans about \$6,500. Mrs Taylor explained that she and her husband had found the new Waimauku property "an expensive property to maintain". She said that there were "a few issues initially and much expense", which had led to the

³⁹ At [107].

mortgage arrears. After the letter of demand was received from Westpac, she and her husband paid the arrears immediately.

[98] As at March 2004, the only “external” debt Mrs Taylor had was her debt to the Commissioner. It had increased to about \$25,000. What is significant is that the Taylors, while undoubtedly under financial pressure, were still meeting all their other commitments, so far as the evidence shows. The one exception was the tax debt, with respect to which Mrs Taylor had developed a mental block.

[99] BTA was obviously not seeking to call up what the Taylors owed it. There is no dispute that it continued to operate its business. So the focus has to be on the one external debt, the \$25,000 owed to the Commissioner.

[100] It was common ground before us that, at that time, Mrs Taylor did not have the cash to meet that debt. But Mr St John submitted that this did not mean Mrs Taylor was unable to pay this debt: had she asked the trust to lend her the \$25,000, it would have easily been able to borrow a little more and then to advance the money to her so that the debt could be paid. The trust could have simply given money to Mrs Taylor as a beneficiary. It could have lent her money, setting off the loan against the money it owed her. Either way, it would not have become a creditor. Alternatively, Mrs Taylor could have demanded interest on the debt. Presumably the trust would have had to borrow to meet an interest demand. It would have had no choice but to attempt that course as the alternative was the calling up of principal and interest.

[101] In support of the submission that Mrs Taylor was in a position to get cash to meet the debt to the Commissioner, Mr St John pointed to Mr Fortune’s evidence. Mr Fortune confirmed that, had Mrs Taylor approached him as a director of FMT, he would have approved the trust increasing its borrowing and using trust assets as a security for the additional lending. He considered the amount owing to the Commissioner “as at 2 March 2004 ... relatively modest and well within what the trust could have afforded”. He added that “the equity ratio position” was unlikely to have concerned a lender. He also noted that Westpac had later that year been prepared to advance further funds, which in his view confirmed his opinion that the

bank would have advanced funding in March 2004, had it been asked. Mr Fortune was not cross-examined about what he said he would have done or with respect to his opinion.

[102] If all this was possible, then why did it not happen? The answer is that Mrs Taylor kept the tax problem to herself. She did not tell either her husband or Mr Fortune about the tax arrears. Because of her medical condition, she was simply avoiding this problem, somehow hoping to rectify the situation if and when she became well again.

[103] Mr St John criticised the Judge's finding on Mrs Taylor's ability to borrow from the trust. He directed most of his fire to the Judge's failure to refer to the authorities he had cited demonstrating that regard can be had to a person's ability to borrow money when assessing the person's ability to pay all his or her debts. Although Heath J did not refer to the authorities, it is reasonably clear that his Honour acknowledged Mr St John's proposition. Where he disagreed with Mr St John's submission was on the application of the proposition to the facts of this case. As to that, he said:

[108] The position is no different if considered in the context of moneys being advanced by the trustees to Mrs Taylor. There is no evidence that moneys beyond those borrowed to meet Mr Taylor's tax debt could have been serviced. The best evidence that the trust could not advance the money was the fact that it did not do so after the date on which the company went into liquidation and before Mrs Taylor was adjudged bankrupt.

[104] Mr St John also submitted these factual findings were wrong. We agree with that submission. The Judge's findings were made in the context of a consideration of whether the *three* "debt forgiveness" gifts were voidable in terms of s 54(2).⁴⁰ We have emphasised the word "three" as Heath J considered the three gifts (made in June 2002, March 2004, and April 2006) globally. That was, with respect, an error. The evidence needed to be analysed at each point in time. As at March 2004, far from there being "no evidence" that the trust could have provided the money, there was uncontested evidence that it could have. And indeed later that year Westpac did

⁴⁰ The discussion begins at [101] and continues to [109].

advance more money to the Taylors on the basis of the security given by the trust, as Mr Fortune noted in his evidence.

[105] We also do not agree that “the best evidence that the trust could not advance the money” was the fact it did not do so after the date on which BTA went into liquidation (24 August 2006) and before Mrs Taylor was adjudged bankrupt (20 November 2006). The position was entirely different then from what it had been in March 2004.

[106] In our view, the trustees did establish that Mrs Taylor was at March 2004 able to pay all her debts. The trust was heavily indebted to her. The trustees, had they been aware of the problem, would have borrowed further money to enable her to pay off the debt and could easily have regarded that loan as part repayment of what the trust owed her.

[107] The 2004 gift should not have been voided under s 54.

Was Mrs Taylor fraudulent in making the 2004 gift?

[108] We can dispose of this matter briefly. We do not think it has been established that Mrs Taylor did sign the gift statement with intent to defraud the Commissioner. Again, it is the fragile state of Mrs Taylor’s mental health at this time which is key to understanding her actions. She did nothing to instigate the making of this gift. She and her husband were completely reliant on FMT for the running of the trust. Those responsible for FMT had no doubt diaried ahead that another tranche of gift forgiveness was due in March 2004 and had prepared the necessary documents based on FMT’s template. Probably FMT had systems set up for all Fortune Manning’s clients who had set up family trusts in similar circumstances with similar ends in mind. It seems clear on the evidence that the Taylors signed the documents without in any way questioning their appropriateness. There is no evidence to suggest that either Mrs Taylor or her husband envisaged that Mrs Taylor was heading for bankruptcy at that time. Mr Taylor was not aware of the tax mess Mrs Taylor had created as a result of her inactivity on that front. That inactivity had been caused by a mental block arising from her depression.

[109] The 2004 gift should not have been voided under s 60.

The Jeep purchase

The evidence relating to the Jeep purchase

[110] On 17 January 2007, Lifestyle Autos sold to the trust a Jeep Cherokee for \$21,000. It is common ground that the Jeep was acquired as trust property.

[111] It is also common ground where the money came from to purchase it. In July the previous year, Mutual Finance Ltd lent to the Taylors and the trust \$173,900, secured by a second mortgage over the trust's Waimauku property. At the time this money was borrowed, the Taylors were in very difficult financial circumstances. Each had a substantial tax debt and BTA was facing liquidation. The intention was that the trust would borrow enough money to enable the Taylors to pay their tax debts, using trust property as security. The money borrowed was used to pay off Mr Taylor's tax debts but Mrs Taylor did not pay off hers. Instead, some of what was left from the Mutual Finance borrowing, after paying Mr Taylor's tax debt, was used for the purchase of the Jeep.

[112] We note in passing that as late as July 2006, the trust was able to borrow \$173,900. This largely reflected the significant increase in value of the Waimauku property. At the time of this loan, a registered valuer had valued the property at \$820,000.

[113] Mr Neil submitted that, since the Taylors were parties to the Mutual Finance loan, we should treat the purchase of the Jeep by the trust as having been financed by a gift from the Taylors to the trust. Mrs Taylor's share of that gift would, he submitted, be caught by s 54(1).

The Judge's findings

[114] The Judge made no specific findings with respect to the Jeep or its purchase. The advance of \$10,500 (being her half share of the cost of the Jeep) is referred to at

[10(e)] as having been made “between 1 April 2006 and 31 March 2007”. It gets brief mention again at [93] and then is finally referred to in one line of [119], when discussing appropriate relief. At no point was the transaction fully analysed. This was one of Mr St John’s complaints before us.

Our evaluation

[115] We can deal with this issue very briefly. First, the trust was a party to the Mutual Finance loan agreement. It was, of course, the crucial party as only it was in a position to provide security for the loan. So the money, when it was received by the borrowers, belonged to the trust, jointly and severally with the Taylors. For it to use the money for trust purposes did not require any gift from the Taylors. Whether part of the money still held at the date of Mrs Taylor’s adjudication should have been regarded as part of the bankrupt’s estate is not an issue before us. We would add, however, that Mutual Finance did not prove in Mrs Taylor’s bankruptcy. Accordingly, given the loan had only a one year term, we assume that the other joint borrowers (Mr Taylor and trust) between them satisfied the debt.

[116] Quite apart from this, the alleged advance to the trust, if it was made, was made after Mrs Taylor’s adjudication. Section 54(1) is applicable only with respect to gifts made in the two year period before adjudication. If Mrs Taylor acted improperly after adjudication, other provisions of the Insolvency Act may be engaged. We have not been referred to them.

[117] We therefore hold that Mrs Taylor did not make an advance to the trust in January 2007 in order to enable the trust to buy the Jeep. Rather, what happened is that the trust utilised some of the money it had jointly borrowed to make that purchase. Mrs Taylor made no advance or disposition. As a consequence, there was nothing to be caught by either s 60 or s 54(1). In so far as the Judge directed the trustees to account to the Assignee for \$10,500, he was, with respect, in error.

The outcome

[118] We have found that the Assignee was wrong in setting aside the five transactions in dispute before us.⁴¹ The only transaction properly voided was the 2006 gift. As we have said, however, the Judge did not grant the Assignee relief in respect of the three gifts (in 2002, 2004 and 2006) which formed part of the gifting programme.⁴² Mr Neil accepted the correctness of the Judge's reasoning in that regard.

[119] The net result, therefore, is that the trust is not obliged to pay the Assignee anything.

[120] In these circumstances, we do not need to consider Mr St John's submission that, even on the findings Heath J had made, his Honour had miscalculated the relief.

[121] We allow the appeal. We quash the High Court judgment under which the trust was required to pay the Assignee \$227,000 plus interest. For the record, we reverse the Assignee's decisions to set aside the dispositions made by Mrs Taylor other than his decision to set aside the 2006 gift.

[122] We observe in passing that the Assignee, once seized of the debt back, was entitled to demand interest from the trustees on Mrs Taylor's half share of the debt.⁴³ The Assignee appears not to have taken that course. We do not know whether Mrs Taylor has been discharged from bankruptcy. If she has not been, that course may be a possibility for the future. We have heard no submissions on this, however; accordingly, these are only tentative views.

Costs

[123] Heath J, by supplementary judgment dated 2 December 2009, awarded the Assignee costs of \$35,940.61. We quash that costs order. We direct that costs with

⁴¹ At [16] above.

⁴² At [117]–[118].

⁴³ The debt was held by the Taylors as tenants in common in equal shares.

respect to the High Court proceeding are to be redetermined in that Court in light of this judgment and the reasons therefor.

[124] Obviously, in this Court, the trust is entitled to costs. But for a matter we come to in a moment, we would have reduced the costs payable to the trust on account of its solicitor's failure to prepare the case on appeal in accordance with r 40D of the Court of Appeal (Civil) Rules 2005. This was a case which called out for the exhibits to be set out in the exhibits volume "in chronological order".⁴⁴ Because that was not done, it was extremely difficult to find one's way through the mass of exhibits in this case. Correct resolution of this case, as we hope the reasons for judgment show, depended on understanding what the position was at a number of different points of time. It is much easier to form an assessment on those matters as an appellate court if the court is able to look at the contemporary documents in chronological order, with cross-references to those parts of the evidence where the documents are referred to.

[125] This failing on the trust's part, however, is counterbalanced by a breach of the rules by the Assignee's counsel. The rules put limits on the length of lawyers' submissions. Without leave, submissions must not exceed 30 pages, using 1.5 line spacing and a typeface of not less than 12 point size.⁴⁵ Mr Neil's submissions were 30 pages long, but were single-spaced in 11 point typeface. This may seem pedantic, but the net effect was to enable Mr Neil to put in submissions which, while ostensibly complying with the 30 page limit, were in reality closer to 45 pages in length, had the rules been complied with. That is unfair on opposing counsel who have complied with the rules. It is also unfair on the judges who have to read over-long submissions in smaller typeface. This is not a case where the Court would have granted leave for longer submissions, had such leave been sought.

[126] Given there was procedural fault on both sides, we will treat that as self-cancelling. In the circumstances, therefore, we grant the trust standard costs.

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⁴⁴ See r 40D(1)(b).

⁴⁵ Court of Appeal (Civil) Rules 2005, rr 9 and 41(1).