NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA566/2012
[2013] NZCA 660

BETWEEN	GFM Appellant
AND	JAM Respondent

Hearing:	5 and 6 June 2013 (further submissions received 8 November 2013)
Court:	Randerson, Stevens and Wild JJ
Counsel:	M J McCartney QC for Appellant M W Vickerman and Z L Wackenier for Respondent
Judgment:	17 December 2013 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Orders are made in respect of the former family home as set out in [119] of the judgment.

C The costs of the appeal are reserved on the terms set out in [135].

REASONS OF THE COURT

(Given by Wild J)

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Introduction

[1] The primary issue on this second appeal is whether the High Court erred in valuing the parties' relationship property at the date the proceeding was heard in the Family Court. In adopting hearing date values the High Court differed from the separation date values selected by the Family Court.

[2] This appeal is pursuant to leave granted by Woodhouse J, in a judgment he gave on 17 August 2012,[1] to appeal his substantive judgment of 3 May 2012.[2] That judgment had reversed a decision of Judge Burns given in the Family Court on 4 November 2010.[3]

Background

[3] The parties married in 1985 and separated on 2 October 2004. When the parties separated, their three children were aged 11, nine and seven. Two had significant health problems.[4]

[4] Upon separation the husband moved out of the family home. The wife and children have remained living in the home ever since.

[5] From the time of the birth of the parties' second child, the wife's role was that of mother and "home maker". The husband was a businessman. In 1987 he set up a company called Video Unlimited NZ Ltd (VUL). The parties were equal shareholders in VUL, the husband the sole director. A particularly valuable asset of VUL was a licence from the World Wrestling Federation (WWF) for the exclusive rights to distribute its videos in Australasia. VUL's profits were the source of most of the parties' asset base when they separated.

[6] During the marriage four other companies of relevance to this proceeding were formed. Tandem Investments Ltd owned a video shop in Christchurch and also sold library rentals. Video Busters Ltd owned a residential investment property next door to the family home in Auckland. Entertainment Properties (NZ) Ltd owned and operated a restaurant called Iguacu in Parnell. Finally, Metropole Ventures Limited owned and operated the Metropole Restaurant and Bar, also in Parnell. The wife was involved little, if at all, in any of these business ventures during the marriage. Following separation the husband continued to operate the businesses. The extent to which he consulted with the wife following separation remains a matter in dispute.

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1 *JAM v GFM* [2012] NZHC 2102, [2012] NZFLR 712 [Leave judgment].
2 *JAM v GFM* [2012] NZHC 290, [2012] NZFLR 469 [High Court judgment].
3 *JAM v GFM* FC Auckland FAM-2006-004-2610, 4 November 2010 [Family Court judgment].
4 Although we note the husband disputed the significance of one of the children's illnesses.

[7] We will need to revert, in considerably more detail, to the manner in which the businesses were operated and disposed of following separation.

[8] The parties agreed that the value of the relationship property at the date of separation was $3,402,865. Of that the net value of the parties' businesses comprised $1,714,885 and the value of their family home $1.55 million.

[9] At the date of hearing, the total value of the parties' business assets was agreed at $973,000, putting the losses incurred by the businesses post-separation at $742,000. The family home was valued at date of hearing by the wife's expert at $1.3 million, and by the husband's expert at $1.8 million.

[10] The parties' accounting experts did not agree on post-separation drawings.

Other issues

[11] Other issues argued on this appeal are:

(a) *Post-separation business losses*: Did Woodhouse J err in the way he dealt with losses incurred post-separation by the parties' businesses?

(b) *Separation agreement about relationship property*: The High Court Judge held the parties did not reach agreement on their relationship property when they separated. Was this finding erroneous?

(c) *Sale of family home*: Woodhouse J directed that the wife should have an opportunity to buy the husband's half interest in the family home. In the event that the wife was unable to do that, the Judge directed that the home be sold with an equal division of the net proceeds.[5] Were these orders wrong?

(d) *Assets acquired post-separation*: Did Woodhouse J err in not taking into account the value of three assets:

[5] The family home remains unsold, pending the outcome of this appeal.

(i) Jigsaw, a business started by the husband after the parties separated;

(ii) racehorses acquired, and race winnings earned, by the husband post-separation; and

(iii) tax losses made by the parties' businesses up to the time they ceased trading.

[12] Should we find Woodhouse J erred in adopting hearing date values, we obviously need not resolve any of these other four issues.

High Court's approach to the appeal

[13] Ms McCartney QC sought to fault the way Woodhouse J had approached the husband's appeal to the High Court. First, she submitted the Judge had erred in treating the appeal as a general one, and not as an appeal from the exercise of a discretion which, she submitted, involves the "much stricter and narrower" test laid down by this Court in *May v May.*[6]

[14] Secondly, Ms McCartney argued Woodhouse J had failed to acknowledge the specialist skills of the Family Court Judge, or the advantage hearing the parties give evidence over four or five days had given the Family Court Judge in applying "his specialist understanding to the dynamics of the relationship and the needs and circumstances of the parties and their children".

[15] Neither of these criticisms is correct. As we point out in [35](b) below, s 2G of the Property (Relationships) Act 1976 (the Act) contains a presumption, and one strengthened by subsequent amendments, rather than giving an open discretion. Yes, there is a discretion to depart from that presumption, but it is a fettered one.

[16] Insofar as Judge Burns was exercising a discretion, the High Court found he had done so upon irrelevant or improper considerations. For one example, Judge

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[6] *May v May* (1982) 1 NZFLR 165 (CA) at 170. The test is reiterated by Tipping J in his judgment in the Supreme Court in *Kacem v Bashir* [2010] NZSC 112; [2011] 2 NZLR 1 at [32].

Burns factored in an informal agreement he found (incorrectly) the parties had reached when they separated. As Woodhouse J put it, the consequence was that "s 2G(2) has been used in this case to achieve what Part 6 directs should not happen".[7] For another example, Judge Burns under the heading "Difficulty and practicality" had taken into account 12 issues which would require resolution if the s 2G presumption applied, and which he considered he could not practically resolve. Working through these, Woodhouse J dismissed a number of them as immaterial. Those that were material could be resolved without difficulty. The answers to some of the material issues had been agreed. If the *May v May* test applied – and we consider it did not – then Woodhouse J's analysis demonstrated that it was met.

[17] The gist of Ms McCartney's second submission is that the High Court did not defer to the Family Court, given the latter's specialist skills and the advantage it had as the court of first instance which heard the evidence. Ms McCartney did not use the word "defer"; her complaint was a lack of "acknowledgment". Whichever word is used, the submission flies directly in the face of what the Supreme Court made clear in *Austin, Nichols & Co Inc v Stichting Lodestar*, for example in this passage:[8]

> … The appeal court must be persuaded that the decision is wrong, but in reaching that view no "deference" is required beyond the "customary" caution appropriate when seeing the witnesses provides an advantage because credibility is important.
>
> (Footnotes omitted.)

[18] Having considered the judgments of the Family Court and the High Court with care, we are satisfied that the latter approached the appeal in exactly the way mandated by the Supreme Court in *Austin, Nichols*.

Approach on this second appeal

[19] When granting leave pursuant to s 67 of the Judicature Act 1908 for a second appeal, it is essential that the Court identifies the questions on which it grants leave. Rodney Hansen J's judgment in *Clayton v Clayton* is an example of the way in which that should be done.[9]

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7 High Court judgment, above n 2, at [87].
8 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [13].
9 *Clayton v Clayton* [2013] NZHC 1529.

[20] When it embarks on a second appeal such as this, this Court must know the questions it is required to address. The importance of this is demonstrated by this Court's decision in *Clayton v Clayton*.[10] We particularly draw attention to the appendix to that judgment, in which the issues on the second appeal are set out.

[21] It is unfortunate that Woodhouse J did not do that in his leave judgment. Although he set out the well-established principles, quoting from this Court's judgment in *Waller v Hider*,[11] the Judge merely listed nine matters of principle he considered were "of some general importance". He also mentioned that there were "a number of conflicting findings of fact of consequence".[12]

[22] At the outset, the appellant conducted this second appeal as if it were an opportunity to air, for the third time, every issue between the parties, no matter how trivial. The notice of appeal, running to 12 pages, and detailing some 16 alleged errors of law, principle or fact by the High Court, demonstrates this.

[23] The Court's minute of 3 December 2012 identified two issues warranting hearing of this appeal by the Permanent Court. Despite this, the wife's list of issues filed on 29 May 2013 still contained seven issues, three preliminary and four "specific".

[24] We emphasise again that the judgment granting leave should set out the questions on which leave is granted. The notice of appeal should then be confined to those issues, as should the submissions and argument on the second appeal.

Second memorandum of counsel for the wife

[25] By minute of 30 September 2013, the Court sought clarification by Ms McCartney of figures she had put to the Court in the course of her oral submissions.

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10 *Clayton v Clayton* [2013] NZCA 633.
11 *Waller v Hider* [1998] 1 NZLR 412 (CA) at 413.
12 Leave judgment, above n 1, at [12] and [13].

[26] Ms McCartney responded helpfully to the Court's request in a memorandum dated 11 October. Then, in a second memorandum dated 17 October Ms McCartney purported further to "address … matters raised by the Court".

[27] This second memorandum was wholly inappropriate. It was not in response to matters raised by the Court and breached the longstanding *Practice Note* on further submissions following conclusion of a hearing.[13] In a memorandum of 21 October filed in response, Mr Vickerman rightly complained that Ms McCartney's second memorandum raised new matters that were not in response to the Court's inquiry in its minute of 30 September, and sought to relitigate both the appeal to the High Court and the appeal to this Court. We decline to consider Ms McCartney's second memorandum, and thus Mr Vickerman's response to it in the latter part of his 7 November Reply Memorandum. On a second appeal, without the assistance of the expert accounting witnesses who gave evidence in the Family Court, and long after counsel have gone and the hearing is over, this Court is in no position to resolve the errors the appellant suggests were made both by the Family Court and High Court Judges. And it is distinctly not the role of this Court on a second appeal to do that.

[28] The five issues we deal with in this judgment are those capable of meeting the *Waller v Hider* test. Even then, one issue and part of a second issue are not properly before us[14] and two others are marginal.[15]

Hearing date values

The issue

[29] To reiterate, we need to decide whether Woodhouse J erred in taking hearing date values, as opposed to the separation date values adopted by the Family Court.

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13 *Practice Note* [1968] NZLR 608; *McGechan on Procedure* (online looseleaf ed, Brookers) at [PN3].

14 Jigsaw, dealt with at [87] and racehorses, dealt with at [130]–[133] below.

15 Separation agreement about relationship property dealt with at [89]–[110] and sale of family home at [111]–[119].

Sections 2G and 18C of the Property (Relationships) Act 1976

[30] As it was amended in 2001, when ss 18B and 18C were inserted in the Act, s 2G states:[16]

> **2G Date at which value of property to be determined**
>
> (1) For the purposes of this Act, the value of any property to which an application under this Act relates is to be determined as at the date of the hearing of that application by the court of first instance.
>
> (2) However, the court of first instance or, on an appeal the High Court, Court of Appeal, or Supreme Court may, in its discretion, decide that the value of the property is to be determined as at another date.
>
> (3) This section is subject to Part 6.

[31] And s 18C provides:

> **18C Compensation for dissipation of relationship property after separation**
>
> (1) In this section, **relevant period** has the same meaning as in section 18B.
>
> (2) If, during the relevant period, the relationship property has been materially diminished in value by the deliberate action or inaction of one spouse or partner (**party B**), the court may, for the purposes of compensating the other spouse or partner (**party A**),—
>
> (a) order party B to pay party A a sum of money:
>
> (b) order party B to transfer to party A any property, whether the property is relationship property or separate property.
>
> (3) In proceedings commenced after the death of one of the spouses or partners, this section is modified by section 86.

[32] Section 18B is headed "Compensation for contributions made after separation". Section 18B(1) provides:

> (1) In this section, **relevant period** in relation to a marriage, civil union or de facto relationship, means the period after the marriage, civil union or de facto relationship has ended (other than by the death of

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16 The equivalent section prior to the amendment was s 2(2). These 2001 amendments came into force on 1 February 2002. Section 5 of the Property (Relationships) Amendment Act 2001 changed the name of the Act from the Matrimonial Property Act 1976 to the Property (Relationships) Act 1976. Section 2G(2) was also slightly amended on 1 January 2004 by the Supreme Court Act 2003.

> one of the spouses or partners) but before the date of the hearing of an application under this Act by the court of first instance.

Section 18B is framed in a similar way to s 18C, save that it enables the Court "if it considers it just" to make an order compensating party A where party A did anything that would have been a contribution to the marriage or relationship had it not ended.

[33] Sections 2G, 18B and 18C were a belated response to the October 1988 report of a Working Group on Matrimonial Property and Family Protection. The report recommended amendment to the then Matrimonial Property Act 1976 to enable the courts to take account of post-separation contributions and conversely of post-separation dissipation of relationship property.[17] The Working Group pointed out that s 2(2) – the predecessor of s 2G – was being used by the Court of Appeal to take account of post-separation contributions, which was never its intended purpose.

[34] As a leading commentator noted earlier this year, s 18C gave powers to the Court "rather different" from those recommended by the Working Group.[18]

[35] We consider the following summarises the current position of ss 2G and 18C, as they have been interpreted and applied by the Supreme Court and this Court:

(a) *Overall aim*: The Court's overall aim should be to achieve a just division of relationship property between the parties having regard to the purposes and principles of the Act set out in ss 1M and 1N.[19]

(b) *Presumption*: Since 1976, under s 2(2) and then (from 1 February 2002) s 2G, the presumption under the Act has been for valuation at the date of hearing. That presumption was strengthened by the introduction of ss 18B and 18C.[20]

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17 *Report of the Working Group on Matrimonial Property and Family Protection* (Ministry of Justice, Wellington, 1988) at 27–28.

18 Bill Atkin "Life After the Split – post-separation events" (paper presented to the New Zealand Law Society Webinar, 31 May 2013) at 4.

19 *M v B* [2006] 3 NZLR 660 (CA) at [164] and [179] per William Young P, and at [227] per Hammond J. *M v B* did not deal with ss 2G and 18C. The issue in that case was economic disparity. However, the observations of the Court about the overall scheme of the Property (Relationships) Act and its purposes and principles are relevant to the issues in this case.

20 *Burgess v Beaven* [2012] NZSC 71, [2013] 1 NZLR 129 at [25]; *Walker v Walker* [2007] NZCA 30 at [42].

(c) *Basis for s 2G(1) presumption*: The presumption reflects the basic premise of the Act that parties share equally in the "product" of their marriage or relationship, and that the value of that product is to be assessed by the court at contemporary and not historic values, because otherwise equal sharing would not be achieved.[21] Specifically, delivering the judgment of the Supreme Court in *Burgess v Beaven*, William Young J observed:[22]

> The general approach, however, was that hearing date values were conducive of equity and in particular that both parties should usually share increases in values associated with inflation (as opposed to personal effort).

(d) *Onus*: The onus of persuading the Court to depart from the default or presumptive position in s 2G(1) rests on the party contending for a different valuation date. In that respect we agree with *Fisher on Matrimonial Property*,[23] notwithstanding the observation of Robertson J in this Court's judgment in *M v B* that "notions of onus of proof fit uncomfortably within [the Act]".[24]

(e) *Use of ss 18B and 18C rather than the s 2G discretion*: Section 2G is not expressly subject to ss 18B and 18C. Nevertheless, where a court desires to attribute to one party the benefits or losses that party has brought about post-separation, that is "more directly" achieved under ss 18B and 18C respectively, and "there is less need than in the past to depart from the default position of hearing date valuation".[25]

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21 Atkin at 1.

22 *Burgess v Beaven* at [24], instancing *Jorna v Jorna* [1982] 1 NZLR 507 (CA).

23 Robert Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [16.20].

24 *M v B* at [39].

25 The first citation is from *Fowler v Wills* [2004] NZFLR 252 (CA) at [24], endorsed by *Walker v Walker*, above n 20, at [43]. In *Walker* at [44] this Court observed that this approach had received academic endorsement in Margaret Briggs "Debts and Valuation" in Nicola Peart, Margaret Briggs and Mark Henaghan (eds) *Relationship Property on Death* (Brookers, Wellington, 2004) 167 at [7.3.4], where the author suggests that ss 18B and 18C were designed to take some of the load off s 2G and should therefore be applied whenever directly relevant. The second citation is from the Supreme Court's judgment in *Burgess v Beaven* at [25].

The High Court judgment

[36] Woodhouse J considered ss 2G, 18B and 18C in [67]–[83] of his judgment. He referred to the case law, the leading texts, and also to ss 1M and 1N, noting that the Family Court had not mentioned those two important sections. With one exception, we consider this part of the High Court judgment to be comprehensive and accurate.

[37] The exception relates to the Judge's endorsement of the High Court's interpretation of s 18C(2) in *Hutt v Hodge* and *PGO v MAB*.[26] If those two cases held that s 18C(2) did not require that the relevant party (party B) acted with the deliberate intention of diminishing the value of the relationship property, and did materially diminish its value, then we disagree. The word "deliberate" in s 18C(2) must surely necessitate that party B acted or failed to act intending to diminish the value of relationship property. We do not consider the word "deliberate" refers simply to party B's action or inaction. Where, prior to division of relationship property, a party continues to deal with that property with no intention to diminish its value, it would be unjust that s 18C operate to penalise that party. That result would not accord with the ss 1M and 1N aim of a just division of relationship property.

[38] The purpose of s 18C(2) is to give the court a discretion to compensate a party whose spouse or partner has deliberately diminished the value of relationship property by actions or inaction during the period between separation and first instance hearing. The actions or inaction must be deliberate and must be done with the intention of diminishing the value of the relevant property for s 18C(2) to become operative.

[39] Having considered ss 2G and 18B and 18C and the law governing their application, Woodhouse J considered the reasons the Family Court had given for exercising the s 2G(2) discretion to value the parties' relationship property at the date of separation. The Family Court's first reason was the difficulty and complexity of

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[26] *Hutt v Hodge* [2007] NZFLR 437 (HC) at [10]–[16]; *PGO v MAB* [2011] NZFLR 232 (HC) at [6].

fixing values at hearing date. The Family Court relied on this Court's decision in *X v X [Economic Disparity]*.[27]

[40] Woodhouse J rightly pointed out that there was no issue in the appeal to this Court in *X v X* about the separation date values adopted by the Family Court. In that case, the Family Court had accepted that there had been a roughly equal division of the relevant assets at separation.[28] Further, Woodhouse J did not consider that the complexities of assessment justified the exercise of the discretion under s 2G(2).[29]

[41] Woodhouse J then dealt with 12 issues the Family Court Judge had considered under his "Difficulty and practicality" heading. Working his way through each, Woodhouse J held either that the issue did not need to be decided, or that it could only be decided by comparing separation date with hearing date value(s), in order to determine which produced the just outcome. The following is an example of an issue where Woodhouse J did not share the Family Court Judge's assessment of difficulty and impracticality:

> [99] *Valuation of shares at date of hearing*. In my opinion, to exercise the discretion to avoid answering this issue effectively begged the very question as to whether the discretion should be exercised. In any event, as a matter of fact, there was no difficulty, complexity or impracticability in this regard. The accounting experts were agreed on the hearing date values.

And this is an example of an issue Woodhouse J considered did not arise:[30]

> [102] *The status of tax losses and their recoverability*. This does not appear to have been a material issue because the accountants agreed that neither party was in a position to utilise the losses.

[42] The Family Court's second reason for adopting separation date values was its view that the husband must bear responsibility for some but not all the losses incurred by the parties' businesses post-separation and also, to varying extents, responsibility for decisions or events that affected the parties' businesses during the marriage. Woodhouse J expressed the firm view that decisions and events affecting relationship property during the marriage could not support the Family Court's

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27 *X v X [Economic Disparity]* [2009] NZCA 399, [2010] 1 NZLR 601.
28 *X v X [Quantum]* [2008] NZFLR 512 (FC) at [74].
29 High Court judgment, above n 2, at [93].
30 But note that in [129] below we point out that there was no longer agreement between the parties' accountants at the hearing in the Family Court.

adoption of separation date values.[31] The nub of the High Court Judge's quite detailed and careful consideration of causation in respect of the business losses incurred post-separation was that the evidence did not support the Family Court's conclusion that the husband should bear sole responsibility for the losses attributed to him as a consequence of the adoption of separation date values. Consequently, the post-separation business losses did not provide grounds for the Family Court's exercise of the s 2G(2) discretion, or for an order under s 18C.[32]

[43] The Family Court's finding that the husband had, at separation, promised the wife that she and the children "could remain living in the home and at the end of the day that would become hers together with the household furniture and chattels" was its third reason for adopting separation date values.[33] Woodhouse J observed, correctly, that this was a question of fact on which he needed to reach his own conclusion.[34] Having considered the evidence and other considerations relevant to this issue, the Judge found that there was neither an agreement nor promise by the husband in the terms contended for by the wife. This is one of the issues on appeal. We revert to it in [89] and following.

[44] Lastly, Woodhouse J noted three further factors that the Family Court had factored in to the exercise of the s 2G(2) discretion: "role division", "proximity" and "children's interests". The first of these was the fact that the husband had continued running the parties' businesses post-separation, as he had during the marriage. "Proximity" referred to the Family Court's finding that the Iguacu restaurant was purchased "quite proximate to the date of separation".[35] The "children's interests" refers to the children's wish, conveyed to the Family Court by counsel appointed to represent the children, that they continue living in the family home, at least while they were at school.[36] Having found that none of the four main factors relied on by the Family Court supported its decision to exercise the s 2G(2) discretion,

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31 At [108].
32 At [121].
33 Family Court judgment, above n 3, at [47].
34 High Court judgment, above n 2, at [122].
35 Family Court judgment, above n 3, at [53]. As Woodhouse J pointed out at [108] and [123] of the High Court judgment, the Family Court erred here. The Iguacu restaurant business and property were purchased in June 2002. The Family Court may have intended to refer to Metropole, which was purchased in April 2004 – some five months before the parties separated in October 2004.
36 At [54].

Woodhouse J held that these three further factors "could not by themselves provide a principled basis for departing from hearing date values".[37] He elaborated on this. For example, in respect of the children's interests, he held:[38]

> It was not open to the Judge to meet the needs of the children by altering the presumed valuation date designed to achieve equality between the husband and wife.

Wife's submissions on appeal

[45] For the wife, Ms McCartney argued that the High Court's judgment erred in substituting hearing date values, because they did not provide a just division of relationship property. The cases, in her submission, do not require hearing date values in every case, but rather hold that there is now less need to depart from the default position in s 2G(1) of valuation at hearing date. We accept that, although we consider Ms McCartney understated the strength of the hearing date presumption, particularly since the introduction of ss 18B and 18C.

[46] Ms McCartney suggested that Woodhouse J had erred in referring to the Act's purpose as being equal sharing of relationship property rather than a just division of it. We are quite sure Woodhouse J's focus was on the latter. His references to equality reflect the emphasis in ss 1M and 1N on the equality of the parties' contributions, their status and the different forms of their contributions to the relationship. Equal sharing will be a just division, unless justice demands an unequal division.

[47] The second and somewhat related point made by Ms McCartney is that the s 2G(2) discretion may be exercised if s 18C does not provide for a just division. Our summary in [35] above recognises that. This point, in turn, seems rightly to acknowledge that s 18C rather than s 2G(2) is to be used if applicable. In the course of oral argument, Ms McCartney accepted that a finding that the post-separation drop in the value of the parties' business assets was not the fault of the husband rendered resort to s 2G(2) inappropriate.

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37 High Court judgment, above n 2, at [133].
38 At [133].

[48] Third, Ms McCartney argued that the High Court was wrong to exclude s 18C on the grounds that the husband, post-separation, was entitled to continue running the parties' businesses on a "business as usual" basis. In a submission directed primarily to the issue of post-separation losses, Ms McCartney submitted:

> 78. The policy of the Act is that once the marriage ends, the rationale for sharing equally in the fortunes and misfortunes of the former spouse or partner ends. The moment the parties involve themselves actively in determining the fate of an asset any presumption of equal sharing should end. Former spouses/partners should only share in the results of change if they have shared in the actions contributing to that change, or if those changes are spontaneous, such as inflation. By forcing the parties to share equally in changes that are the result of post-separation actions by one or the other, but not both, the Court is wrongly continuing the relationship.

Ms McCartney maintained the evidence established that the husband took exclusive control of the businesses post-separation. The husband's post-separation decisions were made without consultation with the wife, let alone her consent. Relying primarily on *Hutt v Hodge*, Ms McCartney argued that s 18C applied to the husband's actions post-separation in relation to the parties' businesses, actions which had clearly lowered the value of those businesses. This third argument is really directed to the issue of post-separation losses, and responsibility for them. We deal with that issue starting at [54] below.

[49] Finally, Ms McCartney argued that compensation under s 18C would not provide a just result here, and that the Family Court was correct to apply s 2G(2) to achieve a just result. In the six years between separation and hearing date, there had been so many changes to the relationship property that valuation at hearing date would be speculative, arbitrary and unjust to the wife. Valuation at hearing date would also be contrary to the children's interests and to the wife's reliance on an agreement/representation at date of separation.

[50] In this case there was, in Ms McCartney's submission, difficulty, impracticality and speculative intangibles that were a relevant consideration the Family Court Judge was entitled to take into account in exercising the s 2G(2) discretion. Ms McCartney relied on William Young P's judgment in *M v B* calling

for "a broad brush assessment … to produce an outcome which is "just" …".[39] She referred also to Robertson J's acceptance in *X v X [Economic Disparity]* of separation date values in circumstances where at separation each party had control of items of relationship property of broadly equal values and, post-separation, each had applied their property in different ways and to suit their own purposes.[40]

Our decision

[51] In [48] above we quoted from that part of Ms McCartney's submissions where she argued that Woodhouse J's judgment had the effect of "wrongly continuing the relationship". When they separated, the parties were and remained entangled in their jointly owned business interests. It was not until around June 2006 – about a year and eight months after separation – that all those businesses were either sold or ceased trading. Later in this judgment we hold that a one year and eight month period was not unreasonably long and explain why. Ms McCartney's submission that justice somehow demanded an immediate, clean break with all the parties' assets valued at the point of separation, is simply at odds with the reality of their situation.

[52] Ms McCartney's arguments do not persuade us that Woodhouse J erred in holding that a just division required valuing the parties' relationship property at hearing date. We agree with the Judge that the factors relied on by the Family Court for the exercise of the s 2G(2) discretion to adopt separation date values did not justify that course. That is the position even when the factors are aggregated. They simply do not justify departing from the s 2G(1) presumption of hearing date values. Indeed, mainly for the reasons we give in [62] and following below in relation to post-separation business losses, our view is that the separation date values adopted by the Family Court resulted in an unjust division of the parties' relationship property. If adjustment were required for the losses incurred post-separation by the parties' businesses, then s 18C, as far as it applied, was the appropriate mechanism.

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39 *M v B*, above n 19, at [179].
40 *X v X [Economic Disparity]*, above n 27, at [24]–[25].

[53] Accordingly, we answer this first issue: no, the High Court did not err in valuing the parties' relationship property at the date the proceeding was heard in the Family Court. Accordingly, this first ground of appeal fails.

Post-separation business losses

The issue

[54] The issue here is: did Woodhouse J err in the way he dealt with the losses of $742,000 incurred post-separation by the parties' businesses?[41]

The High Court judgment

[55] Woodhouse J dealt with this issue in [107]–[121] of his judgment.

[56] Woodhouse J started by noting that Judge Burns' view in the Family Court that the husband must bear significant responsibility for the losses was one of Judge Burns' "primary reasons" for exercising the s 2G(2) discretion to adopt separation date values. He immediately observed that Judge Burns "does not appear to reach a definitive conclusion on responsibility for loss".[42] That was a fair observation because Judge Burns began his consideration of responsibility for the post-separation business losses by stating:[43]

> … On the evidence before me I cannot rule in favour of either party. The explanation provided by the husband gives some explanatory power but does not account for all of the losses only some.

[57] The following points summarise Woodhouse J's consideration of the post-separation business losses:

(a) The Family Court was wrong to reject the husband's unchallenged evidence that the Iguacu real estate (as opposed to the restaurant business) had been sold at a profit.[44]

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41 We explain the $742,000 in [9] above.
42 At [107].
43 Family Court judgment, above n 3, at [36].
44 High Court judgment, above n 2, at [109].

(b) The following conclusion by the Family Court was not a principled one, in that it was not based on any discussion of the evidence:[45]

> … There were delays in the sale of Iguacu and Metropole. The timing of sale was solely determined by the husband. He must take responsibility for the failure to mitigate the losses by sale at an earlier date.

(c) Although the Family Court noted the case law urging caution by judges when evaluating business decisions, it did not give effect to that case law, because it found the husband had made bad business decisions for which he must take responsibility.[46]

(d) Associated with that need for caution in assessing the quality of the husband's business decisions, is a need to avoid inappropriate use of hindsight. The facts would need to be clear before a conclusion adverse to the husband as the business manager could properly be drawn.[47]

(e) There was not an absence of consultation by the husband with the wife about important business decisions post-separation. Further, the husband continued operating the businesses much as he had while the parties were together.[48]

(f) The Family Court's apportionment of post-separation losses rather overlooked that the parties' asset base had substantially come from the profits earned by VUL during the marriage, and that the decisions to purchase Iguacu and later Metropole had been made during the marriage.[49]

(g) The Family Court judgment produced "inconsistencies in relation to post-separation outcomes". For example, the actual sale prices achieved for Iguacu and Metropole well after separation were adopted

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45 At [110], quoting from [41] of the Family Court judgment.
46 At [111].
47 At [112].
48 At [113].
49 At [114].

in fixing separation date values, without a firm base for concluding those prices would have been achieved at separation date.[50]

(h) At the heart of the Family Court's judgment was its acceptance of the expert evidence of Mr Clyth MacLeod, on which the wife's expert accounting witness Mr Peter Lane based his calculations. Mr MacLeod's opinions were challenged in fundamental respects. Mr MacLeod's opinions also conflicted with the husband's largely uncontested evidence about factors beyond his control that contributed to the business losses. Still further, Mr MacLeod's view that the husband lacked the expertise to run Iguacu and Metropole had no relevance under the Act, as the parties purchased the businesses together, "with the husband, as the manager, having whatever skills he did have".[51]

[58] Those points led Woodhouse J to conclude:

> [121] I am satisfied, on what is a question of fact, that the evidence did not justify a conclusion that the husband should bear sole responsibility for the losses that he was in fact required to bear by. In consequence, the business losses did not provide grounds for exercise of the discretion under s 2G(2) or under s 18C.

Wife's submissions on appeal

[59] Ms McCartney argued that the husband's actions did not have to be deliberate, but merely had to lower the value of the property for s 18C to apply. Knowledge of consequences was not an element of s 18C: *Hutt v Hodge*.[52] We have dealt with that argument in [37] above, and say no more about it.

[60] In Ms McCartney's submission the High Court's "business as usual" reasoning did not conform with the policy and principles of the Act. The evidence established that the husband had taken exclusive control of the businesses post-separation, making unilateral loss-making decisions without consultation with the wife. The argument was that the following actions by the husband had resulted

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50 At [115].
51 At [116]–[120].
52 *Hutt v Hodge*, above n 26.

in losses: delay in selling Iguacu and Metropole, selling profitable businesses and property (the rental property and the video shop, purchase and sale of another residential property, refusal to repay debt on the family home resulting in excess mortgage interest, and running down VUL (including writing off plant and transferring stock at an undervalue).

[61] The gist of Ms McCartney's argument for the wife on this issue is perhaps captured in the submission we have set out in [48] above.

Our decision

[62] We restrict ourselves to the businesses that contributed most significantly to the post-separation losses. First, Iguacu. The parties bought Iguacu in June 2002. Although the wife, post-separation, was highly critical of the decision, the purchase was explained by a need to compensate for the down-turn in VUL's profitability, against a background where the husband did have some experience in the hospitality trade.[53] Iguacu was losing money when the parties bought it. Under cross-examination the husband accepted: "… we took on a bum really. What we thought we were buying was not what we got and I needed to try and fix the business".[54]

[63] The wife's case, based on Mr MacLeod's evidence, was that Iguacu should have been sold within six months of separation. Had it been listed with a specialist business broker in September/October 2004, he expected it would have sold for more than the net $1,080,000 achieved in August 2005 and without the need for a vendor loan.[55]

[64] We note these points about Mr MacLeod's evidence:

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53 The husband outlined this in his evidence: Notes of Evidence at 32 [NoE].

54 NoE at 33/9.

55 Affidavit of Clyth Iain MacLeod at Request of [wife], sworn 21 May 2009, at [14] (Case on Appeal [CoA] at III/554).

(a) Mr MacLeod had no sales data to back his opinion as to the saleability of Iguacu. He was not aware that only one offer had been received for Iguacu – $350,000 in 2005.[56]

(b) He accepted that the development of restaurants on the Auckland waterfront for the America's Cup, the absence of parking in Parnell and the drink driving laws had all impacted negatively on the restaurant trade in Parnell.[57]

(c) He accepted that Mr Maurice Crosbie (a former owner of Iguacu) was a very experienced and passionate operator in the restaurant industry, but was unaware the husband had sought Mr Crosbie's advice about running Iguacu.[58]

(d) Although he expressed the view that the sale price achieved for Iguacu was not a good one, he was unable really to explain why, in his valuation of another restaurant, he had described what Iguacu had fetched as "a surprising price".[59]

(e) He had expressed an opinion about the likely sale price for Iguacu, but accepted that he had not undertaken any valuation analysis of Iguacu at all.[60]

[65] In our assessment, those concessions exposed Mr MacLeod's opinions as unreliable, in that they lacked a sound factual basis and on one important point conflicted with an opinion he had expressed elsewhere.

[66] Iguacu sold for $1.08 million with settlement on 31 August 2005. That was 11 months after separation. We agree with Woodhouse J that 11 months was a reasonable sales period, given the difficult market conditions acknowledged by Mr MacLeod. That is certainly the position if the post-separation period of grace the

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56 NoE at 156/3–5.
57 NoE at 156/18–22.
58 NoE at 157/4–11.
59 NoE at 158/31.
60 NoE at 159/31–32.

Family Court allowed the wife is factored in. As Woodhouse J pointed out, the fourth judgment of the Family Court allowed the wife a grace period of six months in relation to financial arrangements between husband and wife which had existed before separation.[61] We agree with Woodhouse J's conclusion about this:[62]

> …There seems to be no reason why some grace period should not have been allowed to the husband before a court might conclude, if there was evidence justifying such a conclusion, that the businesses should have been put on the market earlier than they were. I also consider that there is a fair degree of artificiality in expressing an opinion that both of these businesses should have been put on the market more or less on the day the husband and wife separated. And, except in a narrow sense related to assessment of financial performance at a given date, it was not a matter for Mr MacLeod's opinion. Neither business was performing well before separation. If a grace period of six months is added to Mr MacLeod's assessments of six months and nine months for Iguacu and Metropole respectively, the projected sale date for Iguacu would be around September 2005, compared with settlement of the sale in August 2005, and the projected sale date for Metropole would be around December 2005, compared with the settlement of the sale in June 2006.

[67] Despite the wife's assertions to the contrary, the husband was motivated to sell Iguacu to reduce the parties' overall debt, and stem its losses. We note that a number of the parties' liabilities to the National Bank were repaid from the proceeds of the sale of the Iguacu restaurant business. Inevitably, the husband would have been required to give personal guarantees both to the Bank and to the landlord of the Iguacu business (the husband had earlier sold the real estate). It simply would not have been in the husband's interests deliberately to delay the sale of Iguacu.

[68] As to the sale price, the $1.08 million achieved accorded with the valuation dated 5 April 2005 the husband obtained from Harcourts. Significantly, that valuation referred to Parnell restaurants "facing fierce competition from the continued growth along Auckland waterfront".[63]

[69] We detect no fault in Woodhouse J's assessment that the parties should bear equally the losses made by Iguacu until it was sold.

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61 *JAM v GFM* FC Auckland FAM-2006-004-2610, 19 September 2011 at [15]–[16].
62 High Court judgment, above n 2, at [118].
63 CoA at VI/1410.

[70] Much the same considerations apply to Metropole. Hindsight certainly demonstrated that the decision to purchase Metropole in about April 2004 was a bad business decision. But the rationale at the time was to inject economies of scale into the combined Iguacu/Metropole enterprise. The decision to purchase Metropole was also one made during the marriage, albeit just a few months before the parties separated.

[71] Metropole took longer to sell than Iguacu. In evidence the husband said people stopped coming to Metropole after there was a brawl there. The husband's evidence was that he listed Metropole for sale with five different agents, including Mr MacLeod's own firm. One of those agents had later come back to the husband requesting an exclusive agency which the husband had given, though not immediately. But the husband made the point that Metropole had not been sold through that exclusive listing, but by his own endeavours, as was the case with Iguacu.[64] The sale price achieved of $126,600 was obviously a good one, since there was evidence that the efforts of the five agents with whom the business had been listed had produced only one "ridiculous" offer, of $50,000.[65]

[72] Again, the Family Court's view was based on Mr MacLeod's evidence:[66]

> … Had Metropole been actively marketed for sale in September/October 2004 by normal marketing strategies including print, direct mail, internet advertising and database marketing, I would have expected the business to have sold within six to nine months. …

[73] There are the same problems in basing a conclusion on Mr MacLeod's evidence. We have already commented adversely on the unreliability of his opinions. In the case of Metropole, Mr MacLeod was constrained to accept that listing through the agency of his firm had not produced any offers, or at least none he was aware of.[67] Further, he thought Metropole had been sold through the sole agency, which the husband said was not the position.[68] Mr MacLeod's six to nine

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64 NoE at 49/23–33.
65 CoA at III/633.
66 Affidavit of Mr MacLeod, above n 55, at [19] (CoA at III/555).
67 NoE at 160/22–24.
68 NoE at 161/1–6.

months sales period does not factor in the period of grace we discussed in [66] above.

[74] As with Iguacu, we agree with Woodhouse J that it was not a reasonable outcome to visit on the husband all the post-separation business losses made by Metropole. The just result was an equal sharing of those losses.

[75] Next is the position of VUL. As noted in [5] above, this was the company that made the profits from which the parties purchased the bulk of their assets. Its business was producing and renting, both in Australia and New Zealand, VHSs (video cassettes), and later DVDs, under licence from the WWF. VUL lost its Australian licence in 2002. Although it retained the New Zealand licence for another three years, the husband's evidence was "I couldn't make it work with just New Zealand on its own but I tried … I looked at all the angles on how I could make it work …".[69] Then, in the summer of 2005/2006, VUL lost its New Zealand licence from WWF. The husband deposed "that was the last straw really".[70] The business of VUL was then wound up, ceasing operation on 31 March 2006. In that same month the husband formed a new company, Jigsaw Entertainment Ltd. Jigsaw purchased the business assets of VUL for $142,488. VUL wrote off its remaining plant and equipment which had a book value of $506,205. That was mainly represented by the book value of the video masters, which VUL had used for producing the VHSs it rented and sold.

[76] In the Family Court Judge Burns had in his judgment listed 12 issues which he would not have to resolve if he adopted date of separation values. These included:[71]

> iv) determining whether shares in Jigsaw are separate or relationship property;
>
> v) whether assets of [VUL] and Jigsaw when transferred was paid at correct market value and the bona fides of that transaction;

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69 NoE at 99/29–31.
70 NoE at 100/11.
71 Family Court judgment, above n 3, at [33].

[77] A little later Judge Burns factored in the VUL/Jigsaw position in reaching his decision to adopt separation date values. He did it, under the heading "Consultation/conduct" in the following way:[72]

> … the formation of Jigsaw and many other decisions during the course of the evidence [we think this should be marriage] where there was little or no reference to the wife for her input or consent. The assertion by the husband that Jigsaw is his separate property reinforces my view that he maintains control. The transfer of the assets to Jigsaw from [VUL] without reference to the wife reinforces the way the husband saw his involvement with the businesses. That transaction was not formalised. There were aspects which gave me concern. …

[78] Woodhouse J noted that passage.[73] The Judge did not share the Family Court's view that there was any particular difficulty or complexity in resolving those two issues. He said:[74]

> …The prominent issue appears to have related to the value of the [VUL] stock. The husband put in evidence an offer from another company for the stock and this, on its face, established that the sum debited to the husband for the transfer of the stock to his new company, Jigsaw, represented the realisable value. The wife raised issues as to the quality of the evidence, but did not produce any concrete evidence on value. … The matters referred to by the Judge were not matters of discretion but of fact, and in my opinion, although the evidence was limited, on the balance of probabilities the husband had established that he had paid proper value. In addition, the difference between the figures for the husband and wife was not substantial.

[79] In her written submissions Ms McCartney argued that the husband had deliberately run down VUL, in the process writing off plant to a value of $166,000 and transferring stock at under value.[75] In the course of her oral submissions, Ms McCartney handed up to the Court a handwritten analysis headed "Avoidable losses". This included $182,560, being a proportion of the total losses for VUL. In her memorandum of 11 October 2013 to the Court Ms McCartney explained that the figure of $182,560 was an error, and that the correct figure for post-separation losses by VUL was $421,676.[76]

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72 At [40].
73 High Court judgment, above n 2, at [45].
74 At [100].
75 Appellant's written submissions at [75].
76 Memorandum by counsel for the appellant providing material requested by the Court, 11 October 2013, at [19]–[20].

[80] Also in her oral submissions, Ms McCartney complained that Woodhouse J had not addressed the VUL position. She took issue with Woodhouse J's finding that Jigsaw was the husband's separate property.[77] She contended that Jigsaw was relationship property and had a value of $60,000.

[81] Our understanding of these arguments is this:

(a) Woodhouse J erred in holding that the VUL/Jigsaw position was not a factor supporting the Family Court's adoption of separation date values.

(b) Alternatively, if Woodhouse J's substitution of hearing date values was upheld, then:

(i) the Judge was wrong not to apportion the $421,676 losses made by VUL post-separation to the husband; and

(ii) this Court should hold that Jigsaw was relationship property and had a value of $60,000.

[82] If that overstates the wife's position on appeal, it does not greatly matter because we do not accept any part of that argument. In rejecting it, it is sufficient to make five points. First, $499,700 of the $506,205 plant written off by VUL was the book value of the movie masters. In his affidavit sworn 3 November 2008, Mr Lane deposed "the [wife] estimates that they could have been sold for at least 30 per cent of book value, being $166,000".[78] In fact, what the wife had deposed was "the value of those movie masters taken over by Jigsaw Entertainment was not less than $166,000".[79] In her 11 October 2013 memorandum Ms McCartney pointed out "there was no cross-examination of the wife".[80] But the explanation for the lack of cross-examination was doubtless that the wife had not advanced any basis at all for

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[77] At [154](d).

[78] Affidavit of Peter Dennis Lane on relationship property addressing accounting issues, sworn 3 November 2008, at [3.33] (CoA at II/484).

[79] Updating affidavit of [the wife], sworn 14 February 2009, at [12] (CoA at II/509).

[80] At [23].

her value of "not less than $166,000". The wife's evidence must be contrasted to that of the husband who was managing VUL's business. He deposed:[81]

> … when VUL was wound up, its value was in the remaining stock and not in the technologically defunct and expired video masters. As the video masters had absolutely no commercial value they were destroyed at the crushing plant on the Concourse in Henderson. The video masters are each the size of an A4 ringbinder and are heavy. The storage required would be the equivalent of a 20ft container. The book value was illusory and reflected no more than cost price. …

[83] Second, as Woodhouse J noted, the husband had put in evidence an offer from another company to purchase VUL's remaining stock – "approximately 74,000 units of a variety of titles". This was an offer from JSM Entertainment Ltd dated 14 June 2006.[82] In her 11 October 2013 memorandum, Ms McCartney stated "the stock was transferred at the values shown in a letter provided to the husband by a friend of the husband".[83] This appears to be an echo of the wife's complaint in evidence "I am aware that [the husband] says he offered the movie masters to a friend and can thus establish market price. I do not accept that a friendly confirmation from a non-arms length friend establishes price".[84] In that evidence the wife confuses the video masters with VUL's stock of approximately 74,000 VHSs. And, in fact, those VHSs were purchased by Jigsaw for $148,000, $15,000 above JSM's offer of $133,200 (not taking into account that JSM's offer provided for instalment payments spread over five months).[85]

[84] Third, the basis for the wife's claim that Jigsaw is relationship property appears to be based on the acceptance by Mr Anthony Curteis, the husband's in-house accountant, that VUL could have been left to carry on Jigsaw's business. But Mr Curteis explained "we were advised to sort of let's keep this apart, let's start something which is over here and in many respects it was a fresh start …".[86] Mr Curteis explained that VUL's VHS business "had died and was … a hurdle

81 Affidavit of [the husband], sworn 14 July 2009, at [75] (CoA at III/589).
82 CoA at I/112.
83 At [23].
84 Updating affidavit of [the wife], sworn 18 February 2009, at [12] (CoA at II/508–509).
85 [Husband's] affidavit sworn in support of his notice of partial opposition, sworn 15 December 2006, at [9(c)] (CoA at I/98).
86 NoE at 205/18–20.

around our neck".[87] Further, Ms McCartney's submission cannot be reconciled with her submission recorded at [48] above.

[85] Fourth, the $60,000 value for Jigsaw put forward by Ms McCartney simply adopts Mr Lane's estimate of the goodwill of the business.[88] Under cross-examination Mr Lane conceded, of the $60,000, "its purely a perceptive number".[89] The opinion of Mr John Leonard for the husband was that there was no goodwill in Jigsaw's business activity.[90]

[86] There is a fifth and final point. Mr Vickerman was entitled to object that Woodhouse J's finding that Jigsaw was the husband's separate property had not been appealed by the wife. Unless we have overlooked it, embedded somewhere in the wife's 12 page notice of appeal, the point was not brought on appeal to this Court. It does not feature in the list of issues the appellant filed on 29 May this year. It is, as Mr Vickerman noted, raised on appeal "by a side wind".

[87] To summarise, we reiterate our rejection of the wife's argument that the post-separation losses incurred by VUL should be borne by the husband, her argument that VUL wrote off valuable plant and transferred stock at an undervalue, and her claim that Jigsaw is relationship property.

[88] Accordingly, we answer this second issue: no, Woodhouse J did not err in the way he dealt with the losses of $742,000 incurred post-separation by the parties' businesses. Accordingly, this second ground of appeal fails.

Separation agreement about relationship property

The issue

[89] Disagreeing with the Family Court, Woodhouse J held the parties had not reached an informal agreement on their relationship property when they separated. Was the Judge in error?

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[87] NoE at 205/21–22.
[88] Jigsaw Entertainments: Business Valuation (9 March 2010) at [4] (CoA at VI/1516).
[89] NoE at 115/21.
[90] Valuation prepared by J M Leonard, Gerry Rea Partners, 30 May 2008 at [2.1] (CoA at II/454).

[90] As we indicated in [43] above, the existence of an informal agreement was one of the factors which had influenced the Family Court to adopt separation date values. This issue was argued, and is to be decided, in that context.

Legislation

[91] The provisions permitting spouses to contract out of the Act are in pt 6 of the Act. We need not set any of them out. It is sufficient to note two points. First, s 21F(1) provides that an agreement is void unless it complies with the requirements set out in s 21F(2)–(5). Those requirements aim to ensure that the agreement is clear and just to the parties. Ms McCartney readily conceded the informal agreement contended for here did not comply with those requirements. Indeed, it did not comply with any of them. The wife did not suggest that the parties' circumstances were such that the Family Court could nevertheless give effect to the agreement, pursuant to s 21H.

[92] The second point is that a court may under s 21J set aside an agreement that would cause serious injustice, even though it satisfied the requirements of s 21F. Ms McCartney's submission was rather the converse of this: that not giving effect to an informal agreement which admittedly did not comply with s 21F would result in injustice to the wife.

The High Court judgment

[93] This issue was dealt with by Woodhouse J in [122]–[132] of his judgment.

[94] In the Family Court Judge Burns had accepted the wife's evidence:[91]

> … that the husband promised that she and the children could remain living in the home and at the end of the day that would become hers together with the household furniture and chattels and that he would take over the business interests which would eventually become his. …

[95] Woodhouse J pointed out, again correctly, that this was a finding of fact on which he was bound to reach his own conclusion on the evidence. The Judge therefore began by considering the evidence. In several respects, he found that it did

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[91] Family Court judgment, above n 3, at [47].

not support the Family Court's conclusion. For example, the Family Court had based its finding on the following:[92]

> At the time of separation the business interests were not in difficulty. Iguacu had relatively recently been purchased. [The husband] would [have] had a reasonably optimistic view of the various business interests and would not have been aware of various issues that were going to arise post-separation.

[96] Woodhouse J considered this finding wrong in every respect. It was Metropole not Iguacu that had been purchased shortly before separation. The evidence of the wife's expert accounting witness, Mr Lane, established that both Iguacu and Metropole were making losses when the parties separated. The wife had both given and called evidence questioning the husband's experience in the hospitality industry, and thus his ability reliably to reach the "reasonably optimistic view" the Family Court referred to.

[97] Further, the husband in his evidence had accepted he had, when he left, expressed the hope that it would be possible for the wife and children to remain in the home, the wife receiving it as part of her share of the relationship property. He had emphasised that it was the expression of a hope, not a promise or commitment. Woodhouse J found that more consistent with the parties' circumstances at separation.

[98] The High Court Judge considered several matters provided solid support for the husband's version. The first, and perhaps most cogent, was that the parties' actions, in particular those of the wife, were inconsistent with her evidence of an informal agreement or promise. We summarise:

(a) the husband's September 2006 application for equal division of *all* the parties' relationship property was inconsistent with the asserted informal agreement;[93]

[92] At [46].
[93] High Court judgment, above n 2, at [125].

(b) equally inconsistent was the wife's application in November 2006 for an interim injunction restraining the husband and his solicitor, effectively from dealing with the parties' businesses;[94]

(c) submissions to the Family Court made by Ms McCartney for the wife in connection with interim maintenance in May 2007, and the Family Court's judgment of 14 May 2007, were both inconsistent with the informal agreement or promise. For example, Ms McCartney was critical of the husband post-separation taking "de facto control of all income earning businesses comprising the relationship property";[95] and

(d) it was only in her affidavit sworn on 18 February 2009, the twelfth affidavit the wife had filed in the proceeding, that the wife for the first time asserted there had been an informal agreement or promise.[96]

[99] Second, the underlying premise of the informal agreement or promise was that it would produce equality, but:[97]

> On that premise the wife's proposition did not contain within it the necessary alternative that, if in the end the businesses were worth less than the home, the husband would be entitled to a share of the home.

[100] Third, the alleged promise by the husband had been made at a time of considerable uncertainty and emotional upheaval for the parties:[98]

> … Quite apart from the clear provisions of Part 6 of the Act, designed to avoid what might be described as rash commitments without legal advice, the commitment to which the husband is being held is one that was made before any period of adjustment and review for which a period of grace, if it is to be applied, is allowed.

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94 At [125].
95 At [126], citing *JAM v GFM* FC Auckland FAM-2006-004-2610, 14 May 2007 at [14].
96 At [128].
97 At [130].
98 At [132].

Wife's submissions on appeal

[101] Ms McCartney stressed that the relevance of the informal agreement found by the Family Court was to its exercise of the s 2G discretion. She sought to persuade us that Woodhouse J's approach to this issue was flawed. First, Ms McCartney submitted that the Family Court Judge had seen and heard the witnesses, and therefore his view of their evidence was to be preferred.

[102] Secondly, Ms McCartney maintained there is "a very substantial body of evidence that supports the wife's evidence" of the informal agreement.[99]

[103] The third submission was that "the role division during the marriage informed the agreement", and the evidence established that at separation "the husband knew the value of the businesses and that they roughly equated with the value of the home".[100]

[104] Next, Ms McCartney submitted that the wife's actions post-separation were not inconsistent with the informal agreement she later asserted. Ms McCartney argued:[101]

> Until mid-2008 she was unaware that she would need to advance grounds for the exercise of the s 2G(2) discretion. Her earlier affidavit is not inconsistent with the agreement/promise – it was not raised as a relevant matter because at that time it was not considered relevant.

[105] Lastly, Ms McCartney submitted the wife had relied on the agreement/representation, including by using her credit cards in order to preserve the home. Had she known the husband was going to change his position and require half the home, she would have adopted a different position by applying to the Court following separation for orders to protect her interest in the property.

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99 Appellant's written submissions at [87].
100 At [88].
101 At [89].

Our decision

[106] We are not at all persuaded Woodhouse J erred in holding that the husband had not, upon separation, informally agreed or promised that the wife would have ownership of the family home.

[107] It is correct that it was Judge Burns in the Family Court who saw and heard the husband and wife give their evidence and face cross-examination. But this is not a case such as *Rae v International Insurance Brokers (Nelson Marlborough) Ltd*, where the judgment turned on the credibility of two witnesses who gave sharply conflicting evidence on the critical issue.[102] Woodhouse J was right to resolve this issue on the basis of the several other available indications that the husband had not agreed or promised as asserted by the wife.

[108] As to Ms McCartney's submission that "the role division during the marriage informed the agreement", we see no logical nexus between the two. In support of this submission Ms McCartney submitted that the evidence established that at separation the husband knew the value of the parties' various assets. The evidence she referred to does not, in fact, establish this. When asked under cross-examination whether he had a view, as at 2005, as to the overall value of the (relationship) property, the husband answered: "I did but it was very difficult to ascertain exactly what that was until we took things to market".[103] Ms McCartney persisted, asking the husband what he thought was the net value of the parties' relationship property in 2005. The answer was: "… I would have thought they were in excess of $3 million".[104] Critically, in terms of the asserted informal agreement, Ms McCartney did not seek, and the husband did not offer, any breakdown of that estimate.

[109] We do not accept the explanation advanced as to why the wife only asserted the informal agreement/promise four years after separation, in her twelfth affidavit. Woodhouse J was correct to hold that the wife's earlier actions were inconsistent with this belated assertion.

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[102] *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) cited by the Supreme Court in its judgment in *Austin, Nichols & Co Inc v Stichting Lodestar*, above n 8, at [13].

[103] NoE at 18/13–14.

[104] NoE at 18/25.

[110] We see no error in Woodhouse J's determination of this issue. Indeed, we are in agreement with it. We answer this third issue: no, the High Court Judge did not err in holding the parties had not reached an informal agreement on their relationship property when they separated. Accordingly, this third ground of appeal fails.

Sale of family home

The issue

[111] Were the orders Woodhouse J made in relation to the family home wrong?

The High Court's orders

[112] In summary, Woodhouse J ordered:[105]

- the husband and wife are to have an equal share in the former family home, assessed at current market value;
- the wife was to have the opportunity to purchase the husband's half interest at the value agreed between the parties; and
- if the wife did not exercise that opportunity the home was to be sold and the net proceeds divided equally between the parties, save the wife was to be paid the adjusting sum of $286,070 the Judge had earlier fixed.

Submissions for the wife on appeal

[113] Ms McCartney submitted:

> 103. The order for sale is very unjust to the wife and children. They are exposed to the very real risk that they will be outbid by a stranger and will lose their beloved home. The authorities establish that the party who has the connection to the home is the one who is given the opportunity to purchase at the value established by the court.[106] The order for sale further undermines the interests of the children who live in the home.

[105] High Court judgment, above n 2, at [163](6)–(8).
[106] Citing *Birch v Birch* (2004) 23 FRNZ 984 (FC).

Our decision

[114] The family home had an agreed value of $1.55 million at date of separation (October 2004), the value adopted by the Family Court.

[115] The value of the family home at the date of hearing in the Family Court was unknown. The Family Court had two significantly differing valuations: $1.3 million (for the wife), and $1.8 million (for the husband).

[116] For the following reasons – which are essentially those put to us by Mr Vickerman for the husband – we are firmly of the view that Woodhouse J's orders were appropriate. First, the family home will undoubtedly have increased in value since the hearing in the Family Court, and on appeal in the High Court. It is a substantial family home in a desirable inner suburb of Auckland.

[117] Second, that increase in value is passive. It is the result of the rising Auckland property market, not the endeavours of either party. It would be unjust if the windfall of that increase in value accrued wholly to the wife.

[118] Third, and perhaps a compounding point, the wife has had the benefit of living in the home rent free since the parties separated. Woodhouse J rejected the husband's claim for an occupation rent. The husband, on the other hand, has had to pay the cost of accommodating himself.

[119] Given that the wife has remained living in the home since separation, it is entirely appropriate that she have the opportunity to buy the husband out. But, subject to that, any orders which did not yield the parties an equal share of their most substantial asset would be unjust. We therefore uphold Woodhouse J's orders, though they now need updating. To achieve this we substitute the following orders:

(a) By ***7 February 2014*** the wife is to give the husband written notice if she wishes to purchase the husband's interest in the family home.

(b) By ***21 February 2014*** the parties are to agree on the price.

(c) Settlement is to be on ***28 March 2014***, or such other date as the parties agree.

(d) If the wife does not give notice in accordance with (a) or if notice is given but orders (b) or (c) are not complied with, then the property is to be sold on the open market on terms and conditions agreed between the parties or, failing agreement within three weeks of this order taking effect, upon terms and conditions fixed by the Family Court upon the application of either party.

(e) The net sale proceeds of the home are to be divided equally between the parties save that the wife is to be paid, from the husband's share, the adjusting sum of $286,070 ordered by the High Court (in [163], order 5).

Assets acquired post-separation

The issue

[120] The issue here is whether Woodhouse J erred in not holding that the parties' relationship property included:

(a) Jigsaw;

(b) racehorses acquired, and race winnings earned, by the husband post-separation; and

(c) tax losses accrued by the parties' businesses up to the time of their sale.

[121] We have, in [75] to [88] above, already dealt with Jigsaw, so we need say nothing more about that company.

Tax losses

[122] The Family Court considered there was difficulty and impracticality in determining "the status of tax losses and whether they are recoverable".[107] By "recoverable" we take Judge Burns to mean utilisable by either or both the parties. That was amongst the difficulties the Family Court factored in in deciding to adopt separation date values. The High Court did not agree with the Family Court "because the accountants agreed that neither party was in a position to utilise the [tax] losses".[108]

[123] The following are the points Ms McCartney put to us in her submissions for the wife:

(a) tax losses valued at $268,000 were relationship property at hearing date;[109]

(b) those tax losses could be used by the husband if the wife transferred her shareholdings to the husband;[110]

(c) the High Court held there was no difficulty in assessing the value of the tax losses and their recoverability (ie utility);[111]

(d) the Family Court was correct to hold that the value of the tax losses was intangible, speculative and arbitrary, in particular because it was dependant on sustainable profits;[112]

(e) the High Court made a factual error in holding that the accounting experts had agreed the value of the tax losses.[113]

107 Family Court judgment, above n 3, at [33](vii).
108 High Court judgment, above n 2, at [102].
109 Appellant's written submissions at [17] and appendix 2, which allocated all of those tax losses to the husband.
110 At [23]–[24].
111 At [35].
112 At [79](b), [83].
113 At [104](b).

[124] Those submissions advance – and not in the alternative – two conflicting propositions:

(a) The Family Court was right to regard valuing the tax losses as too difficult, and thus to factor in that difficulty in deciding to adopt separation date values.

(b) The value of the tax losses was $268,000 and should be allocated to the husband if hearing date values are adopted.

[125] The position is that the parties' accounting experts did agree that the tax losses accumulated by the parties' companies, while substantial, had no immediate commercial or personal value because neither party had any immediate ability to benefit from them.[114] However, on the eve of the hearing in the Family Court, Mr Lane changed his mind, producing a document headed "Video Unlimited Group: Potential value of tax losses".[115] Assuming available tax losses of $3,479,702, and assuming also that the husband maintained assessable income of at least $184,741 for 18.81 years, Mr Lane expressed the view that the net present value (NPV) of those tax losses to the husband was at least $268,483. That NPV valuation employed a discount rate of 20 per cent per annum to cover uncertainty and risk.

[126] That last minute valuation by Mr Lane was the subject of considerable evidence at the Family Court hearing. Mr Leonard adhered to his view that the tax losses had no value to the parties, and was challenged on this view at length in cross-examination by Ms McCartney. Mr Lane, in turn, was closely questioned by Mr Vickerman. Having considered this opposing evidence, we incline to the view that the Family Court Judge was correct to see difficulty in placing any accurate value on the tax losses. Quite apart from that, the husband had no interest in attempting to utilise the tax losses, and said so in his evidence in the Family Court. He said he saw them as a minefield.

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114 Second affidavit of John Leonard as to the Value of Relationship Property on Behalf of the [husband], sworn 11 August 2009, at [11] (CoA at III/661); third affidavit of Peter Denis Lane addressing accounting issues, sworn 7 September 2009, at [2] and the attached unsigned joint statement of accounting experts "they are agreed as to the … tax losses available to the companies having no immediate value" (CoA at III/734).

115 CoA at VI/1515.

[127] Toward the end of Mr Vickerman's cross-examination of Mr Lane there was this exchange:[116]

> Q Well my client's position Mr Lane is that he is very nervous about being able to use these tax losses, and without a warranty that they are usable, he simply doesn't want them.
>
> A Well?
>
> Q And are you giving that warranty?
>
> A I'm saying that if he goes to a competent tax advisor, he can get the warranty he requires.
>
> Q You are in effect saying then that a tax advisor will give that warranty, but you won't?
>
> A I don't pretend to be a tax advisor, but from my own experience I can see absolutely no difficulty. It's the job of an expert witness to provide warranties.[117]

[128] Although Mr Vickerman might have been out of order in asking Mr Lane to give a warranty to the husband that he could use the tax losses, it is significant that Mr Lane declined to do so. But what is even more significant is that he told the Court that he did not pretend to be a competent tax advisor. Mr Lane's valuation was thus outside his area of expertise and ought not to have been adduced in evidence.

[129] It must be accepted that Woodhouse J erred in holding that it was a matter of agreement between Messrs Lane and Leonard that the tax losses were of no value. At the Family Court hearing they were no longer in agreement. But the end result is that there was no error in the High Court placing no value on the tax losses as an item of relationship property.

Racehorses

[130] The Family Court accepted the husband's evidence that the parties had divided their racehorse interests shortly after separation and operated on the basis of separate interests thereafter.[118]

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116 NoE at 127/24–35.
117 We think there is a "not" missing from this last sentence.
118 Family Court judgment, above n 3, at [64].

[131] Racehorses do not feature in the High Court's judgment. Mr Vickerman is thus correct in submitting that racehorses cannot be a point on appeal to this Court, and that the wife is attempting to re-litigate the Family Court's finding by the side wind of arguing that the alleged value of the husband's racehorse interests makes a hearing date valuation unfair.

[132] Although we need go no further, we make two brief points:

(a) The wife's claim is that racehorses worth $112,000, and stakes and winnings worth $112,000, at hearing date were relationship property. In the course of submissions, Ms McCartney updated that claim to $163,530 for racehorses and $233,570 for stakes. Whichever claim is advanced, Ms McCartney readily accepted that it made no allowance for the costs of owning the horses and earning the stakes eg training fees, vet bills, float fees and so on.

(b) Although Ms McCartney accepted that, post-separation, the horse Maheer Dream had been sold, and the wife's $10,000 half share given to her, there was no allowance, not even a notional interest factor, for that $10,000 which Ms McCartney advised us had been spent on legal fees and retiring credit card debt.

[133] To summarise, the claim in respect of racehorses and racing stakes is not properly before this Court, and is anyway not a properly substantiated one.

Result

[134] The appeal is dismissed.

[135] In respect of the former family home, we make orders in terms of [119]. As requested by the parties, the costs of the appeal are reserved. If an order is sought a memorandum is to be filed no later than ***7 February 2014***, with any memorandum in reply to be filed by ***21 February 2014***.

Solicitors:
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