IN THE COURT OF APPEAL OF NEW ZEALAND

CA701/2013
CA711/2013
[2014] NZCA 117

BETWEEN	MICHAEL LEITH THOMPSON Appellant
AND	CHRISTINE HAMILTON THOMPSON First Respondent
AND	MICHAEL LEITH THOMPSON, DEAN ALAN ELLWOOD AND BRUCE KENNETH DELL AS TRUSTEES OF THE M L THOMPSON FAMILY TRUST Second Respondents

Hearing:	12 February 2014
Court:	Randerson, Stevens and Miller JJ
Counsel:	Lady D A Chambers QC for Appellant A E Hinton QC and S Ambler for First Respondent V T M Bruton and P Brown for Second Respondents (excused from appearance)
Judgment:	8 April 2014 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is allowed and the cross-appeal is dismissed.

B The decision of the Family Court is reinstated with the result that the payment of the sum of $8 million to the appellant is to be treated as the separate property of the appellant.

C The application for leave to adduce further evidence on appeal is dismissed.

D The stay of execution granted in the High Court is discharged.

E **All questions of costs in the High Court and the Family Court are to be determined in those Courts in the light of the judgment of this Court.**

F **Costs in this Court are reserved on the terms set out in [94].**

G **In relation to the application by the second respondents for costs, there will be no order for costs.**

REASONS OF THE COURT

(Given by Stevens J)

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An $8 million payment – separate or relationship property?

[1] Following the dissolution of their marriage in 2005, the appellant, Mr Thompson, and his wife Mrs Thompson, the first respondent, agreed on the division of their considerable assets. These included the family home, a holiday home, various chattels, and the proceeds of the sale of a business, Nutra-Life Health & Fitness (NZ) Ltd (Nutra-Life) and its holding company, Health Foods International Ltd (HFI), which had some 10 years earlier been transferred to the

M L Thompson Family Trust (the MLT Trust). The second respondents are the trustees of that Trust. The parties were unable to agree on their respective entitlement to a payment of $8 million, made to Mr Thompson by the purchasers of the Nutra-Life business under a restraint of trade covenant entered into in December 2006, over four years after the parties first separated in 2002.

[2] Mrs Thompson's claim to half of the $8 million payment was first determined in the Family Court. Judge Rogers concluded that payment was separate property under s 9(4)(a) of the Property (Relationships) Act 1976 (the Act), and there was no basis upon which it was just to treat any portion of the payment as relationship property.[1] Mrs Thompson appealed to the High Court.

[3] Andrews J agreed that the payment was the separate property of Mr Thompson.[2] The Judge then exercised her discretion under s 9(4) of the Act to treat part of the restraint of trade payment to Mr Thompson as relationship property.[3] She considered that there was some connection between the restraint of trade payment and efforts made during the marriage, however, the evidence before the Court was insufficient to allow her to apportion the payment between the amount pertaining to Mr Thompson's business performance during the relationship, and the amount compensating Mr Thompson's for the loss of his future earnings.[4] The Judge held, if the parties failed to reach agreement on apportionment, additional evidence would be required at a further hearing.

[4] Mr Thompson appeals this finding under s 9(4) on the basis that Andrews J erred in the exercise of her discretion, and wrongly allowed further evidence to be admitted. Mrs Thompson cross-appeals against the finding the restraint of trade payment was Mr Thompson's separate property.

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1 *CHT v MLT* [2013] NZFC 306 [Family Court judgment] at [37]. Mrs Thompson's claim under s 44C of the Act, for compensation for property disposed of to a trust, also failed. Although the disposition had the effect of defeating Mrs Thompson's rights, Judge Rogers did not consider a compensatory order was needed in the circumstances: at [42]–[49].

2 *Thompson v Thompson* [2013] NZHC 2001 [High Court judgment] at [82].

3 At [88]–[99]. The appeal by Mrs Thompson against the refusal of the Family Court Judge to make an award of compensation under s 44C was also dismissed, as Andrews J did not consider that any rights held by Mrs Thompson had been defeated: at [104]–[112]. This ground of cross-appeal was abandoned before hearing in this Court.

4 At [93].

[5] Immediately prior to the Family Court hearing, the parties had negotiated a series of consent orders in respect of the division of their assets.[5] These determined who would own which assets, and included an adjustment payment to be made to Mr Thompson. In August 2013, Andrews J granted a stay of enforcement of these consent orders, to expire 48 hours after the issue of her substantive judgment.[6] Following delivery of the substantive judgment, the Judge granted an extension of the stay of execution pending further order of the Court.[7]

[6] Mr Thompson appeals against these decisions granting a stay of execution on the basis that the High Court did not have jurisdiction to grant a stay or, in the alternative, the Judge was in error in granting the stay.

[7] The issues for determination on appeal are as follows:

(a) Is the $8 million payment relationship or separate property?

(b) Should any portion of that payment be treated as relationship property under s 9(4) of the Act?

(c) Should leave be granted to either the appellant or the first respondent to adduce further evidence on appeal?

(d) Should the stay of execution be discharged?

Some further background

[8] The background facts are not in dispute. The following summary draws on the outline in the High Court judgment. Mr and Mrs Thompson married in 1971. They had five children (now all adults) and had been married for nearly 31 years upon their separation in August 2002. Mr Thompson had many years experience working in the health foods/dietary supplements industry. In 1972 he was employed by Healtheries of New Zealand Ltd (Healtheries), later becoming a director. In 1984,

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5 *Thompson v Thompson* FC Manukau FAM-2006-092-1674, 12 October 2011.

6 *Thompson v Thompson* [2013] NZHC 1946 [First stay of execution] at [14].

7 *Thompson v Thompson* HC Auckland CIV-2013-404-2616, 30 August 2013 (Minute of Andrews J) [Second stay of execution].

he resigned and established Nutra-Life. A holding company for Nutra-Life and associated companies, HFI, was incorporated in 1989. Mr and Mrs Thompson sold their respective shareholdings in HFI to the MLT Trust in 1994.

[9] Having separated in August 2002, their marriage was dissolved on 25 July 2005. In December 2006, the trustees of the MLT Trust sold the business and assets of HFI and two other entities (the HFI Group) to companies associated with the Next Capital Health Ltd (Next). The purchase price was $72.3 million. The sale agreement was conditional upon, among other requirements, Mr Thompson entering into a restraint of trade covenant. Upon entering into the covenant on 21 December 2006, Mr Thompson received a payment of $8 million. It is common ground that the sale of HFI Group was at a very good price, and a significant factor in achieving that price was Mr Thompson's agreement to enter into the restraint of trade covenant.

[10] Because of its importance to the issues we have to decide, further detail on the sale of the HFI Group to Next is necessary. We now turn to examine the specific commercial agreements involved.

The agreement for sale and purchase

[11] The parties to the agreement for sale and purchase (the sale agreement) were HFI, Nutra-Life and Nutra-Life Health & Fitness (Aust) Pty Ltd as vendors (HFI/Nutra-Life), the trustees of the MLT Trust as covenantors, three Next-related companies as purchasers, and Next as guarantor. This agreement included the sale of the business and assets as a going concern. The sale involved assets in New Zealand and Australia as well as intellectual property (IP Assets).

[12] The purchase price was calculated under clause 3 of that agreement as follows:

> 3.1 **Purchase Price for Assets**
>
> The Purchase Price for the purchase of the Assets and the assumption of the Assumed Liabilities shall be the sum of $72,300,000, adjusted in accordance with clause 3.2, allocated as follows:

(a) for the Assets (other than the Goodwill and the IP Assets), for the IP Assets, and for Assumed Liabilities, the amounts agreed by the Vendors and the Purchaser prior to Completion and formally recorded in the Completion Statement (being comprised of the elements set out in clause five of the First Schedule); and

(b) for Goodwill, the balance of the Purchase Price.

[13] It is common ground that few adjustments were required under cl 3.2, resulting in a total purchase price very close to the stipulated sum of $72.3 million. This comprised an amount of approximately $22.9 million for the Assets and a total of $49.4 million for Goodwill and IP Assets. The term "Assets" was defined in cl 1.1 as:

> prepayments (to the extent specified in the Completion Statement), the Fixed Assets, the Inventories, the Book Debts, the IP Assets and the Goodwill (but excluding, for the avoidance of doubt, the Excluded Assets).

The Excluded Assets are not relevant for present purposes.

[14] The term Business was defined in 1.1 as meaning:

> … the businesses of the Vendors as of the Completion Date, including in respect of the research, development, manufacture, production, marketing, distribution or worldwide sale of nutritional products, supplements, herbal and sports nutrition products, and the licensing of the Trade Marks …

[15] Goodwill was defined as follows:

> "**Goodwill**" means the goodwill and trading reputation of the Business and includes (but without limitation) the benefit of and all the Vendors' rights and interest in:
>
> (a) the Business Contracts (other than the HFI-NLHF Licence);
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> (b) the Business Names and all logos used in the Business;
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> (c) the business licences and permits of the Business, including the Material Business Licences;
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> (d) the Business Records;
>
> (e) the Properties;
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> (f) all formulae, techniques, know-how, trade secrets, specifications, designs, copyright and patents owned or held by the Vendors for use

in the Business (including all other intellectual property rights in each of the foregoing);

(g) all customer and supplier relationships with the Business, including any operating lease but excluding any finance lease; and

(h) all software programmes, domain names and websites (including copyright in the material within those websites) owned or held by the Vendors relating to the Business,

but excluding, for the avoidance of doubt, the IP Assets.

[16] The completion conditions in clause 6.1 included some important obligations on Mr Thompson as follows:

6.1 **Conditions**

Completion, and the [parties'] obligations at Completion, are conditional upon the following:

(a) Michael Leith Thompson (or nominee) agreeing to contribute the lesser of $12,000,000 and the sum necessary to subscribe for 19.95% of the ordinary share capital in Next Capital Health Group Limited at Completion (on an as-converted, fully diluted, basis) in cleared and immediately available funds to subscribe for stapled units in Next Capital Health Group Limited immediately after Completion occurring under this Agreement on the terms agreed between the Michael Leith Thompson and Next Capital Health Group Limited on the Execution Date (as may be subsequently varied in writing by those persons);

(b) Michael Leith Thompson agreeing to a personal restraint of trade for the longer of five years from Completion and two years from the date on which he ceases to be a director of Next Capital Health Group Limited and its subsidiaries that is substantially similar to the restraint included in clause 11 and agreeing to provide services to allow the smooth transition of the sale of the Business, that are incidental to the Transaction and that will be for a temporary period commencing on Completion on the terms agreed between the Michael Leith Thompson and the Purchasers on the Execution Date (as may be subsequently varied in writing by those persons);

…

[17] Clause 11.2 contained a "non-compete" obligation providing:

… the Vendors and the Covenantors undertake that neither the Vendors, nor the Covenantors (solely in their capacities as trustees of the M. L. Thompson

Family Trust), nor any company that is a related company of any of them, will during the Restraint Period and in the Restraint Area:

(a) directly or indirectly carry on or be engaged in, whether solely or with another person and whether for himself or itself or as manager, employee, director or agent for any other person, or in any other capacity whatsoever, any Restricted Activity; or

(b) hold any interest in any company, corporation, partnership, joint venture, association or other business entity which directly or indirectly carries on or is engaged in, whether solely or with another person and whether as manager, employee, director or agent for another person, or in any other capacity whatsoever, any Restricted Activity in New Zealand, Australia.

The restraint of trade covenant

[18] The restraints on Mr Thompson were contained in a separate agreement, entered into at the same time. The introduction made the following acknowledgements:

C. MLT [Michael Leith Thompson] has knowledge, skill and experience that, if utilised by a competitor of Next, would be detrimental to the business to be acquired by Next under the Sale and Purchase Agreement.

D. Accordingly, Next has required MLT to enter into a restraint of trade for a period equal to the longer of five years after Completion and two years after he ceases to be a director of Next Capital Health Group Limited and its subsidiaries, and to provide certain incidental temporary, transition, services to Next.

…

[19] Under the "non-compete" provisions in the covenant, cl 1 provided:

1. NON-COMPETE

1.1 **Definitions**

For the purposes of this Section 1, "**Restricted Activity**" means any activity or business which is the same as or similar to the businesses of the Vendors as of the Completion Date, including in respect of the research, development, manufacture, production, marketing, distribution or worldwide sale of nutritional products, supplements, herbal and sports nutrition products, and the licensing of certain trade marks.

1.2 **No competition**

Subject to clause 1.5, MLT agrees that he will not, during the Restraint Period (as defined in clause 1.3) and in the Restraint Area (as defined in clause 1.4):

(a) directly or indirectly carry on or be engaged in, whether solely or with another person and whether for himself or as manager, employee, director or agent for any other person, or in any other capacity whatsoever, any Restricted Activity; or

(b) hold any interest in any company, corporation, partnership, joint venture, association or other business entity which directly or indirectly carries on or is engaged in, whether solely or with another person and whether as manager, employee, director or agent for another person, or in any other capacity whatsoever, any Restricted Activity.

[20] The "Restraint Period" was described in clause 1.3 as the greater of five years from the completion date under the sale agreement, or two years after Mr Thompson ceases to be a director of Next and its subsidiaries. Under cl 1.4 the Restraint Area is defined as:

The Restraint Area is each of the following areas separately:

(a) New Zealand, Australia, Middle East, the United Kingdom and Asia;

(b) New Zealand, Australia, Asia and the Middle East;

(c) New Zealand, Australia and the Middle East;

(d) New Zealand and Australia; and

(e) New Zealand.

[21] Mr Thompson formally acknowledged the reasonableness of the restraint in cl 1.8. The consideration agreed by the parties at cl 1.10 was $8 million, with Mr Thompson agreeing to provide the restraints already noted in cl 1.2.

[22] The transition services mentioned in preamble D (in addition to the restraints) were the subject of the following agreement:

2. PROVISION OF TRANSITION SERVICES

2.1 **Agreement by MLT to provide transition services**

MLT agrees to provide Next with transition services to allow the smooth transition of the sale of the businesses of the Vendors to Next under the Sale and Purchase Agreement (the "**Transition Services**").

The Transition Services will be incidental to the sale of such businesses and will be for a temporary period commencing on Completion.

2.2 **Scope of services**

MLT and Next will agree on the scope of the Transition Services from time to time (each acting reasonably).

2.3 **Compensation**

Next shall not be obliged to pay MLT any salary or other form of remuneration or compensation for the provision of the Transition Services.

The value of the business and assets

[23] The shares in Nutra-Life had been transferred to the MLT Trust in 1994 for $1.11 million. This amount was determined following a valuation of the fair market value carried out by chartered accountants, Deloitte.

[24] After Mr and Mrs Thompson separated in August 2002, Mr Thompson continued to work in the business of HFI/Nutra-Life in an executive director role. In May 2005 Hussey & Co, chartered accountants, on Mrs Thompson's instructions prepared an "indicative assessment" of the fair market value of the shares in HFI/Nutra-Life. This produced an "indicative value" of between $37.9 million and $43.6 million, with an approximate midpoint of $40.7 million. It is accepted that Hussey & Co did not have comprehensive access to the required financial information.

[25] In November 2006 the trustees of the MLT Trust asked Deloitte to advise on the reasonableness of the price and offer structure proposed by Next for its purchase of the business. Deloitte reported that the price of $72.3 million was "very favourable". The report stated:

> Given Next's stated position that Mike's ongoing transition role, given his close knowledge of both businesses, is critical in bringing the two companies together and maximising the synergies between them, we believe that the value Next would ascribe to the transaction without Mike's contractual and equity commitment would be materially reduced. In fact, it is possible (and indeed likely) that Next (or any other prospective buyer) would be not interested in Nutra-Life at all without these commitments.

[26] The trustees also obtained a report from Simmons Corporate Finance on the Next requirement of a restraint of trade on Mr Thompson. The report opined:

> In our view, if the Restraint of Trade was not entered into, a purchaser would likely price the Transaction at a lower value as it would consider the acquisition to be more risky due to the increased possibility of competition.

[27] The report also placed a fair market value on the restraint of trade covenant at between $6.2 and $9.6 million.

[28] Having obtained such professional advice, the trustees were of the view that the payment to Mr Thompson of $8 million for his restraint of trade was both reasonable and appropriate, and did not have an adverse impact on the sale price to be received by the trustees for the sale of the business. They recognised that the Simmons report had proceeded on the basis that a midpoint of $8 million was reasonable for a two year restraint of trade, whereas in fact Next had, following final negotiations, required Mr Thompson to agree to an increased period of restraint of the longer of five years or two years after he was no longer a director of Next. On this basis the trustees formally resolved to support the sale of the business to Next at $72.3 million.

[29] Following completion of the sale Mr Thompson acquired the 20 per cent shareholding in Next for $12 million. He also provided transition services, the detail of which is not dealt with in the evidence. He remained as an unpaid director of Next, now Vitaco, and has undertaken a full range of directorial responsibilities.

First issue – relationship or separate property?

Family Court decision

[30] Judge Rogers assessed the legal status of the restraint of trade covenant by reference to the proceeds of the sale of the HFI Group. The Judge noted that neither Mr nor Mrs Thompson were vendors. The Judge concluded that at the time of sale the HFI Group and its assets were neither relationship nor separate property under the Act, but rather trust property.[8]

[31] The Judge was not persuaded the restraint of trade payment became relationship property merely by virtue of its association with the sale of the business.[9] Any claim to the $8 million as relationship property pursuant to s 8(e) of the Act must fail because the payment was received some four years after the parties had ceased living together as husband and wife.[10] The Judge considered, accordingly, the payment fell squarely in the category of separate property as set out in s 9(4)(a) of the Act.

High Court judgment

[32] Andrews J considered that the restraint of trade covenant and the payment raised two separate considerations. First, the restraint of trade covenant was given to protect the value of the HFI/Nutra-Life business. Therefore it was necessary to focus on the value of restraining Mr Thompson from certain activities for a specified period.[11] The Judge considered that this could constitute an element of "business goodwill".

[33] The second consideration was that the covenant restrained Mr Thompson from using his personal skills and attributes. This necessitated a consideration of the benefits and burdens of his not using those skills and abilities. This element was "personal goodwill".[12] The Judge recognised the distinction between these elements

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8 Family Court judgment, above n 1, at [34].
9 At [33]–[36].
10 At [37].
11 High Court judgment, above n 2, at [64].
12 At [65].

of goodwill – business goodwill as attaching to a business, and personal goodwill as the attributes of an individual, and an unassignable asset.

[34] Andrews J held that it was consistent with authority that a payment for a restraint of trade covenant could be for both business and personal goodwill simultaneously.[13] An important factor in deciding whether a portion of the payment was attributable to each element was the effect of the covenant in protecting the business goodwill of HFI/Nutra-Life. As only business goodwill attaches to the business, the central question was whether Mr Thompson's entering into the covenant increased the value of the business to $72.3 million (the purchase price), or to $80.3 million (the purchase price and the payment to Mr Thompson).[14] The Judge found the evidence, including the valuations, was not determinative.[15] She held that, accordingly, Mrs Thompson had not established the payment for the restraint of trade covenant was for business goodwill. Rather, the entirety of the payment for business goodwill was incorporated in the total purchase price of $72.3 million. The payment under the covenant was therefore for Mr Thompson's personal goodwill.[16]

Submissions for Mrs Thompson on appeal

[35] Mrs Thompson cross-appealed against the finding that the payment was not relationship property. The submissions developed by Ms Hinton QC in support of that cross-appeal may be summarised thus:

(a) Mr and Mrs Thompson together built up the business, in which the goodwill was divided between their company, Nutra-Life, and one of its principals, Mr Thompson.

(b) When Mr and Mrs Thompson sold their shares in Nutra-Life to the MLT Trust it acquired the part of its goodwill which attached to Nutra-Life, but not that part of its goodwill associated with Mr Thompson.

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13 At [66].
14 High Court judgment, above n 2, at [67].
15 At [75].
16 At [82], surveying from [68]–[80].

(c) After separation, all aspects of the business were sold. When goodwill is sold it is normal for the purchaser to protect its acquisition through a restraint of trade.

(d) HFI/Nutra-Life sold the assets owned by the company (including the business goodwill) and Mr Thompson sold that component of the business goodwill that continued to be his asset. The $8 million purchase price he received was for his portion of the business goodwill. In exchange, Mr Thompson gave the restraint of trade.

[36] In oral argument Ms Hinton presented the following diagram representing what she submits is the correct characterisation of the property at the date of separation:

Business		
(A) Company Goodwill	**(B) Principal's Goodwill**	**(C) Personal Attributes ("Personal goodwill" is confusing)**
• Reputation of the business associated with names used by the business • Contacts used by business **$72 million (including also fixed assets)**	• Principal's contacts with business clientele (customers, suppliers etc) • Knowledge and experience of the business **$8 million**	• General skills • Expertise • Talent • Qualifications

[37] Ms Hinton relies on the decision of this Court in *Z v Z (No 1)* as authority for the proposition that the business goodwill that "resided in" Mr Thompson was an item of relationship property under s 8(e) of the Act.[17] She contends that the finding in *Z v Z (No 1)* of this Court, that a restraint of trade covenant "attaches to the business"[18] means the payment for that covenant necessarily constitutes a payment for business goodwill. Thus, the $8 million payment Mr Thompson received on the sale of his business goodwill (ie the payment for the restraint of trade covenant)

[17] *Z v Z (No 1)* [1989] 3 NZLR 413 (CA) as applied in *Brownie v Brownie* HC Christchurch AP217/97, 4 April 1998 at 11.

[18] At 415.

represents "proceeds of any disposition of relationship property" under s 8(1), even though it was paid to Mr Thompson. Therefore the High Court Judge was wrong to conclude that the $8 million payment was exclusively for Mr Thompson's personal goodwill.

Our analysis

[38] The starting point is that from 1994 all of the shares in HFI/Nutra-Life were owned by the trustees of the MLT Trust. There is no challenge to the value at which those shares were transferred to the trustees. It was for the trustees to deal with those assets as they saw fit. As we have seen,[19] when a sale of the shares to Next was proposed in 2006, the trustees took professional advice as to the price proposed by Next for purchase of the business of $72.3 million and the proposed sum of $8 million for the restraint of trade covenant. Having regard to the terms of the proposed agreement, the valuation advice and other relevant market information, the trustees formally resolved on 28 November 2006 as follows:[20]

> …
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> E. The Trustees are aware that restraints of trade commitments are required by Next from Michael Thompson and Mark Matthews as conditions precedent to the sale and also of the proposal by next to pay Michael Thompson the sum of $8m as consideration for his commitment to the restraint of trade. Having considered the circumstances, including valuation opinions as has been able to be obtained in the time available, the Trustees are satisfied that the arrangement with [Mr Thompson] is not unreasonable.
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> F. The Trustees are also aware that [Mr Thompson] was required to take a shareholding of up to 20% in the Next entity that will be the holding company of the businesses of Nutralife and Healtheries and are satisfied that the shareholding is available only to [Mr Thompson] and not to the trustees.
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> …

[39] There is no doubt the price of $72.3 million was determined on the basis of a willing but not anxious buyer and seller. The content of the sale agreement is critical in identifying what aspects of the HFI/Nutra-Life business were sold to Next. All New Zealand and Australian assets were included, and the definition of Assets in the

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[19] Described at [25]–[28] above.

[20] The reference to Mr Mark Matthews is to another senior executive of Nutra-Life, from whom Next had sought and obtained a restraint of trade.

sale agreement included IP Assets and Goodwill. The latter was defined to include the goodwill and trading reputation of the business.[21] The sale agreement says nothing about the concept of "principal's goodwill", a concept to which we will return shortly. Nor did it purport to transfer the personal knowledge and experience of Mr Thompson of the business. It could not do so as personal attributes are unassignable.[22] The goodwill transferred is all expressly goodwill which is attached to the business.[23]

[40] We agree with the observation of this Court in *Z v Z (No 2)* that in a matrimonial property context, concepts of property of different types should be given their conventional commercial meaning.[24] The International Financial Reporting Standards calculate goodwill as, simply, the difference between consideration transferred, and the assets acquired.[25] As we have outlined at [12] above, referring to cl 3.1 of the sale of HFI/Nutra-Life, the goodwill sold to Next was the entirety of the difference between the purchase price of $72.3 million and the "Assets" purchased, for $49.4 million. This is consistent with the standard approach to accounting for business goodwill. It tends to support the conclusion that the price paid by Next included all of the goodwill attached to the business, a point to which we will return later.

[41] It is true that the giving of a restraint of trade covenant on the sale of a business demonstrates the purchaser's recognition that such a covenant may be important to protect the business goodwill of the entity being acquired. This is achieved by contracting with one or more of the key individuals previously associated with the business in order to harness the personal goodwill of the covenantor(s) involved. As Thorp J observed in *Briggs v Briggs*, the granting of a restraint of trade should not undermine or exclude the possible significance of personal goodwill.[26] These can often coexist in a business. In some situations, such

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21 As per the definitions set out at [14]–[15] above.

22 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 279 and 282–283; *Briggs v Briggs* (1996) 14 FRNZ 404 (HC) at 411–412; *Brownie v Brownie*, above n 17, at 11.

23 As the definition at [15] above makes clear.

24 *Z v Z (No 2)*, above n 22, at 279.

25 Specifically, IFRS 3 *Business Combinations*, at [3.37] (as at 1 January 2013). Previously, International Accounting Standard 3 *Business Combinations*. These are adopted in New Zealand through the External Reporting Board, NZ IFRS 3 – *Business Combinations* (as at 1 April 2014).

26 *Briggs v Briggs*, above n 22, at 411–412.

as that in *Briggs*, the personal goodwill of the proprietor can have a significant effect on the value of the business.[27]

[42] However, the decision in *Briggs* does not assist us in determining the present issue. That is because there the Court's focus was on the valuation of a business that was being transferred into the sole ownership of the husband, who was to continue its operation. Accordingly, his personal goodwill would continue to be employed in the business. At the same time, there was significant business goodwill, in the form of client lists, business processes, a newsletter, and its association with a location, phone numbers and staff. The value of the business as a whole was calculated by capitalising its income.[28] Thorp J recognised that it was necessary to discount the resulting valuation to recognise that the husband's personal goodwill was not transferrable and so, not an asset of the business to which the wife might lay claim.

[43] Reference to accepted accounting practices is useful in support of this view. As a general proposition, goodwill is the future economic benefits arising from assets not capable of being individually identified and separately recognised.[29] It is the undifferentiated and aggregate residual value in the business purchased in a transaction. So in this case, goodwill represented the sale price of $72.3m less specified assets of $49.4m, the amount being specified in this case at cl 3.1 of the sale agreement as the "balance of the Purchase Price".[30] Accounting standards also have something to say about the characteristics of goodwill as an asset. Notably, SSAP 22, as one example, states that the main characteristic of goodwill is that it is incapable of being realised separately from the business as a whole.[31]

[44] Two points follow. First, one would ordinarily expect that in an arm's length transaction the purchaser would capture all of the goodwill that is capable of being realised with the business. Whether it did so in any given transaction is a question of

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27 At 412.

28 At 412–413.

29 IFRS 3 – *Business Combinations*, above n 25, at Appendix A; see also NZ IFRS 3, above n 25.

30 At [12] above.

31 Statement of Standard Accounting Practice 22 *Related Party Disclosures.* This is the international framework. It is adopted in New Zealand by way of New Zealand International Accounting Standard 24 *Related Party Disclosures (NZ IAS 24),* implemented through the External Reporting Board (issued pursuant to Financial Reporting Act 1993, s 24(1)(a)) (as at 28 February 2014).

fact. Second, the concept of business goodwill does not preclude the possibility that the business owner will possess personal goodwill, which is capable of being realised separately from the business as a whole, perhaps through a restraint of trade.

[45] It follows, then, that we disagree with Ms Hinton's contention that this proposed category of "principal's goodwill" ought to be recognised and characterised as relationship property. There is no sound analytical basis for characterising Mr Thompson's personal contacts and industry experience as being in a separate or different class from either business goodwill or personal attributes: they are the one or the other. If the former, they were sold as part of the business to Next. If the latter, they are not assignable as an asset of the business, and so have no value to it. Either way they do not comprise relationship property in this case.

[46] The restraint given by Mr Thompson plainly affected, in a positive way, the price Next was prepared to pay for the assets and goodwill of the business. The price itself is not in issue, which is the sole question upon which *Briggs* bears. Nor could it be, given that Mrs Thompson accepts the price was "very good" and its merits had been thoroughly assessed by the trustees with the benefit of independent professional advice. The $72.3 million secured the purchaser's right to the assets and the goodwill of the business, and not any part of Mr Thompson's personal goodwill.

[47] Any element of personal goodwill residing in Mr Thompson was not assigned to the company in the sale agreement. Rather, Mr Thompson's ability to establish and operate a business in the same field was constrained by the covenant in favour of Next for the period of the restraint. The sum of $8 million paid by Next as consideration for the covenant reflects the loss of Mr Thompson's future business opportunities along with the other burdensome commercial obligations he undertook as part of the arrangement. These included the transition services to be provided to Next as well as payment in advance for his services as a director.[32] It is also relevant that Mr Thompson was required to commit $12 million of his own resources to acquire a 20 per cent shareholding in Next.

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[32] As defined in cl 2 of the covenant set out at [22] above. This is particularly so in the absence of any requirement by Next to pay Mr Thompson remuneration in the future.

[48] Ms Hinton submits, as noted above at [35]–[36] that the company goodwill transferred under the sale agreement included an element of "principal's goodwill". This, she suggests, is the element of business goodwill retained by Mr Thompson personally. We do not accept this proposition. No part of the definition of goodwill in the sale agreement could be viewed as Next contracting to acquire Mr Thompson's own personal business contacts with people within the health foods sector generally, or his extensive knowledge and experience of the industry.[33] These aspects, more accurately described as personal attributes (to use Ms Hinton's term), were the subject of the separate restraint of trade covenant.

[49] Ms Hinton placed considerable emphasis on a dictum of Richardson J in *Z v Z (No 1)* where he said:[34]

> In the hypothetical market the willing but not anxious seller must be taken to seek the maximum price obtainable from what is available for sale. Protection against the hypothetical seller's competition through a covenant in restraint of trade is an element of goodwill increasing the price a hypothetical buyer would otherwise be prepared to pay. *As an element in the goodwill the covenant attaches to the business and cannot properly be characterised as a purely personal attribute*.

[50] We do not regard this passage as determinative in the present circumstances. First it needs to be seen in context. *Z v Z (No 1)* concerned the value to be ascribed to the husband's legal practice on separation. The husband was to continue working in the practice and so it was necessary to apply, for valuation purposes, the test of the value at which a willing but not anxious vendor would sell and a willing but not anxious purchaser would buy.[35] Richardson J emphasised that this was essentially a practical question, not to be overlaid by philosophical niceties.[36] The case therefore involved a hypothetical market valuation (as the opening words of the passage relied upon makes clear).

[51] Whether any aspect of the (personal) goodwill secured by a restraint of trade covenant ought to "attach" to the business for relationship property purposes will

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33 As outlined at [38]–[40] above.
34 *Z v Z (No 1)*, above n 17, at 415 (emphasis added).
35 At 414.
36 At 415, referring *Hatrick v Commissioner of Inland Revenue* [1963] NZLR 641 (CA) at 661.

depend on the facts.[37] Here we are not engaged in a hypothetical market valuation. The Court has before it an actual commercial agreement, involving parties (including the trustees) negotiating on an arm's length basis. The negotiated price for the "Assets" and "Goodwill" of the HFI/Nutra-Life business, as defined between the parties, was determined on that basis, as was the consideration to be paid to Mr Thompson under the restraint covenant. Both elements of the total transaction were reviewed, and independently assessed, by the trustees. There is no suggestion in the evidence that the price for the covenant sum of $8 million contained any element of business goodwill. Moreover, in this case the giving of the covenant by Mr Thompson had the effect of increasing the overall price of the business to $72.3 million. In those circumstances we see no basis upon which any element of what was captured by the covenant could be said to "attach" to the business.

[52] This analysis may be tested by considering what Mr Thompson was being paid for under the covenant. We are satisfied that he was not receiving payment for any aspect of the business, goodwill or otherwise. Rather, the payment was to secure his agreement not to use his acknowledged personal skills and industry experience in the future in any way prejudicial to the interests of Next. In other words it was to protect Next's investment in acquiring the business, including its goodwill in the enterprise. The evidence of Mr Lockhart, a witness from Next, confirms that Next was not prepared to pay $72.3 million for the business unless Mr Thompson gave a comprehensive restraint of trade and was contractually bound to contribute a substantial part of his equity into the purchasing entity. The covenant was seen as a crucial prerequisite to the transaction, particularly given that Next already owned Healtheries, another company in the same industry.

[53] Not only did the covenant commit Mr Thompson to contributing equity, but it also required him to serve on the board of directors of Next in which he has been described as having played a "key role". The other restriction on Mr Thompson was the use of his entrepreneurial flair not only in New Zealand, but also in other parts of the world as described at [20] above. Thus the covenant comprehensively prevented Mr Thompson from competing with Next or from soliciting any employees of

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[37] As noted in *Brownie v Brownie*, above n 17, at 411.

HFI/Nutra-Life. The evidence of the witness from Next is confirmed by the acknowledgements in the introduction to the covenant as earlier described.[38]

[54] For these foregoing reasons, we are satisfied that the present case is distinguishable from *Z v Z (No 1)*. First the case involved an actual, completed sale rather than a hypothetical valuation. Second, the shares in HFI/Nutra-Life were owned by the trustees. The trustees satisfied themselves as to whether the sale agreement represented a proper return on their investment. Third, the restrictions on Mr Thompson are of an entirely different category from those discussed in *Z v Z (No 1)*. If that case had involved a real as opposed to a hypothetical transaction, the restraint would have been limited to the clients of the legal practice being sold. The husband would likely have been free to exercise his legal skills at another firm acting for different clients. Here, the restraints on Mr Thompson were as extensive as could be imagined.

[55] Any concern regarding the risk that an element of business goodwill might be reflected, and potentially concealed, in a payment for a restraint of trade covenant is mitigated by the Court's ability to identify and set aside a sham transaction. Mrs Thompson has made no allegation that the sale of HFI/Nutra-Life for $72.3 million and the payment of $8 million for the covenant constituted a sham. We accept it will always be important for a court to carefully scrutinise the real nature and substance of the transaction where the sale of a business is concerned.

[56] In the present case, Ms Hinton accepted that Mr Thompson had acted in good faith and that the giving of the covenant and the payment of the $8 million constituted a genuine transaction. This distinguishes the case from the facts in *Brownie v Brownie* where the Court determined that the payment of a $250,000 retainer to Mr Brownie on the sale of a business should be treated as matrimonial property.[39] The Family Court decision appealed against had found that retainer received could not be viewed in isolation from the obligations upon both the parties

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38 Set out at [18]–[19] above.

39 *Brownie v Brownie*, above n 17, at 4.

to ensure performance of the guarantees and restraints pursuant to the sale of their portion of business shares. Applying *Z v Z (No 1)*, the Court concluded:[40]

> … to the extent to which [the retainer] is not in the nature of genuine remuneration for services to be rendered, [it] can be treated as representing the proceeds of a disposition of those shares.

The High Court did not see fit, therefore, to disturb the finding of the Family Court.

[57] There is a further factor running in favour of Mr Thompson. Despite the fact that it was Mr Thompson who was required to agree to significant restrictions on his ability to use his personal skills and work in the industry in which he was experienced, Mrs Thompson herself benefited from the restraint given by Mr Thompson by virtue of the enhanced price of $72.3 million for the business. As a countervailing consideration, she made no future contribution and was not required to restrict her activities after December 2006 in any way, by means of a restraint of trade covenant.[41]

[58] In summary, we are satisfied that the sum of $72.3 million for the business represented a sum considerably higher than would have been paid for the business, had the covenant not been given by Mr Thompson. The $8 million that Mr Thompson was paid was for the restriction on the use of his personal attributes or personal goodwill in the future and the other obligations he assumed. There was no element of "principal's goodwill" to be taken into account. Nor was there any element of business goodwill involved in the payment to Mr Thompson under the covenant. This is not a situation where value that ought properly to have attached to the business was wrongly transferred to Mr Thompson.

[59] It follows that the payment of $8 million was Mr Thompson's own separate property. Accordingly there is no basis for a conclusion that part of the business goodwill could be said to reside in Mr Thompson and so be available as an item of relationship property under s 8(e) of the Act. Further, there was no reason to conclude that the sale of the business goodwill through payment for the restraint of

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40 At 11.

41 As compared with the situation in *Brownie* where Mrs Brownie was required to personally guarantee the performance by Mr Brownie of his obligations under the covenant and retainer.

trade covenant represented the proceeds of any disposition of relationship property under s 8(l) of the Act.

[60] In reaching this conclusion we uphold the conclusions to similar effect in both the Family Court and the High Court.

[61] The cross-appeal by Mrs Thompson is dismissed.

Second issue – relationship property under s 9(4)?

Family Court decision

[62] As already noted, Judge Rogers concluded that there was no basis for exercising the broad discretion in s 9(4) of the Act to treat any part of the separate property of Mr Thompson as relationship property.[42] While the payment involved could arguably have been trust property, it had not been established that the interests of justice required the Judge to treat the $8 million as relationship property.

High Court judgment

[63] Andrews J accepted that Mr Thompson's personal skills and abilities were not property under s 2 of the Act.[43] However, she accepted, factually, that the division of roles in the relationship substantially helped Mr Thompson to develop these skills to such an extent that Next was prepared to pay Mr Thompson $8 million for his covenant. Referring to a decision of Fisher J in *Cossey v Bach*,[44] Andrews J noted that the exercise of the discretion under s 9(4) normally occurs where there is evidence that the property in question is directly or indirectly traceable to assets which had constituted matrimonial property during a marriage. What was required was "some connection between the existence of the separate property and the earlier marriage partnership". Andrews J then said:[45]

> [93] In my view such a connection between the existence of the [restraint of trade] payment and the efforts during the marriage exists in this case. By Mrs Thompson looking after the children and the home, this enabled

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42 Family Court judgment, above n 1, at [41].
43 High Court judgment, above n 2, at [92].
44 *Cossey v Bach* [1993] 3 NZLR 612 (HC) at 625.
45 Footnotes omitted.

> Mr Thompson to develop his skills and abilities to an extent he could not otherwise have done. He was able to build up HFI/Nutra-Life into an extremely valuable company due to this division in roles. It is for these developed skills and abilities, or for them not to be used, as well as Mr Thompson's demonstrated performance, that Mr Thompson was paid the $8 million RoT payment. These skills, abilities, and performance are causally linked to the efforts in the relationship. Therefore there is some connection between the RoT payment and the relationship.
>
> [94] The mere presence of a connection between the RoT payment and the relationship does not, however, automatically mean that it is just to treat the whole $8 million RoT payment as relationship property under s 9(4). In addition to determining whether there is a connection between the RoT payment and the relationship, it is also necessary to determine the character of the RoT payment. …
>
> [95] If the RoT payment was purely forward looking, as in *Roberts v Roberts* where the redundancy payment was paid to compensate future disruption to Mr Roberts' employment, then I find that it would not be just to treat the payments as relationship property under s 9(4). However, if some of the RoT payment was not solely to compensate future disruption to Mr Thompson's employment, and instead was based on rewarding Mr Thompson for his performance as director of HFI/Nutra-Life during the relationship, then in relation to this portion of the payment, I find that it would be just to treat this portion as relationship property. This is the same distinction as was made in *Brownie v Brownie* (HC), between compensation for future earnings or services rendered, and the payment in respect of skills and attributes acquired during the marriage.

[64] The Judge then observed that some of the value ascribed to the restraint was "based on Mr Thompson's past performance.[46] Therefore she concluded that "this portion is not forward-looking and is not compensation for future disruption. Instead, this payment is for business performance that is firmly connected, even made possible by the relationship." Andrews J said further:[47]

> [98] I find that it would be unjust not to treat the portion attributable to Mr Thompson's business performance during the relationship as relationship property. This is in line with the obiter comment in *Brownie v Brownie* (HC), where the High Court considered that even if the portion of the retainer attributable to the restraint of trade was separate property, it would be just to treat it as relationship property. I find that it is just to treat this portion of the RoT payment attributable to the past performance – the portion not acting as compensation for future disruption – as relationship property.

[65] Andrews J did not consider on the evidence before the Court that it was possible to fix the amount of the payment for the covenant which is attributable solely to compensating Mr Thompson for loss of future earnings. The Judge thought

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46 At [96].

47 Footnote omitted.

that such an exercise would require further evidence and a further hearing should the parties not be able to reach agreement.[48]

Submissions of the parties

[66] For Mr Thompson, Lady Chambers QC submits that authority requires the separate property to be traceable to relationship property.[49] Here, the business was trust property. The personal skills of Mr Thompson cannot be property. Therefore there is no property interest traceable to relationship property. Hence the finding of Andrews J, that Mrs Thompson had an interest in the forward looking payment to Mr Thompson, is contrary to this authority. Lady Chambers relied on *Z v Z (No 2)*, where the Court found the increase in earning capacity gained by a spouse during the marriage, from acquiring degrees and qualifications, and improving career skills and expertise, could not constitute relationship property.[50] As Mrs Thompson had no entitlement to any share of these skills before the end of the marriage, there is no identifiable property interest which it would now be just to treat as relationship property.

[67] In reply, Ms Hinton submits that there is no support for limiting the application of s 9(4). Ms Hinton emphasises the broad discretion conferred on the Court to treat property as relationship property when it is just in the circumstances.

[68] Ms Hinton submits that the restraint of trade payment was in consideration for Mr Thompson's ownership of the remaining business goodwill or "principal's goodwill". This is property in which Mrs Thompson can have an interest. It did not indirectly give Mrs Thompson an interest in the personal skills of Mr Thompson, as suggested by Lady Chambers. Ms Hinton submits that while the payment was post-separation, the property for which it was paid was the goodwill of the business, which was in existence before separation.

Our analysis

[69] Section 9(4) of the Act provides:

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48 High Court judgment, above n 2, at [99].
49 *Cossey v Bach*, above n 44, at 625.
50 *Z v Z (No 2)*, above n 22, at 280–283.

9 Separate property defined

…

(4) The following property is separate property, unless the court considers that it is just in the circumstances to treat the property or any part of the property as relationship property:

(a) all property acquired by either spouse or partner while they are not living together as husband and wife or as civil union partners or as de facto partners:

…

[70] The interpretation of s 9(4) is informed by reference to certain of the purposes and principles of the Act:

1M Purpose of this Act

The purpose of this Act is—

…

(b) to recognise the equal contribution of both spouses to the marriage partnership, of civil union partners to the civil union, and of de facto partners to the de facto relationship partnership:

(c) to provide a just division of the relationship property between the spouses or partners when their relationship ends …

1N Principles

The following principles are to guide the achievement of the purpose of this Act:

(a) the principle that men and women have equal status, and their equality should be maintained and enhanced:

(b) the principle that all forms of contribution to the marriage partnership, civil union, or de facto relationship partnership are treated as equal:

(c) the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners arising from their marriage, civil union or de facto relationship or from the ending of their marriage, civil union or de facto relationship:

…

[71] The starting point for the ascertainment of property resulting from a marriage partnership is the date of separation.[51] Property acquired after that date is usually considered the separate property of the acquiring spouse.

[72] Circumstances may however warrant an exception to this general principle. The Act recognises the need to make provision for the period, whether months or years, which normally elapses between separation and final determination of property rights. Section 9(4) is one statutory means of doing so. The legislative policy behind this provision (and the other provisions which complement it)[52] is to ensure each party gets their rightful share in the net assets of the relationship, together with the benefit or burden of any post-separation changes in the form of, or value inherent in, the assets themselves. Additionally, and conversely, the legislative policy is to ensure that post-separation assets, liabilities and changes in value that have been due to the post-separation conduct of, or changes in, fortunes of one party alone, are not shared.[53] This principle is of course subject to, for example, any compensation that might be awarded for deliberate action or inaction of one spouse or partner under ss 18B and 18C of the Act.[54]

[73] The key factor in deciding whether to attribute to one or both parties, the benefit or burden of changes in assets and liabilities after separation is the presence or absence of a causal link with the relationship, and the assets and liabilities that link has produced. This is consistent with the objectives listed in the long title: to recognise the equal contribution of the husband, wife or partners to the relationship; to provide for a just division of property when the relationship ends; and to give the parties a clean break from the relationship.[55]

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51 Property (Relationships) Act 1976, s 2F.

52 Including, for example, ss 9(3), 9A(1), (2) and (3), 9(5) and 17.

53 Robert Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [16.3].

54 See *GFM v JAM* [2013] NZCA 660 at [35]; Application for leave to appeal to the Supreme Court was recently declined in *GFM v JAM* [2014] NZSC 32. The principle is subject also to the discretion in s 2G to value property at a date other than the date of separation to ensure justice between the parties, discussed by this Court in *GFM v JAM*. Further relevant mechanisms in achieving this principle under the Act include the classification of pre-separation assets and debts under s 20E, the sharing thereof according to ss 17 and 17A, the classification of increases in value according to s 9A, and the classification of the increases in debts according to s 20D.

55 *Z v Z (No 2)*, above n 22, at 264.

[74] There are strong policy reasons behind this clear demarcation between changes inherent in the relationship property, which is shared, and changes brought about by the actions of one of the parties after separation, which is not generally shared. Failure to observe this demarcation would not give proper recognition to the clean break principle. As *Fisher on Matrimonial and Relationship Property* observes, each party would continue to have a stake in the conduct and fortunes of his or her ex-partner, despite the intended termination of the relationship. It could also needlessly promote the:[56]

> … malicious post-separation consumption of relationship property, or increase in deductible debts (since in each case the burden would be shared with the innocent party), while discouraging the energetic party from acquiring or improving assets and repaying debts after separation (since the benefit of these exertions would be unfairly shared with the other party).

[75] Accordingly assets acquired after separation will usually be separate property, unless their acquisition was directly or indirectly due to past or present relationship property. Careful recognition must be given to the post-separation contributions of the parties when this inquiry is undertaken. The discretion involved in that assessment has been consistently emphasised to be broad.[57]

[76] We agree with the observation of Andrews J that Mr Thompson's skills and abilities are not property under s 2 of the Act.[58] We also agree with the Judge's comment that "[b]y Mrs Thompson looking after the children and a home, this enabled Mr Thompson to develop his skills and abilities to an extent he could not otherwise have done".[59]

[77] Where we part company with the Judge is as to the role the payment for the restrictive covenant had in relation to those skills. We do not consider that this payment was compensation for the time in which these skills were developed. Rather, we consider the skills, abilities and performance of Mr Thompson are what would have been used by him, following a clean break, to have enabled him in the future to earn a living and embark on new and different entrepreneurial ventures. He

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56 At [16.3].

57 *Morris v Morris* (1981) 5 MPC 99 (CA) at 100; *Brown v Brown* [1982] 1 NZLR 513 (CA) at 515; *M v B* [2006] 3 NZLR 660 (CA) at [179] per William Young J.

58 High Court judgment, above n 2, at [92].

59 At [93], set out at [63] above.

was precluded from doing that for a time, at least in the health food/dietary supplements industry, by the restraint required by Next. That was a forward-looking restriction.

[78] We consider a better analogy to be that Mr Thompson's skill set (developed as it no doubt was while he was managing director of NFI/Nutra-Life) was, at the end of the marriage, the equivalent of a spouse's enhanced earning capacity. This Court in *Z v Z (No 2)* has firmly rejected the notion that enhanced earning capacity is matrimonial property.[60] One of the reasons for that conclusion was that the fruits of this earning capacity are often reflected in the tangible wealth accumulated during the marriage. Mrs Thompson was able to, and did, share in that wealth, at least for present purposes through the sale of HFI/Nutra-Life. But when enhanced earning capacity is not reflected in tangible assets, it counts for nothing.[61] Neither in our view can it be called in aid to justify the exercise of the discretion in s 9(4) to treat it as relationship property.

[79] The second limb of the reasoning of Andrews J was to examine the character of the payment. On this aspect the Judge found the payment was "not purely forward-looking". Rather, it was in part rewarding Mr Thompson for his performance as a director of HFI/Nutra-Life.[62]

[80] We disagree. We have fully analysed the character of the payment when addressing the first issue. We do not repeat that analysis set out at [51]–[58] above. But we do repeat that, in addition to those considerations, no part of the sale agreement with Next or the restraint covenant was challenged as a sham. It was a negotiated arm's length transaction in which a critical presence was the trustees as owners of the HFI/Nutra-Life shares. The genuineness of the transaction is not in question.

[81] At the end of the day, the $8 million was what a hard-nosed commercial buyer was prepared to pay to Mr Thompson in order to protect the goodwill of $49.4 million paid for the business and to acquire Mr Thompson's services for a

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60 *Z v Z (No 2)*, above n 22, at 280.
61 At 281.
62 High Court judgment, above n 2, at [95], set out at [63] above.

period in the future. It follows that we see no principled basis upon which it would be just to treat any part of the $8 million separate property as relationship property. The particular circumstances of these transactions do not support such a conclusion.

[82] For the above reasons, the appeal by Mr Thompson is allowed. The decision of the Family Court is reinstated with the result that the payment of the sum of $8 million to Mr Thompson under the restraint of trade covenant is to be treated as separate property.

Third issue – further evidence on appeal?

[83] We can quickly dispose of this question. It was part of Mr Thompson's appeal that, even if this Court were to accept it was just to treat a portion of the restraint payment as relationship property, the failure by Mrs Thompson to produce sufficient evidence on this point in the courts below meant her claim could not succeed. In essence, this was a challenge to the conclusion of Andrews J in the High Court that she did not consider it possible to fix the amount of the payment for the restraint covenant which is "attributable solely to compensating Mr Thompson for his loss of future earnings".[63] Without hearing argument on the point, the Judge was of the view that this was an exercise that would require further evidence and possibly a further hearing should the parties not be able to reach agreement.

[84] It is unnecessary for us to address this point further since Mrs Thompson was unable to identify any evidence that she might have wished to advance on the s 9(4) issue and Mr Thompson did not seek to adduce further evidence on appeal.

[85] It follows that the application for leave to adduce further evidence on appeal is dismissed.

Fourth issue – discharge of stay of execution?

[86] We have already referred to the two decisions of Andrews J on the stay of execution given on 2 August 2013 and on 30 August 2013.[64]

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63 High Court judgment, above n 2, at [99].

64 First stay of execution, above n 6; Second stay of execution, above n 7.

[87] This issue was argued by Lady Chambers on an alternative basis. First, the High Court did not have jurisdiction to grant a stay of the consent orders (agreed on 12 October 2011, and dated 24 April 2013), or to extend any stay of those orders. Alternatively, the High Court was in error in granting the stay, and the extension of the stay, after finding:[65]

(a) Mr Thompson had the ability to make a payment to Mrs Thompson if he were required to do so as a result of the appeal; and

(b) Mrs Thompson could pay or make arrangements to pay, the sum required under the consent orders.

[88] The lack of jurisdiction aspect turns on the question of whether the consent orders made in the Family Court were "an order appealed against" in terms of r 20.10 of the High Court Rules. In the end we do not need to decide this question as we consider that the question of the grant or otherwise of a stay is clearly resolved on the facts.

[89] In resisting any discharge of the orders for stay, Ms Ambler argues for Mrs Thompson that no error had been shown in the decisions to grant the stay by the High Court. The Judge had exercised her discretion appropriately after undertaking a careful balancing exercise of all the relevant matters.

[90] We are satisfied that there is no basis upon which a stay should have been issued. The findings of the Judge in the first stay judgment, that Mr Thompson had the ability to make a payment to Mrs Thompson if he were required to do so as a result of the appeal, and that Mrs Thompson could make arrangements to pay the sum required under the consent orders, are decisive. In addition, we now have reached the point where the appeal has been heard and determined. Even if the case were to proceed to the Supreme Court, we are entirely satisfied that Mr Thompson would, if Mrs Thompson were successful in the Supreme Court, have the ability to repay her following any successful appeal.

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[65] First stay of execution, above n 6, at [12].

[91] The consent orders have been in place since prior to the hearing in the Family Court. Mr Thompson has succeeded both in this Court and the Family Court. We see no good reason why he should be barred from the benefit of his judgment or the fruits of the consent orders.

Result and costs

[92] The appeal is allowed and the cross-appeal is dismissed. The stay of execution granted in the High Court is discharged.

[93] All questions of costs in the High Court and the Family Court are to be determined in those Courts in the light of the judgment of this Court.

[94] So far as costs in this Court are concerned, the parties invited us to reserve costs on the basis that if agreement could not be reached, then the parties were to file memoranda and costs could be determined on the papers. Accordingly, if agreement cannot be reached, the appellant is to file a memorandum of no more than three pages setting out the basis upon which costs are sought. Such memorandum is to be filed by no later than 16 May 2014. The first respondent is to file a memorandum in reply of no more than three pages by no later than 30 May 2014.

[95] Counsel for the second respondents signalled an interest in the question of costs. Submissions were filed on behalf of the second respondents and Mrs Thompson.

[96] The trustees were properly joined as second respondents since they were parties to the High Court litigation and they held all the relevant assets. It is true that Mrs Thompson abandoned the claim against the trustees at a late stage by which time their submissions had been prepared. However, taking a broad view of this matter and the size of the trust funds which have been divided equally between the parties, we consider that the fair outcome is an order that Mr and Mrs Thompson equally bear the costs of the trustees' participation in the court proceedings. We understand that this has already occurred so no order is necessary.

Solicitors:
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