LEAVE GRANTED PURSUANT TO S 11B(3) OF THE FAMILY COURT ACT 1980 THAT THIS JUDGMENT MAY BE PUBLISHED USING THE PARTIES' FULL NAMES.

IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TAURANGA MOANA ROHE

CIV-2017-463-51
CIV-2017-463-30
CIV-2017-463-31
[2019] NZHC 3389

BETWEEN	KATHARINE ELIZABETH PRESTON and Others Plaintiffs
AND	GRANT LEE PRESTON and Others Defendants

Hearing: 1 to 8 July 2019

Counsel: IM Hutcheson for plaintiffs
JM McCleary for defendants

Judgment: 18 December 2019

Reissued: 11 February 2020

JUDGMENT OF FITZGERALD J

This judgment was delivered by me on 18 December 2019 at 4 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors: Jespersen & Associates, Auckland (G Jespersen)
Buddle Bentley McCleary Ltd, Whakatane

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Introduction

[1] Grant and Katharine Preston were married in December 2010, but separated in September 2015.[1] The end of their marriage has resulted in three sets of legal proceedings:

(a) The first, the "051" proceeding, in which Mr Preston seeks orders under the Property (Relationships) Act 1976 (the Act) defining what is relationship property and dividing that property between himself and Mrs Preston.[2] In turn, Mrs Preston makes a number of applications pursuant to the Act, and the Family Proceedings Act 1980 (the FPA), for adjustments to the relationship property pool and its division.

(b) The second, the "031" proceeding, in which Mrs Preston claims an equitable interest in both a home owned by Mr Preston's family trust, and the shares in his drilling business, Eastern Bay Thrusting Ltd (EBTL) , also (largely) owned by the trust.

(c) The third, referred to as the "030" proceeding, regarding the couple's holiday property in Pauanui, which is jointly owned by their respective family trusts. Mrs Preston's trust says Mr Preston's trust is in breach of an agreement to sell the property.

[2] As will be evident from the length of this judgment, the three sets of proceedings give rise to a plethora of factual and legal issues. But, key issues for determination are as follows:

(a) The point at which the parties commenced a de facto relationship.[3]

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1 I will refer to the parties as Mr Preston and Mrs Preston, including in the period before they were married.

2 The 051 proceedings were transferred to the High Court from the Family Court in 2017.

3 Pursuant to s 2B of the Act, if a marriage is immediately preceded by a de facto relationship, that de facto relationship must be treated as if it were part of the marriage. The point at which the de facto relationship commenced in this case is relevant because it informs the exact division of some relationship property items, and the availability of certain of Mrs Preston's claims.

(b) The extent of Mrs Preston's contributions to the home owned by Mr Preston's family trust.

(c) The extent of Mrs Preston's contributions to EBTL.

(d) Whether the economic disparity between Mr and Mrs Preston's respective positions at the end of the marriage was caused by the division of responsibilities within the marriage (and if so, to what extent).

(e) Whether a deed pursuant to which Mr Preston, as settlor of his family trust, made Mrs Preston a discretionary beneficiary of that trust, is an "ante-nuptial settlement" for the purposes of s 182 of the FPA.

(f) Various legal issues arising out of Mrs Preston's trust's attempt to buy out Mr Preston's trust's interest in the Pauanui property once their marriage had ended.

[3] In the next section of this judgment, I provide a general overview of the factual background, before turning to the claims themselves.

Factual background

The parties' respective backgrounds and their meeting in 2007

[4] Mrs Preston has two children, a son born in 1993 and a daughter born in April 2006. Prior to meeting Mr Preston, she was in a de facto relationship with her then partner. She and her partner jointly owned a property they had bought in Ohope in late 2005.

[5] Prior to meeting Mr Preston, Mrs Preston had worked as a manager and photograph developer at a photography shop in Rotorua, at cafés in Rotorua and as a duty manager at a garden centre/gift shop/café. In 2000, she started studying part-time at Massey University, in a BA in education (though she did not continue those studies past 2001). From 2005 to 2007, she imported craft products from Indonesia. When

she met Mr Preston in 2007, she was working at the Ohope Charter Club, a sports bar and family bistro at Ohope Beach.

[6] Mr Preston has two children with his first wife – a daughter who was born in 1990, and a son born 1991. That marriage ended in 2001.

[7] At all relevant times, Mr Preston has owned and operated a contracting business which carries out directional drilling, pipe jacking, trenching and underground thrusting of cables and pipes. Mr Preston purchased the business in 1990 and incorporated it into EBTL in 1995.

[8] A local accounting firm, FisherQuay Ltd (Fisher Accountants) has for many years provided accounting and related services to Mr Preston and EBTL. In 2004, they advised him it would be sensible to settle a family trust into which his major assets could be transferred, for the ultimate benefit of his two children. In accordance with this advice, in August 2004, Mr Preston settled the Grant Preston Family Trust (GPFT). Its trustees are Mr Preston and Fisher Partners Trustees Ltd (Fisher Partners), Fisher Accountants' trust company. The final beneficiaries of the trust are Mr Preston's two children.

[9] In 2005, GPFT purchased a residential section in The Fairway, Whakatane. Mr Preston (through GPFT) commenced building a residential home on the section in or about mid-2006. I will refer to the property and resulting home as "The Fairway".

[10] Mr and Mrs Preston met in early to mid-2007. As noted, at that time, Mrs Preston was working at the Ohope Charter Club, which Mr Preston frequented as a patron. Mrs Preston was still in a relationship with her former partner at the time.

[11] There was some debate as to whether the first several months of Mr and Mrs Preston's relationship was an affair, i.e. before Mrs Preston separated from her then partner. Mrs Preston accepts there was a very brief period of overlap, but that once it was clear an intimate relationship was developing with Mr Preston, she broke it off with her partner. Mr Preston, on the other hand, says the affair continued until

October 2007, when Mrs Preston "went back" to her partner, but recommenced her relationship with Mr Preston a few weeks later.[4]

[12] In the event, I have not found it necessary to determine the precise nature of the parties' relationship in the period up to October 2007. Certainly, from that point, she and Mr Preston were in a relationship which, by all accounts, was reasonably intense, though still somewhat "secretive". Mrs Preston broadly accepted this, stating that, at least during these early stages, she did not want her new relationship to be "in the face" of her former partner.

2007 to October 2009

[13] The Fairway property received its Code of Compliance Certificate in around mid-2007, and Mr Preston, together with his son and his son's then girlfriend (now wife) lived there from about from late-2007. Mrs Preston was at that time living in rental accommodation in Ohope. She and Mr Preston nevertheless spent a fair bit of time with each other, including staying at each other's homes.

[14] In January 2008, Mr Preston bought Mrs Preston two diamond rings. Mrs Preston said that while she wore the rings on her right hand, Mr Preston had said at the time words to the effect that "you should have them on the other hand" (indicating plans of marriage). Mr Preston did not recall saying anything to this effect, but agreed "you don't buy rings for nothing". He nevertheless characterised the relationship as still "very secretive and fickle".

[15] In January or February 2008, Mrs Preston was looking to buy a new car, and an EBTL employee was selling a BMW. Mrs Preston ended up buying the car, initially with a cheque from EBTL, but later reimbursing EBTL. The BMW was later traded in for a Mazda, which was purchased by EBTL.[5]

[16] The pair continued to spend much time with each other, and photographs were produced in evidence showing them, for example, with Mrs Preston's young daughter, and enjoying time in early 2008 with Mr Preston's parents.

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4 Mrs Preston does not dispute she briefly returned to her partner at this time.
5 Following their separation, Mrs Preston has retained the Mazda vehicle.

[17] Mrs Preston said that from the beginning of 2008, when Mr Preston was living at The Fairway, the property was "just a shell" and "together we turned it into a home". Mr Preston firmly denies this, and says Mrs Preston significantly exaggerates her contributions to The Fairway at that time. I return to this particular issue later in this judgment.

[18] In July 2008, Mrs Preston moved from Ohope to Rotorua, where her son was attending high school. While she was in Rotorua, she worked for a company managing bookings for holiday lets and cleaning and maintaining the properties. She purchased a house-lot of chattels from the departing tenants of the property she rented. Mrs Preston remained in Rotorua for more than a year, until October 2009, when she moved to live with Mr Preston at The Fairway.

[19] Mrs Preston says Mr Preston spent a large proportion of his time with her in Rotorua. Mr Preston disputes this. He accepts however, that towards the end of Mrs Preston's time in Rotorua, he was spending increasing time with her there, which he estimated to be around four days per week. This is consistent with evidence given by a former employee of EBTL, called by Mrs Preston, who said that for at least a month or two, Mr Preston was spending the majority of a week in Rotorua.

[20] In July 2008, the couple bought a Haines Hunter boat ("Playin Hookie"). This was parked from time to time at Mrs Preston's Rotorua property.

[21] At some point in 2008, Mrs Preston decided she wished to pick up studying again, and in particular, psychology. She accordingly started an extra-mural BA course at Massey University, with a major in psychology and a minor in education. For the first few years, Mrs Preston undertook two papers per year, though that increased to several papers per year from 2011. I interpolate to note that, having obtained her BA with a major in psychology in 2013, Mrs Preston then went on to enrol in the Honours programme, and later in 2015, the Doctorate programme.

[22] Turning back to the chronology, in November 2008, and on the advice of his accountants, Mr Preston transferred 99 of the 100 shares he then owned in EBTL to

the GPFT. There is a deed of debt recording GPFT owes a sum of $160,000 to Mr Preston for the transfer of the 99 shares.[6]

[23] Mr and Mrs Preston became engaged on 12 September 2009.

[24] In October 2009, Mrs Preston moved to The Fairway, bringing with her her young daughter. The furniture from her Rotorua rental property went into storage at The Fairway.

October 2009 to October 2014

[25] When she moved to The Fairway, Mrs Preston took over various office administration and account duties in relation to EBTL (taking over from the former person employed by EBTL in that role). At this time, EBTL's office was run from a spare bedroom at The Fairway home. Mrs Preston was paid $15 per hour for 20 hours per week, commensurate with the wage and duties of the person she replaced.

[26] There is considerable dispute as to whether Mrs Preston's role at EBTL extended much, if at all, beyond traditional "office and account administration". Mr Preston says her duties were wages, coding the company income and expenses, GST, PAYE, etc.

[27] Mrs Preston instead describes a more "general management role", and that she was fully "entrenched" in EBTL's business, including regularly working "in the field" with Mr Preston and his team. Mrs Preston says her weekly wage (of around $253 net) was in no way intended to cover all the work she did for EBTL. I return to this particular topic later in this judgment.

[28] At some point prior to 2010, Mrs Preston had received approximately $107,000 from her relationship property settlement with her former partner. In early 2010, Mr Preston sought advice from Fisher Accountants on various options for Mrs Preston to invest the funds; Mr Preston said he was concerned she did not "fritter her money away". By way of example, a Fisher Accountants file note of a discussion with

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[6] It is accepted by Mrs Preston that this is Mr Preston's separate property, as is the one share in EBTL he retained.

Mr Preston on 15 January 2010 noted that Mr Preston had advised that Mrs Preston had $120,000 cash, and that he sought advice on Mrs Preston "investing" the funds. The file note records options of Mrs Preston incorporating a trust and investing in The Fairway, or purchasing a commercial building, or purchasing the building from which EBTL was then operating and EBTL paying her trust rent. The file note recorded that Mrs Preston's father was a lawyer, that "a trust for her is the best option and [her father] will obviously create this". Later entries on the file note show that there were some follow up discussions with Mr Preston at various points during the year (which again discussed Mrs Preston establishing a trust and possible investments via that trust), but that ultimately no progress was made.

[29] In February 2010, Mr Preston, as settlor of the GPFT, executed a deed which added the following class of persons as a discretionary beneficiary of GPFT:

> Any wife or widow for the time being of the settlor.
>
> Any person who is living or has lived with the settlor of the opposite sex on a domestic basis in such manner as if they were legally married to each other, although they may not be so legally married.

[30] Mr Preston said this was again on the advice of his accountants, and given Mrs Preston was benefitting from GPFT funds, she ought to be formally accommodated as a discretionary beneficiary. Mr Fisher, of Fisher Accountants, explained that there were tax benefits in adding Mrs Preston as a discretionary beneficiary, and given she was benefiting from trust funds (in terms of day to day living expenses and the like), it would have been inappropriate for her, as a third party to the trust, to effectively "owe" those funds to the trust. By making Mrs Preston a discretionary beneficiary, the use of trust funds for her benefit could be accommodated as a distribution to her.

[31] Mr and Mrs Preston were married on 4 December 2010.

[32] In January 2011, Mr Preston's son and his girlfriend moved to work in Australia. At around this time, Mrs Preston gave her stepson $5,000 for a new car. She subsequently provided a similar sum to Mr Preston's daughter, so that the position was "even" as between the two children.

[33] Mrs Preston also highlights that she advanced funds to EBTL from time to time over the course of the parties' relationship and marriage. She describes a number of advances from 2011 – 2015 totalling almost $80,000, in relation to the purchase of a new digger, and to assist with wage/tax payments that the company was otherwise unable to pay.

[34] Mr Preston agrees that the funds were advanced to EBTL, though disputes that in Mrs Preston doing so, she somehow "saved" the company from financial strife. He says EBTL was at all times profitable (which is corroborated by the accounting evidence, evidence from EBTL's bankers, and accepted by Mrs Preston), though from time to time, and like many businesses, it had cash-flow issues. Mr Preston says it was simply convenient for Mrs Preston to advance the funds, rather than obtain temporary finance from the bank.

[35] It is not in dispute that all funds Mrs Preston advanced to EBTL were repaid to her.

[36] In November 2011, Mrs Preston, who had started a savings account for a family holiday, funded a family trip to Fiji from that account, costing approximately $8,500.

[37] In December 2012, Mr and Mrs Preston purchased a holiday property at Pauanui. Mrs Preston contributed $60,000 and Mr Preston $10,000. Mrs Preston's contribution came from EBTL, in effect "repaying" her the balance of the funds she had advanced to it.

[38] As noted earlier, in April 2013, Mrs Preston gained her Bachelor of Arts, with Honours, in Psychology.

October 2014 to separation

[39] In October 2014, Mr Preston's daughter from his previous marriage returned to live with Mr and Mrs Preston at The Fairway. She took over much of the EBTL office work that Mrs Preston had carried out to that point. Her return evidently caused some friction with Mrs Preston, which intensified in 2015.

[40] In March 2015, Mrs Preston was accepted into the Doctoral clinical psychology programme at Massey University. This involved a week away from home at the beginning of the course, and thereafter being away each Friday for most of 2015.

[41] It is not in dispute that drawings and other funds from EBTL assisted with the costs associated with Mrs Preston's studies, including travel and accommodation as her studies intensified. She did not require a student loan. In additional to support from EBTL, Mrs Preston also secured scholarships of approximately $15,000. Mr Preston estimates that approximately $30,000 of drawings from EBTL contributed to Mrs Preston's studies overall. Mr Fisher said the assistance ran to "many thousands of dollars", but I was not directed to any accounting or similar information to precisely quantify the figure.

[42] Given ongoing friction between Mrs Preston and Mr Preston's daughter, in May 2015, his daughter went to live with her mother. By this time, however, Mr and Mrs Preston's marriage was also under significant strain.

[43] Up until May 2015, the EBTL office work had been carried out from the home office at The Fairway. From May 2015, the EBTL office was shifted to EBTL's new and larger premises at Te Tahi Street in Whakatane. Mrs Preston says that from this point, she was effectively "squashed out" of running or handling EBTL's office administration or accounts.

[44] In June 2015, Mrs Preston's wage payments increased from 20 hours at $15 per week to 30 hours at $20 per week. Mrs Preston accepts that this came after she had ceased carrying out EBTL's office administration and accounts. But she said the increase had been discussed with Mr Preston and was designed to assist with the increasing costs of travel and accommodation associated with her studies.

[45] Mr and Mrs Preston's relationship continued to deteriorate, and they ultimately separated on 27 September 2015. Mrs Preston left The Fairway, taking with her a (limited) number of possessions. Mr Preston complains that after they separated, Mrs Preston continued to use his credit card and personal eftpos card, incurring costs

of $3,421.12 and $744.55 respectively (including for a number of flights to and from Wellington).[7]

[46] Mrs Preston initially stayed in a rental property, before later living at the Pauanui property. Not long after the separation, Mrs Preston returned to The Fairway and, with the assistance of some friends, removed further belongings from the home. The remainder of what Mr Preston considered to be Mrs Preston's property was later moved out of the house and stored in the garage at The Fairway. Mr Preston said that he asked Mrs Preston on a number of occasions to come and collect it, but she did not do so. It was later moved to and stored at EBTL, from where it was ultimately collected by Mrs Preston.

[47] Mrs Preston also says Mr Preston attended the Pauanui property on more than one occasion after separation to remove chattels. Mr Preston does not deny this, but says that the items he removed were his separate property or (in the case of a hot tub), owned by EBTL.

[48] Various lists and schedules of chattels Mrs Preston took from The Fairway when she first left, that she uplifted on her subsequent visit with friends, and later collected from EBTL's Te Tahi Street yard were produced in evidence, as well as a list of chattels from the Pauanui property which were removed by Mr Preston. Mrs Preston characterises the position as her being effectively "turned out" of The Fairway home with nothing. Mr Preston denies this, stating that she had the various property and chattels she took with her, those which she later collected with her friends, a car, access to her separate bank accounts, her university qualifications, (almost) exclusive possession of the Pauanui property and her separate financial investment in that property.

Subsequent events

[49] Mrs Preston continued her studies in the following years, and commenced her full-time thesis research in 2017. At the time of the hearing before me, she continues in her Doctoral programme, and had just completed her psychology internship.

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7 He accordingly seeks an adjustment in this amount in his favour, pursuant to s 18B of the Act.

[50] Mr Preston continues operating EBTL, in which both his daughter and his son are now heavily involved. In more recent times, Mr Preston has stepped back from the business somewhat, and says his daughter now does much of the work he used to do. His daughter-in-law has taken over the office administration work. This comprises 16 hours per week, and at least in 2019, at a rate of $23 per hour.

[51] In light of the couple's ongoing failure to resolve their relationship property disputes, Mr Preston commenced the 051 proceedings in the Family Court in September 2016. As noted, they were transferred to this Court (as a result of Mrs Preston commencing the 030 and 031 proceedings in the High Court) in 2017.

[52] In December 2017, and by consent, an interim distribution was made to Mrs Preston by way of transferring to her the Playin' Hookie boat plus trailer, at an agreed value of $52,000 plus GST (if any). There is some dispute as to whether the boat was damaged at the time was delivered to her.[8]

[53] Finally by way of background, I note that at no time during the relationship or marriage, did Mr and Mrs Preston have a joint family type bank account. Each maintained their own separate accounts. Mrs Preston did have, however, access to Mr Preston's eftpos and credit cards, including for a short time after separation. Mrs Preston used these cards from time to time during the relationship to purchase family related items. Mr Preston did not have access to Mrs Preston's bank accounts. Mrs Preston says that she also used her accounts to fund family expenditure.

Approach to claims

[54] With that broad background in mind, I now turn to consider the various claims.

[55] In his closing submissions, Mr Hutcheson confirmed that the focus of Mrs Preston's claims in the 051 proceedings are those made under ss 182 of the FPA (orders as to settled property) and s 15 of the Act (economic disparity). Mrs Preston's claims pursuant to ss 9A, 15A and 17 of the Act (sustaining or increasing the value of

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8 See [138] below.

a spouse's separate property) are pursued, but are accepted as being relatively de minimis. This is because they only attach to Mr Preston's one share in EBTL.[9]

[56] I have found it most helpful to deal first with the 051 proceedings, and determine the relationship property pool and Mrs Preston's applications under the Act for adjustments to it. Having done so, I then address her s 182 claim.[10] I then consider whether, given the outcome of the 051 proceedings, any further or different relief ought to follow under the 031 proceedings, being Mrs Preston's equitable claim to a half share in each of The Fairway and EBTL. I lastly consider the 030 proceedings, concerning the Pauanui property.

[57] Before doing so, however:

(a) I make some broad observations on the evidence, and particularly Mr and Mrs Preston's competing evidence, given its obvious relevance as to the nature and content of their relationship.

(b) I then determine the commencement of Mr and Mrs Preston's de facto relationship, given its relevance to aspects of the 051 and 031 proceedings.

(c) I then discuss and make findings on two key factual issues relevant to both the 051 and 031 proceedings, namely Mrs Preston's contributions to The Fairway and to EBTL.

Observations on the evidence

[58] Having carefully considered all the evidence in this case, I am of the view that Mrs Preston was prone to exaggerating at times, both in her written (affidavit)

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9 Claims pursuant to ss 44 and 44C of the Act were advanced, but abandoned.

10 While jurisdiction for such claims ordinarily lies with the Family Court, such claims can be made in the context of proceedings which have been transferred to the High Court, as in this case: *Marshall v Bourneville* [2014] NZHC 2334 at [11]. And while the s 182 claim was strictly made after the proceedings had been transferred to this Court, I do not consider that alters the jurisdictional position. The alternative would have been for Mrs Preston to have commenced that claim in the Family Court, and then applied to have it transferred to this Court in conjunction with the 051 proceedings, as it inevitably would have been.

evidence and oral evidence at the hearing. For example, and as discussed later in this judgment, Mrs Preston's characterisation of the extent of external work she did at The Fairway was in my view significantly overstated. On closer analysis, it ultimately comprised of assisting with some landscaping, staining some fencing, general maintenance work and assisting Mr Preston to put together a kitset garden shed. That is not to suggest these were not valuable or helpful contributions, but the contributions in my view fell far short of how Mrs Preston had sought to characterise them in her evidence.

[59] A similar theme emerged in Mrs Preston's evidence of her involvement in EBTL. I discuss this in more detail below. However, and by way of example, her evidence-in-chief was to the effect that she had been onsite on numerous occasions and regularly assisting on jobs "in the field" for EBTL. This was not, however, borne out by evidence from other workers at EBTL, or by employees of other companies which worked closely with EBTL, or Mr Preston's evidence. And in cross-examination, when pressed for details on her involvement in the field, Mrs Preston accepted it was perhaps limited to around 30 occasions over 10 sites, over the six year period in question. A former EBTL employee called by Mrs Preston estimated around 10 full days over the relevant period.

[60] Mrs Preston also referred to her injecting cash into and supporting EBTL during "immensely tough times" (including on a couple of occasions, to pay wages).

[61] But the evidence demonstrated a business that was profitable at all times, and that as a result, Mr Preston, and later Mrs Preston, enjoyed a relatively good standard of living (The Fairway being purchased and built; the purchase of the boat; an overseas family holiday; the purchase of the beach property; and in addition to wages, drawings by Mr Preston of some $700,000 from EBTL over the period in question). As noted earlier, from time to time, EBTL experienced cash flow difficulties, such that it was convenient to utilise Mrs Preston's money rather than to seek further accommodation from the bank. But objectively, the evidence did not suggest "immensely tough times" for EBTL, or indeed that it experienced any real financial difficulties. A Mr van der Merwe, a senior business manager from ANZ Bank, was EBTL's contact at ANZ and was subpoenaed to give evidence. He noted that EBTL's turnover increased by a

considerable amount from the 2011 to 2014 period (because of the Government's roll out of fibre to schools, which made up a significant portion of EBTL's work), that the business was profitable (albeit "a bit undercapitalised"), and "we would have looked at any facility that you are referring to, on a number of occasions we did extend additional facilities in that region" (referring to a query as to whether ANZ would have likely agreed to an extension of an overdraft facility by some $50,000). He also noted that organising temporary finance to cover wage shortfalls "was a normal business practice we do".

[62] I was also concerned that Mrs Preston had worked with a witness called on her behalf (the former EBTL employee), to jointly write his brief of evidence. The brief was framed in terms that clearly were not the witness's own words, and included comments such as Mrs Preston preparing a "comprehensive report" for WorkSafe, when the witness did not in fact recall having seen the report.

[63] In cross-examination, Mrs Preston also found it difficult to respond directly to a question, and would often provide a long and detailed answer which, I am bound to observe, appeared at times to be seeking to avoid engaging squarely with the question.

[64] In contrast, Mr Preston impressed me as a particularly "straight-up" witness, who answered questions directly and made concessions where appropriate. I found a lot of his evidence had the "ring of truth" about it, and it was broadly consistent with the available contemporaneous materials.

[65] I emphasise that I have not made these observations to be critical of Mrs Preston, or to suggest she sought to be untruthful in her evidence. The process of bringing these proceedings and giving evidence in them will not have been an easy or happy experience for anyone. But the sharp conflict in Mr and Mrs Preston's evidence has required me to assess that evidence and form a view on those aspects I do and do not accept. In doing so, it is necessary and appropriate that I explain why, in broad terms, I have generally preferred Mr Preston's evidence over that of Mrs Preston.

[66] I turn now to the question of the commencement of the de facto relationship.

The start of the de facto relationship

Introduction

[67] Mrs Preston suggests from October 2007, she and Mr Preston were in a "serious" relationship and would spend most of their time together. She says this is evidenced by the fact that in January 2008, Mr Preston gifted her diamond rings as a sign of his commitment to her. From January 2008, Mrs Preston says she and Mr Preston would often stay the night at the other's property. This continued, she says, despite her moving to Rotorua in mid-2008 while Mr Preston remained in Whakatane. She therefore says they were in a de facto relationship from January 2008.

[68] Mr Preston disputes the relationship quickly became serious – as noted earlier, he says that for the first six months of their relationship, Mrs Preston remained involved with her previous de facto partner. He says that while Mrs Preston was living in Rotorua, they "continued to see each other" but did not live together.

[69] As noted above, in October 2009 (being one month after they became engaged), Mrs Preston moved into The Fairway. Mr Preston says it is at that time their de facto relationship commenced.

Approach

[70] To be in a de facto relationship, a couple must be both over 18, and "living together as a couple". Although sharing a home together is an important indicator that two people are living together as a couple, it is not determinative.[11] Section 2D(2) provides the following (non-exhaustive) checklist of potentially relevant factors:

> (2) In determining whether 2 persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:
>
> (a) the duration of the relationship:
>
> (b) the nature and extent of common residence:
>
> (c) whether or not a sexual relationship exists:

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11 *Scragg v Scott* (2006) 25 FRNZ 942 at [40].

(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties:

(e) the ownership, use, and acquisition of property:

(f) the degree of mutual commitment to a shared life:

(g) the care and support of children:

(h) the performance of household duties:

(i) the reputation and public aspects of the relationship.

[71] Overall, the determination as to whether a de facto relationship exists requires a "common sense" approach and assessment of "multiple pieces of circumstantial evidence".[12]

Discussion

[72] The assessment in this case is somewhat difficult given the parties did not physically live together until October 2009. But noting that living together is not determinative, I am of the view that the de facto relationship commenced somewhat earlier than Mr Preston suggests, but considerably later than suggested by Mrs Preston, and commenced in or around the first quarter of 2009, so in or around March 2009. While the assessment is somewhat impressionistic, I have adopted this start point for the following reasons:

(a) The parties were at that time living in separate towns, but towards the latter part of Mrs Preston's time in Rotorua, Mr Preston accepted that he spent a good part of each week there (as noted, this is consistent with the evidence of the former supervisor at EBTL).

(b) By that point, the parties had been together for nearly two years, and were clearly spending increasing time with each other.

(c) Mr Preston was starting to make financial contributions to Mrs Preston and her family (having paid for repairs to Mrs Preston's son's vehicle in July 2009).

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[12] At [64].

(d) Approximately six months later, the couple got engaged, clearly exhibiting by that point a mutual commitment to a shared life. I am of the view that this commitment did not arise "suddenly" upon the engagement, but would have been present somewhat before this.

[73] Mr Preston's suggestion that the de facto relationship only commenced when Mrs Preston moved to The Fairway places too much emphasis, in my view, on the couple sharing a home, at least in the context of the particular facts of this case. Mrs Preston was only residing in Rotorua to be with her son while he attended high school there.

[74] I have not, however, adopted January 2008 as suggested by Mrs Preston. This is because:

(a) At that time, the couple had only been together for three months after Mrs Preston had returned for a short time to her former partner.

(b) For the first year or so of their relationship, the couple maintained separate homes, albeit spending increasing time with each other. This would be common of many relationships not considered a de facto relationship.

(c) There was no suggestion of any joint bank accounts or intermingling of finances during these early stages of the relationship.

(d) The purchase of gifts by Mr Preston for Mrs Preston's young daughter (a teddy bear) and spending time with Mr Preston's parents are also features of many relationships that would not legally be considered a de facto relationship.

(e) I accept Mr Preston's evidence that certainly for the first several months of their relationship, it was somewhat "secretive", given even on Mrs Preston's account, she wanted it to be kept out of view of her former partner.

(f) As noted, I found Mrs Preston's evidence as to her contributions to The Fairway property in the 2008 period, including external landscaping and other similar work, to be exaggerated; in other words, there was not a joint effort in 2008 to turn The Fairway "from a shell into a home".

(g) I do not find the purchase of the diamond rings to be overly significant. They of course demonstrate Mr Preston's significant affection for and wish to provide gifts to Mrs Preston, but this would be consistent with an intense but relatively new relationship.

[75] Mr Hutcheson placed some emphasis on the Fisher Accountants' file note of 15 January 2010 which recorded Mr Preston as having stated that "his partner of three years" was moving in and they were to be married a "few weeks later". Mr Hutcheson says the reference to Mr Preston's partner "of three years" takes the seriousness of the relationship "way back" from October 2009. I do not place substantial weight on this however. The author of the note did not give evidence, and the aspect of it on which Mr Hutcheson relies was factually incorrect in two material respects in any event; Mrs Preston had already moved into The Fairway some months earlier; and the couple were not married "in a few weeks", but rather some 12 months later.[13]

Mrs Preston's contributions to The Fairway

[76] There is no doubt that by the end of 2007, The Fairway was largely complete, including substantial landscaping having been carried out by contractors (in the sum of $15,000). Mrs Preston agreed that when she first visited the property (which can be assumed to be some time in 2007), it was largely complete, save for curtains. By the end of 2007, Mr Preston, and his son and his partner, had been living in the property for some months, and it was nearly two more years before Mrs Preston moved to live there.

[77] I accept Mrs Preston assisted with some plantings at the back of the property, staining a fence and helping assemble a kit set garden shed. It also seems that once

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[13] This aspect of the file note was also not put to Mr Preston in cross-examination.

she moved there, she assisted with some extra fencing, to ensure a pet dog stayed on the property. Once she resided at The Fairway from October 2009, she carried out most of the housework type duties (though accepted that of course others assisted from time to time), and engaged in various maintenance activities (such as washing down the house and spraying and cleaning the driveway).

[78] But in the context of the Preston's overall relationship, including just under five years of marriage, I consider these sorts of contributions to be relatively minor, and certainly not unusual in the context of someone living in a home with others (whether as a wife or otherwise).

Mrs Preston's contributions to EBTL

[79] As noted, Mrs Preston said that her duties went far beyond that of the "office administrator", and she was effectively in a general management role at EBTL. She said that she ran the EBTL office, and put in place comprehensive office management systems and processes which greatly enhanced the running of EBTL's business. Mrs Preston says she:

(a) assisted on-site on numerous occasions in times of need (including undertaking manual labour-type tasks);

(b) addressed health and safety issues and put in place processes within the office;

(c) implemented a time management system;

(d) introduced a system for monitoring and recording of staff training;

(e) prepared comprehensive reports for EBTL as required for WorkSafe (in relation to a workplace accident), and Eastern Bay of Plenty Council (concerning a spill), which were significant matters for EBTL. She said the reports meant a position was reached where no further action was taken against EBTL;

(f) liaised with ANZ and the accountants in relation to financial matters;

(g) assisted with pricing of jobs; and

(h) supported Mr Preston generally in his role as sole director/general manager of EBTL.

[80] Conversely, and as I have already noted, Mr Preston's position is that these matters are significantly exaggerated. I have referred at [59] above to Mrs Preston's acceptance in cross-examination of the likely extent of her work on site (around 30 days across 10 sites, over about a six-year period), and similar evidence given by EBTL's former supervisor (around 10 full days). Further, an employee from one of EBTL's major clients who was frequently on site, said he recalled seeing Mrs Preston on site only once.

[81] I am accordingly satisfied that Mrs Preston has exaggerated the extent of her work "out in the field" for EBTL.

[82] I fully accept Mrs Preston generally organised the EBTL office very well, and put in place some more tailored processes and systems for, for example, collecting workers' time on particular jobs. There is no doubt Mrs Preston is a hard worker and is very organised. She herself said that her nickname with the EBTL employees was "paper work". But I am not persuaded these systems and processes extended materially, if at all, beyond office administration duties, or added any real or substantial value to EBTL's business.

[83] Having reviewed all the evidence, including the relevant documentary materials, the following extracts from Mr Preston's evidence-in-chief represent, in my view, a more accurate picture of Mrs Preston's contributions:

> I am probably guilty, as with many tradesmen, of being a bit untidy and I accept that from time to time there probably are invoices floating around in my ute that should be in the office. Nothing has changed. I was like this before KJ, with her, and after her. All of my office administrators have taken it upon themselves to look in my ute from time to time if they are missing an invoice. It is no big deal.

> KJ's evidence that she created filing systems, had proper filing methods, purchased whiteboards, etc is correct but added no value to the business. These adjustments that KJ made within the office were for her benefit, not mine. There were filing systems but they didn't suit her. She is a very organised person and this is the type of environment that she likes to operate in. She likes order. In the early days she was very enthusiastic and would come to me and ask something along the lines of *"Hey, I'd like to get a whiteboard and write the jobs on it that we are working on."* It was of no consequence to me but if it made her feel better then I was simply happy to go along with these suggestions from time to time. All office administrators I have employed have their own habits and style. Louise Bonne was very organised. Linda was less so. Therase is very organised.
>
> KJ's allegation that she was taught how to price jobs is a complete fabrication. Job pricing is the most important part of the whole operation. I have an extensive and in-depth knowledge of the various locations around the Bay of Plenty region. I understand the soil types and the existing underground infrastructure and other obstructions that we might find when we are drilling. My son Rhys, who works in the field, also has a lot of experience in this now too. The nature of the earth environment in which we are drilling has a huge impact on the pricing for the job. If you get this wrong, you lose money. While KJ may have heard me talk about this type of thing from time to time, under no circumstances would she ever have been involved in actual pricing.
>
> KJ's allegation that she created time sheets for the workers needs to be put into perspective. The timesheets are a pre-printed pad that we purchased from Paper Plus. We give it to the boys at work and they fill them out. It is not rocket science. My recollection in respect of timesheets is that it was actually my idea but KJ went down to Paper Plus and bought them.

[84] There is no doubt Mrs Preston prepared a report to be submitted to the Eastern Bay of Plenty Council for its investigation of an environmental spill. Mr Preston accepts that Mrs Preston did that work, and that it extended somewhat beyond "office duties". Mr Preston gave evidence that he had obtained a quote to prepare a similar report in an amount of $4,375, and that he would be quite happy to compensate Mrs Preston for this. Mrs Preston also referred to a report in the context of a WorkSafe investigation after an accident with a digger at one site. While Mrs Preston characterised this as a joint piece of work together with Mr Preston's daughter, I am satisfied that at least the first stages of the work were largely handled by Mr Preston's daughter, in conjunction with the head contractor with whom EBTL was working, Horizon. It seems, however, that after Mr Preston's daughter had gone overseas on a holiday in 2015, Horizon's lawyers decided that two separate reports, one from Horizon and one from EBTL, would be more appropriate. In this context, Mrs Preston worked to separate out the report and finalise a separate report for EBTL. I

accordingly accept that Mrs Preston had substantive input into this report, but more in its latter stages during 2015.

[85] I accept the two reports extended beyond office administration duties, but equally, they were somewhat "one off" matters over Mrs Preston's six year involvement with EBTL.

[86] There is also no doubt Mrs Preston made several cash contributions to EBTL, including advancing funds to assist the purchase of a new digger. As noted earlier, however, there was also no dispute that the funds were repaid to Mrs Preston (accepting, of course, that EBTL had the benefit of them for a time on an interest free basis). And I have discussed above why I do not accept Mrs Preston's evidence that these cash advances were made during "immensely tough times" for EBTL. For the same reasons, I do not accept her suggestion that her ability to lend funds to EBTL was "a matter of survival".

[87] Mrs Preston also referred to her management role as including her extensive liaison with ANZ Bank, such as the provision and discussion with them of financial projections and the like. Mr van der Merwe, EBTL's ANZ customer manager, said that as far as he was aware:

> [Mrs Preston] was the office administrator or the accountant or the bookkeeper for Grant or assistant in that regard, what was, exactly, was the employment agreement between them, I don't know.

[88] Mr van der Merwe agreed that Mrs Preston was very efficient and there was nothing negative about their dealings with her.

[89] In light of all the above, I conclude that Mrs Preston's contributions to EBTL were very largely consistent with her role as office administrator, though exceeded that from time to time, by very occasionally assisting on site, and preparing the two reports discussed earlier.

[90] A final relevant point is Mrs Preston's submission that she made an indirect contribution to EBTL by way of a significant salary sacrifice. Whether there was in fact a salary sacrifice turns on the nature of work carried out compared to the wages

paid. As noted, I have found that Mrs Preston's contributions were largely consistent with her role as office administrator, for which she was paid a weekly wage.

[91] Accounting experts called by both parties gave evidence as to potential salary sacrifice by Mrs Preston. Both assessments were based on the role of office administrator. But Mr Smith, the expert called by Mrs Preston, took the administrative wages reported in EBTL's accounts post-separation as the appropriate "benchmark" rate. On that basis, and for the total period up to and including the first six months of the 2016 financial year, Mr Smith calculated a total (pre-tax) salary sacrifice of $283,000.

[92] I do not consider that to be the appropriate approach. The EBTL administrative wages include wages paid to both Mr Preston's daughter and his daughter-in-law. While Mr Preston's daughter initially took over the accounts work from Mrs Preston, the evidence was that she was more fully involved in the operational side of EBTL's business, and in the intervening years, has taken over large aspects of the work previously carried out by Mr Preston himself. The office administration work has been taken over by Mr Preston's daughter-in-law, at a much more modest wage.

[93] Mr Shaw, the accounting expert called by Mr Preston, noted that if Mrs Preston was paid a market rate (and her wage was commensurate with the office administrator she replaced), then there would be no salary sacrifice. But adopting the wages paid to Mr Preston's daughter-in-law in the 2017 and 2018 financial years, Mr Shaw calculates a total salary sacrifice over the 2011 to 2016 financial years of $22,000, or $15,000 net of tax.

[94] I prefer Mr Shaw's evidence, as it more appropriately compares "apples with apples". Based on his evidence, there is a very modest salary sacrifice over the approximately five year period Mrs Preston received a wage from EBTL.[14]

[95] Against the backdrop of these findings, I turn now to the 051 proceedings.

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[14] This of course assumes wages paid in 2017 and 2018 financial years are equally applicable in the 2011 to 2016 financial years.

The 051 proceeding

Introduction and procedural background

[96] The 051 proceeding originally concerned the division of the outstanding relationship property. As noted, it was transferred from the Family Court to the High Court in April 2017.

[97] On 11 December 2017, Muir J made orders by consent in relation to some property contested in the proceedings. He ordered the couple's Haines Hunter boat was relationship property, but would vest in Mrs Preston as her separate property at an agreed value of $52,000 plus GST. He also ordered Mr Preston to make available a number of household chattels.

[98] Subsequently, on 2 May 2018, Associate Judge Andrew issued a minute in which he set down general timetabling directions, as well as noting his concerns about the lack of formal pleadings in the 051 proceeding.[15] He accordingly directed Mr Preston to file an amended application, clearly identifying the relationship property and costs at issue.

[99] Mr Preston duly filed a document entitled "Further Particulars of Claim re Application for Orders Pursuant to the Property (Relationships) Act 1976" in which he set out a list of property he believes should be classified as relationship property for equal division.[16]

[100] Mrs Preston then filed an amended statement of defence which substantially widened the scope of the 051 proceeding. By the end of the hearing (and having abandoned some claims), Mrs Preston pursued:

(a) an order pursuant to s 15 by way of compensation for economic disparity;

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15 A difficulty often experienced when Family Court proceedings are transferred to this Court.
16 It does not appear a corresponding list from Mrs Preston was filed.

(b) orders pursuant to ss 9A, 15A, and/or 17 of the Act on the grounds her actions either sustained or contributed to the increase in value of Mr Preston's separate property (his share in EBTL); and

(c) an award pursuant to s 182 of the FPA.

Economic disparity – s 15 of the Act

Introduction

[101] Mrs Preston identifies a disparity in income and standard of living at separation said to have been caused by the division of functions within her marriage to Mr Preston. She seeks an award in her favour to the full extent of Mr Preston's share of relationship property.

Section 15 - approach

[102] Section 15 provides for compensation where, at the end of a relationship, one partner has a significantly higher income and standard of living as the result of the division of functions within the marriage. Unlike s 15A, under which Mrs Preston also claims in relation to Mr Preston's single share in EBTL, it is not dependent on proving a specific contribution to the other spouse's separate property; rather, the inquiry is directed to the way roles are divided in the relationship more broadly:

> **15 Court may award lump sum payments or order transfer of property**
>
> (1) This section applies if, on the division of relationship property, the court is satisfied that, after the marriage, civil union, or de facto relationship ends, the income and living standards of one spouse or partner (**party B**) are likely to be significantly higher than the other spouse or partner (**party A**) because of the effects of the division of functions within the marriage, civil union, or de facto relationship while the parties were living together.
>
> (2) In determining whether or not to make an order under this section, the court may have regard to—
>
> (a) the likely earning capacity of each spouse or partner:
>
> (b) the responsibilities of each spouse or partner for the ongoing daily care of any minor or dependent children of the marriage, civil union, or de facto relationship:

(c) any other relevant circumstances.

(3) If this section applies, the court, if it considers it just, may, for the purpose of compensating party A,—

(a) order party B to pay party A a sum of money out of party B's relationship property:

(b) order party B to transfer to party A any other property out of party B's relationship property.

(4) This section overrides sections 11 to 14A.

[103] The leading decision on s 15 is the Supreme Court's 2017 judgment in *Scott v Williams*.[17] While the members of the Court, including the majority, differed somewhat in their approaches to determining quantum in the event of a successful s 15 claim, a number of principles can be drawn from the judgments on what I consider to be the key issue under s 15 in this case, namely whether the threshold or jurisdictional requirement set out in s 15(1) has been met, namely the *cause* of the economic disparity.

[104] Turning to the majority, I start with the judgment of Arnold J. His Honour first noted the legislative history to s 15, being a response to a perceived deficiency in the way the then Matrimonial Property Act 1976 addressed the position of non-career partners in relationships that operated on "traditional" lines, i.e. with one party (usually female) assuming the primary responsibility for home-making and child care (the non-career partner), and the other assuming responsibility for income earning (the career partner). Arnold J noted[18] that despite equal sharing of relationship property, a recognised concern was that the non-career partner was often left in an economically disadvantaged position at separation; they were unlikely to have the same income-earning ability as the career partner, because the non-career partner:

(a) would have foregone opportunities for career development in order to undertake the primary responsibility for home-making and child-rearing activities, which would likely mean they were ill-equipped to return to the work force following the end of the relationship; and

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17 *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507.
18 At [282].

(b) was likely to continue to have primary responsibility after separation for the day-to-day care of any non-adult children of the relationship.

[105] Section 15 was enacted to seek to deal with these issues. After noting some preliminary difficulties with the s 15 assessment, Arnold J highlighted that to date, assessment of the "causation requirement" of s 15(1) had tended to focus on the non-career partner's lost earning potential or the career partner's earning enhancement. His Honour was concerned this required consideration of various counterfactuals, for example what was the non-career partner's likely career path in the absence of division of responsibilities within the relationship? Or how would the career partner's career have progressed absent the division of responsibilities in the relationship? In cases focussing on the non-career partner's likely career path in the absence of the division of responsibilities, his Honour noted this assessment would be based on contrasting that partner's "but for" income with likely future income after separation; calculating a net present value in respect of the difference; deducting tax and contingencies; and then halving the resulting sum – an exercise considered demeaning, costly and contentious, as well requiring substantial expert evidence.[19]

[106] Arnold J accordingly considered that the appropriate (broader) focus under s 15 should be on the disparity in income and living standards.

[107] In the context of the threshold requirements under s 15(1), Arnold J stated the following:[20]

> If there has been a division of functions in a relationship along traditional lines and there is likely to be economic disparity after separation, the working assumption should be that the division in functions caused the disparity, and that is what should be compensated to the extent "just". Only strong evidence of some other causative factor would be sufficient to negative or limit this working assumption.

[108] And further, that:[21]

> Accordingly, s 15's causation requirement seems to me to be a broad one, in the sense that where a relationship has been conducted along traditional lines and there is a disparity of income and living standards post-separation, it

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19 At [292], [310].
20 At [293].
21 At [311].

> should generally be assumed that the division of responsibilities in the relationship:
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> (a) was for the benefit of both parties;
>
> (b) restricted the non-career partner's income-earning ability; and
>
> (c) enhanced the career partner's earning ability.
>
> As I see it, these working assumptions are supported by research; they are consistent with the Justice and Electoral Committee's report to the House on the Matrimonial Property Amendment Bill and Supplementary Order Paper No 25; and they will, in my view, generally reflect the parties' expectations in long-term relationships of the type at issue in this case.

[109] Arnold J noted that these working assumptions "could be displaced if the evidence was sufficiently compelling, but that would be unusual, at least in relationships of long duration entered into at the outset of a career partner's career".[22] His Honour nevertheless stated:[23]

> … I accept that it will be legitimate to point to personal characteristics as a complete or partial explanation of post-separation disparity in some situations, as where, for example, a career partner enters a relationship as a well-established and successful business or professional person. In that type of case, it may be that only part of the disparity can fairly be said to result from the division of responsibilities in the relationship. In relationships of relatively short duration, this may be a complete explanation for post-separation disparity. Again, however, care must be taken in these situations not to undermine the equality of contribution principle that underpins the PRA.

[110] Glazebrook J adopted a similar approach in relation to these broad threshold requirements. She summarised what she saw as being the proper approach to s 15 as follows:

> [263] Section 15 permits an order to be made which compensates for a disparity in income and living standards between partners after the end of the relationship if this disparity was caused by the division of roles in the relationship. Living standards will normally (but not always) be equated with income.
>
> [264] The assessment of disparity is a broad one and it must be considered in light of provisions in the PRA that treat all contributions made by both partners to the relationship as equal. In long-term relationships where one partner has had primary responsibility for home-making and child-care and the other partner for income-earning activities, this means that the PRA operates on the assumption that any disparity at the end of the relationship is equally attributable to both partners. This assumption can be rebutted but this would

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22 At [323].
23 At [325].

> not be easy to do in the case of long-term relationships. In shorter or differently organised relationships, the principle of equal contribution may also mean that the assumption applies, but it will likely be much easier to show that all or some of the disparity following separation resulted from something other than the division of functions in the relationship.

[111] The other member of the majority, Elias CJ, adopted a similar approach, at least in relation to the threshold or jurisdictional questions within s 15(1). In particular, her Honour agreed with Glazebrook J's summary set out at [110] above and with Arnold J's overall approach.[24]

[112] O'Regan J expressed concern at the concept of adopting "assumptions" under s 15(1), given the positive statutory requirement that the economic disparity has come about "because of" the division of functions in the relationship. He nevertheless stated:[25]

> I think Arnold J and I would agree that, where the relationship was not a traditional relationship of the kind he describes, the Judge has to make a decision about the extent of the caused disparity without assumptions.
>
> …
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> The Judge would need to make a broad assessment taking into account the qualifications and career stage of the partners when the relationship began and when the relationship ended, the period for which the functions were divided, what, in broad terms, the respective functions were and any other relevant matters.

[113] William Young J was also concerned at the concept of assumptions, and did not support the overall approach taken by the majority. Like O'Regan J, he concluded that the words "because of" in s 15(1) require a positive causative link between division of functions and disparity, such that it would be inappropriate to say that in a large range of cases, causation may be assumed.[26]

Section 15 in this case - discussion

[114] Each party called expert evidence as to the economic disparity between them at separation. The experts were largely agreed as to the fact of disparity and its quantum. Key factors driving the disparity were Mr Preston's annual income based

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24 At [331] and [356].
25 At [385], [386].
26 At [446].

on assessments of future maintainable profit of EBTL, plus an assumed market salary for his role in that business; whereas for Mrs Preston, an annual pre-tax income at the date of separation of $33,000.

[115] As to the quantum of the disparity, Mr Shaw's evidence (for Mr Preston) was that the present value of the annual disparity over a three-year period was approximately $517,000. Mr Smith's calculation (for Mrs Preston) for the same period was in a similar range of approximately $576,000. Even halving these amounts in the manner suggested in the authorities, and given any award under s 15 is to be made out of the career partner's share of relationship property, any award to Mrs Preston on the basis of the experts' quantification would absorb the full amount of Mr Preston's share of relationship property.

[116] Having considered the proper approach to s 15 as endorsed by the majority in *Scott v Williams*, I am far from persuaded that the threshold requirement of s 15(1) has been made out in this case. There is no doubt as to the existence of economic disparity. But the nature, duration and "organisation" of Mr and Mrs Preston's marriage is far from the paradigm marriage relationship discussed in *Scott v Williams,* and driving the the principles and "working assumptions" adopted by the majority.[27]

[117] In this case, the parties met and got married somewhat later in life. Both had had significant prior relationships, and in Mr Preston's case, an earlier marriage. Mrs Preston had two children from two earlier relationships, and Mr Preston had two children from his first marriage. In that context, the following factors persuade me that either the working assumptions do not apply, or the evidence in this case displaces or rebuts them:

(a) Mrs Preston was 37 years old at the commencement of the de facto relationship.[28] By that point, she had had a range of different jobs, summarised at [5] above. Prior to the commencement of her de facto

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27 See, for example, [307], [311], [323] and [324].

28 I adopt the commencement of the de facto relationship, given under the Act, where a marriage is immediately preceded by a de facto relationship, the de facto relationship is deemed part of the marriage.

relationship with and then marriage to Mr Preston, she had recommenced her university studies.

(b) Mr Preston was 52 years old at the commencement of the de facto relationship. Since 1990, he had owned and operated EBTL, which by all accounts, had always been a profitable enterprise.

(c) There were no children of Mr and Mrs Preston's relationship. Rather, Mr Preston's son was living with the couple for a brief time before departing to work in Australia. Mrs Preston brought with her into the family unit her young daughter from her prior de facto relationship. In this context, the fact Mrs Preston is her daughter's primary care-giver post-separation (which *may* impact her future earnings potential) is not because of the division of the responsibilities within the marriage, but because her daughter is not Mr Preston's child.

(d) As noted, Mrs Preston recommenced her studies shortly prior to commencing her de facto relationship with Mr Preston. Rather than give up those studies because of a division of functions within the relationship, she continued them, including progressing to an Honours and then Doctorate programme. As noted earlier, this was supported by financial contributions from EBTL.

(e) The duration of the marriage was relatively short. It is far removed from the long-term marriages arranged on traditional lines discussed in *Scott v Williams*.

[118] Accordingly, I am satisfied that the economic disparity at separation was not wholly or partly caused by the division of responsibilities within the marriage. As Arnold J noted in *Scott v Williams*, factors such as the career partner entering the relationship with an established and successful career or business, coupled with the marriage being of relatively short duration, can provide a complete explanation for post-separation disparity.[29] I consider that to be the case here. Nor has Mrs Preston foregone opportunities for career development because of the division of

[29] *Scott v Williams*, above n 17, at [325].

responsibilities in the household, a key concern underpinning the enactment of s 15.[30] On the contrary, her opportunity for career development has been enhanced, given her ability to progress her studies in the way she could during the marriage, including with associated financial support.

[119] Because I have concluded that the threshold test set out in s 15(1) has not been met, it is not necessary to assess whether an award should be made under s 15, and if so, in what amount.

Did relationship property either sustain or contribute to the increase in value of Mr Preston's separate property?

[120] Mrs Preston seeks orders pursuant to ss 9A, 15A, and/or 17 of the Act. As noted, these claims are directed at Mr Preston's sole remaining share in EBTL

Section 15A

[121] Turning first to Mrs Preston's claim under s 15A, this must fail for the same reasons as her claim under s 15. Section 15A(1) contains the same threshold or jurisdictional test as in s 15(1), namely that after the marriage, the income and living standards of one spouse are likely to be significantly higher than the other spouse *because of* the effects of the division of functions within the marriage. As with her claim under s 15, Mrs Preston's claim under s 15A does not meet this threshold requirement.

Sections 9A and 17 – approach

[122] Mrs Preston further says that s 9A(2) of the Act entitles her to a share in the increase in value in Mr Preston's EBTL share. That sub-section provides as follows:

> (2) If any increase in the value of separate property, or any income or gains derived from separate property, were attributable (wholly or in part, and whether directly or indirectly) to actions of the other spouse or partner, then—
>
> (a) the increase in value or (as the case requires) the income or gains are relationship property; but

[30] See [104](a) above.

(b) the share of each spouse or partner in that relationship property is to be determined in accordance with the contribution of each spouse or partner to the increase in value or (as the case requires) the income or gains.

[123] Although the Court of Appeal has held that "the Court should look at matters in the round and not take an overly technical approach", there remains an onus of proof on the party alleging contributions to show "a causal connection [between their actions and the increase in value] which is more than trivial."[31] The Court also noted that it is necessary to establish by evidence that there has, in fact, been an increase in the value of the separate property, and to provide an evidential basis for assessing how much the increase in value has been.[32]

[124] Section 17 of the Act involves a two-stage inquiry:[33]

(a) First, has the value of the separate property been "sustained" by the application of relationship property, or the actions of the other partner?

(b) Second, if so, should the Court exercise its discretion to either increase the share of relationship property, or order compensation be paid to that other partner who sustained the separate property?

[125] Cooke P defined "sustain" in *French v French* as "in the ordinary sense, to sustain something is to keep it up or keep it going."[34] In *Nation v Nation*, the Court rejected an argument that a non-owning partner needed to prove that if not for their work, the other spouse's ability to retain the property would be in jeopardy.[35]

Sections 9A and 17 – discussion

[126] Mrs Preston advances both her ss 9A and s 17 claims along similar grounds. She says that a combination of salary sacrifices by her, the work she did for EBTL and

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31 *Nation v Nation* [2005] 3 NZLR 46 at [69]-[71] (CA).
32 At [80].
33 *Cossio v Cossio* [2018] NZHC 2779 at [61].
34 *French v French* [1988] 1 NZLR 62 at 65. That definition was adopted in *Hebberd v Hebberd* [1992] 3 NZLR 517 at 521.
35 *Nation v Nation*, above n 31, at [133].

the assistance she provided generally to Mr Preston, have sustained and/or increased the value of his share in EBTL.[36]

[127] Mr Preston says Mrs Preston has neither increased nor sustained his separate property. As discussed earlier, he says she has exaggerated the extent of work she did for EBTL, and she was paid fair wages for the work she did do. Instead, he says any increase in value/sustenance of the property is due to contracts won for ultrafast broadband cable. In any case, Mr Preston notes the maximum value of the s 9A claim is likely to be approximately $3,000-$4,000 (being the total increase in value of Mr Preston's one share in EBTL).

[128] Somewhat curiously, Mrs Preston did not call valuation evidence of the value of EBTL at different points in time, but rather only one "end point" valuation. Mr McCleary, counsel for Mr Preston, accepts, however, that Mrs Preston can "borrow" the evidence of Mr Preston's valuation expert in this regard.

[129] That evidence demonstrates that over the course of the parties' relationship, EBTL's enterprise value increased by some $348,000, and that Mr Preston's one share increased in value by $3,480. Under s 9A, that is the maximum amount that could become relationship property, and thus in which Mrs Preston could share. The s 17 claim is not similarly "capped", given if the Court is satisfied a spouse or partner's actions have sustained the other spouse or partner's separate property, the Court may order that the first party is to receive an increased share of relationship property, or order the second party to pay the first a sum of money as compensation. These are not "tied", directly at least, to the increase in value of separate property. Nevertheless, where a spouse's actions have actually *increased* the value of separate property, it would be somewhat odd that actions merely *sustaining* separate property produced a greater financial outcome. And while many authorities in which s 17 awards have been made do not articulate the basis upon which the award has been quantified, at

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[36] For completeness, I note that Mrs Preston originally argued that salary sacrifices, by both herself and Mr Preston, were relationship property, which had in part sustained Mr Preston's separate property (i.e. his one share in EBTL). In closing however, Mr Hutcheson accepted that salary sacrifices were not themselves "property", or "relationship property". He confined the relevance of salary sacrifices to the assessment of broader contributions by Mrs Preston to EBTL.

least in *French v French*, the award was assessed by reference to the increase in value of the husband's separate property over the course of the parties' relationship.[37]

[130] Applying these principles to the current case, it is to be recalled that Mrs Preston was remunerated for her role as office administrator ($15 per hour, for 20 hours per week). As set out at [89] above, I am satisfied that in some relatively minor respects, Mrs Preston contributed to EBTL outside of her role as office administrator. Further, as noted at [93]-[94] above, there was also a very modest salary sacrifice over the 2011 to 2016 financial years, of approximately $15,000 (after tax).

[131] Standing back, I find Mrs Preston's contributions to EBTL, over and above the office administrator role for which she was remunerated, to be considerably more modest than in many of the relevant authorities, which involved ongoing, regular and unpaid work in relation to a spouse's separate property over the period of a lengthy marriage.[38] Ultimately, the evidence in this case falls far short of demonstrating that Mrs Preston's actions *increased* the value of Mr Preston's share in EBTL. There was clearly a significant spike in EBTL revenues in around 2013/2014. Mrs Preston quite properly did not seek to ascribe this increase to efforts on her behalf, rather accepting it was as a result of an "explosion" of work for EBTL from the fibre broadband roll out to schools.

[132] Nor, for the same reasons, do I consider Mrs Preston's actions can be properly characterised as "sustaining" EBTL in the sense required by s 17. I also note that as of October 2014, Mrs Preston started to transition the office administration role to Mr Preston's daughter (which coincided with the intensification of Mrs Preston's studies), and on Mrs Preston's own account, she did not perform any office administration duties from May 2015. Despite this, however, she continued to be paid the same wage by EBTL at all relevant times, and which was increased in 2015 as noted at [44] above. In addition, any relatively minor contributions over and above those for which Mrs Preston was remunerated will have already be reflected in the living expenses of the parties, and the standard of living which they were able to enjoy

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37 *French v French*, above n 34, at 66.

38 See for example, *French v French*, above n 34; *Hebberd v Hebberd*, above n 34; *Nation v Nation*, above n 31; *Cossio v Cossio*, above n 33.

as a result of their contributions to the business.[39] As noted, drawings of some $700,000 were made by Mr Preston from EBTL over the period of the relationship, which ultimately went back into that relationship. I am also mindful that Mrs Preston also enjoyed financial support from EBTL towards her university studies, which will be of enduring benefit to her (but not EBTL or Mr Preston).

[133] I therefore decline to make any orders under ss 9A or 17 of the Act.

Chattels

[134] Various schedules of chattels were produced in evidence, and there was some broad measure of agreement of what had and had not been taken by each party from either The Fairway or Pauanui. However, there was no valuation evidence in relation to the chattels and both parties rather glossed over the issue in closing submissions; suggesting (in Mr Preston's case) that the Court's task in this context was nigh on impossible and that the appropriate order may be that chattels "lie where they fall"; or that the parties would seek to engage further on the question of chattels and file a post-hearing memorandum as to any residual issues (Mrs Preston's case). No such post-hearing memorandum was filed. The evidential position on the chattels is accordingly incomplete.

[135] Mrs Preston included a value for chattels in her overall summary of relationship property of $30,000, though there is no evidential foundation for this. There were also concerns expressed in the evidence about alleged damage to various items of property, though other than the Haines Hunter boat, there was no evidence on these matters other than a number of unparticularised complaints by Mrs Preston.

[136] If parties expect the Court to rule on matters such as this, they are in turn expected to place appropriate materials before the Court to enable it to do so in a principled way. It is not appropriate for the Court to guess or speculate. Nor in the context of proceedings such as this, now more than four years after separation and with relatively modest sums involved, is it appropriate to provide the parties with a

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39 *Hebberd v Hebberd*, above n 34, at 523.

further opportunity to file evidence or make submissions on chattels. Each party's position should have been before the Court at the hearing.

[137] In these circumstances, and as Mr McCleary acknowledged, the Court's task in relation to chattels is impossible. Subject to the issue of the value of the boat, I do not propose to make any orders or determinations as to chattels, which are to lie where they fall.

[138] In relation to the Haines Hunter boat and trailer, orders had been made earlier in these proceedings, by consent, that the boat was to be transferred to Mrs Preston (by way of an interim distribution) for an agreed value of $52,000, plus GST (if any).[40] There was a suggestion the boat was damaged on delivery to her, but I was not persuaded the evidence bore this out. Photographs of the alleged damage were put to Mr Preston who provided what I considered to be reasonable responses to them. A boat valuer who had inspected the boat prior to its delivery to Mrs Preston also did not notice any damage. Nor was I satisfied that the manner in which the boat was delivered to Mrs Preston caused any, or any significant damage to it. In his closing submissions, Mr Hutcheson, quite properly in my view, accepted that for the purposes of establishing the relationship property pool, Mrs Preston would probably "have to live with" the valuation accepted in the consent orders.[41]

[139] I do not consider the value of the boat for relationship property purposes should be GST inclusive, as Mr McCleary suggested. GST does not arise as between Mr and Mrs Preston. And the consent order which reflected the agreed value of the boat, was $52,000 plus GST, *if any*.

[140] The boat will accordingly be included in the relationship property pool at a value of $52,000.

[141] The relationship property pool is set out in the schedule attached to this judgment, together with the relationship property retained by each party post-separation, and thus the balancing payment required to reflect an equal division. In

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40 See [52] above.

41 I note that the suggested "rounding down" for the alleged damage to the boat was minor in any event, being only $2,000.

the event, there was substantial agreement on the content of the relationship property pool; the real dispute was in relation to Mrs Preston's claims for various adjustments to be made to it. Given my findings on aspects of the 030 proceedings which might have altered the content of the relationship property pool,[42] an equalising payment from Mrs Preston to Mr Preston of **$15,903.36** will be required. This will likely require some minor adjustment, however, in terms of the value of Mr Preston's Kiwisaver (reflecting the date upon which I have found the couple commenced a de facto relationship).[43] I will accordingly receive memoranda from the parties on any adjustments required for this reason, before making formal orders on the division of relationship property.

[142] As noted, Mr Preston also sought a (minor) adjustment pursuant to s 18B of the Act for use by Mrs Preston of his credit and eftpos cards in the days immediately following separation. I decline to make such an adjustment. Mr Preston did not address this matter in his closing submissions, including why I should exercise my discretion under s 18B. The amounts in issue are, in the scheme of things, very minor, and Mrs Preston explained that given the nature of the parties' relationship at the time, she was not fully clear the relationship was finally over at that point.

Family Proceedings Act – s 182

Introduction

[143] Mrs Preston seeks an award pursuant to s 182 of the FPA which provides as follows:

> **182 Court may make orders as to settled property, etc**
>
> (1) On, or within a reasonable time after, the making of an order under Part 4 of this Act or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963, the Family Court may inquire into the existence of any agreement between the parties to the marriage or civil union for the payment of maintenance or relating to the property of the parties or either of them, or any ante-nuptial or post-nuptial settlement made on the parties, and may make such orders with reference to the application of the whole or any part of any property settled or the variation of the terms of any such agreement or settlement, either for the benefit of the children of the marriage or civil union

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42 See [211] to [218] below.
43 A nominal value of $60,000 is included for present purposes.

or of the parties to the marriage or civil union or either of them, as the court thinks fit.

(2) Where an order under Part 4 of this Act, or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963, has been made and the parties have entered into an agreement for the payment of maintenance, the Family Court may at any time, on the application of either party or of the personal representative of the party liable for the payments under the agreement, cancel or vary the agreement or remit any arrears due under the agreement.

(3) In the exercise of its discretion under this section, the court may take into account the circumstances of the parties and any change in those circumstances since the date of the agreement or settlement and any other matters which the court considers relevant.

(4) The court may exercise the powers conferred by this section, notwithstanding that there are no children of the marriage or civil union.

(5) An order made under this section may from time to time be reviewed by the court on the application of either party to the marriage or civil union or of either party's personal representative.

(6) Notwithstanding subsections (1) to (5), the court shall not exercise its powers under this section so as to defeat or vary any agreement, entered into under Part 6 of the Property (Relationships) Act 1976, between the parties to the marriage or civil union unless it is of the opinion that the interests of any child of the marriage or civil union so require.

Section 182 – approach

[144] The leading authorities on s 182 are the Supreme Court and Court of Appeal's judgments in *Ward v Ward*[44] and the Supreme Court's decision in *Clayton v Clayton*.[45]

[145] The Supreme Court in *Clayton* noted that s 182 contemplates a two-stage test:

(a) first, determining whether there is a "nuptial settlement"; and

(b) second, determining whether, and if so, in what manner, the Court's discretion under s 182 should be exercised.

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44 *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31. [*Ward SC*]
Ward v Ward [2009] NZCA 139, [2009] 3 NZLR 336. [*Ward CA*]

45 *Clayton v Clayton* [2016] NZSC 30, [2016] 1 NZLR 590.

The parties' respective positions

[146] Mr Hutcheson, for Mrs Preston, relies on the deed dated 1 February 2010 by which Mr Preston, as settlor of the GPFT, amended the trust deed's provisions to confer on Mrs Preston the status of a discretionary beneficiary of the trust. Mr Hutcheson says that taking the broad approach to the concept of "settlement" in s 182, the deed is an ante-nuptial settlement, thus giving the Court power to vary that settlement in accordance with the statutory provisions.

[147] Although she does not specify the exact nature of the orders she seeks, Mrs Preston says she had a reasonable expectation the marriage would continue and that she would continue to benefit from the GPFT, and seeks orders giving effect to that expectation.

[148] Mr McCleary accepts that the 1 February 2010 deed was made within the context of Mr and Mrs Preston's forthcoming marriage. But he says Mr Preston's exercise of his power of appointment under the terms of the GPFT trust deed cannot qualify as a "settlement" for the purposes of s 182, even adopting the broad approach to that concept endorsed by the authorities. In the alternative, Mr Preston says if the claim is made out, the Court should nonetheless exercise its discretion to either decline any relief, or award minimal relief on the grounds Mrs Preston never had an expectation the GPFT would provide her large sums of money.

Is the 1 February 2010 deed a "settlement" for the purposes of s 182?

[149] As far as I am aware, whether conferral of the status of a discretionary beneficiary of a family trust is a "settlement" for the purposes of s 182 has not previously been considered.

[150] The Court of Appeal in *Ward* said the following in relation to the concept of "settlement" as it is used in s 182:[46]

> [22] There should be a generous approach to the interpretation of the term settlement and this has been the traditional approach. For example, in Blood

[46] *Ward CA*, above n 44 (citations omitted). The point was not considered by the Supreme Court, being of the view that the Court of Appeal's approach on this issue was correct and thus declining leave to appeal in relation to it.

> v Blood [1902] P 78 Gorell Barnes J, when dealing with an application to vary a nuptial settlement under the predecessor to the Matrimonial Causes Act 1973, noted that the words of the section are extremely wide. He said that he was anxious that they should not, by any construction the court may put upon them, be narrowed in any way. To narrow the words would be undesirable because the various circumstances which come before the court are so diverse that it is important that, so far as possible, the court should have power to deal with all the cases that come before it, and in dealing with them, to meet the justice of the case.
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> [23] The particular form of the settlement does not matter. It may be a settlement in the strict sense of the term. It may be a covenant to pay by one spouse to the other, or by a third person to a spouse. What is essential is that the settlement should provide for the financial benefit of one or other or both of the spouses as spouses and with reference to their married state: Prinsep v Prinsep [1929] P 225 at 232 per Hill J. The section is thus intended to embrace a large number of transactions which might not appear to be settlements in a conveyancer's eyes: Melvill v Melvill [1930] P 159 (CA) per Lord Hanworth MR.
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> …
>
> [27] What first emerges from the above authorities is that there should be a generous approach to the interpretation of the term settlement. Nevertheless, in order to come within the term settlement as used in s 182 of the FPA, any arrangement must be one which, at the date of the hearing, makes some form of continuing provision for either or both of the parties to a marriage in their capacity as spouses, with or without provision for their children. The property transferred must be impressed with an extant obligation and not be an absolute transfer to one of the spouses. However, what is clear is that the particular form of the arrangement does not matter.

[151] The Supreme Court in *Clayton* endorsed the Court of Appeal's approach. In delivering the judgment of herself, William Young, Arnold and O'Regan JJ, Glazebrook J said the following:[47]

> [33] The Court of Appeal in *Ward* went on to say that to come within the term "settlement" as used in s 182, any arrangement must be one that "makes some form of continuing provision for both or either of the parties to a marriage in their capacity as spouses, with or without provision for their children". It was also made clear that discretionary family trusts can be settlements for the purposes of s 182. Further, property acquired by a trust after it is settled can also come within the definition of settlement. This is because the settlement is "the trust itself and any trust property (whenever acquired) must be part of the settlement".
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> [34] We agree with the analysis of the Court of Appeal in *Ward* . We add that we see the requirement that the settlement be for both or either of the parties "in their capacity as spouses" as meaning only that there must be a connection or proximity between the settlement and the marriage. Where there

47 *Clayton v Clayton*, above n 45, at [33]-[36].

> is a family trust (whether discretionary or otherwise) set up during the currency of a marriage with either or both parties to the marriage as beneficiaries, there will almost inevitably be that connection. As Lord Penzance said in *Worsley v Worsley*:
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> > "The Court would have a great difficulty in saying that any deed which is a settlement of property, made after marriage, and on the parties to the marriage, is not a post-nuptial settlement."
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> [35] An exception may be where the trust is set up by a third party and there are substantial other beneficiaries apart from the parties to the marriage and their children. The other view may be that, as long as the trust has the relevant connection to the marriage and one or both of the parties are beneficiaries, the trust will be a nuptial settlement. But we do not need to decide this point. In this case the trust was set up by Mr Clayton during the marriage and there were no substantial other beneficiaries.
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> [36] The test may be more difficult to meet where there is a settlement made before marriage and a future spouse is named as a possible beneficiary but, at the time of settlement, there is no particular spouse in contemplation. One view may be that once a marriage has taken place and the spouse identified, then there will be the necessary connection with the marriage. Even if that is not the case, however, it may be that each disposition of property to such a trust after marriage could constitute a post nuptial settlement.

[152] Both the Court of Appeal in *Ward* and the Supreme Court in *Clayton* referred extensively to English authorities on the concept of ante and post-nuptial settlements (the English legislation being in broadly similar terms to s 182). A leading decision is that of the House of Lords in *Brooks v Brooks*.[48]

[153] That case considered whether a husband's pension scheme (established three years after the parties had married) compromised an ante-nuptial or post-nuptial settlement. Lord Nicholls of Birkenhead, delivering the lead judgment, emphasised the broad approach to be taken to the concept of a "settlement". He stated:[49]

> In English law "settlement" is not a term of art, with one specific and precise meaning. Its meaning depends on the context in which it is being used. To a conveyancer a settlement essentially connotes a disposition by deed vesting property in trustees to be held by them for a succession of interests. …
>
> In the Matrimonial Causes Act settlement is not defined, but the context of section 24 affords some clues. Certain indicia of the type of disposition with which the section is concerned can be identified reasonably easily. The section is concerned with a settlement "made on the parties to the marriage" So, broadly stated, the disposition must be one which makes some form of continuing provision for both or either of the parties to a marriage, with or

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48 *Brooks v Brooks* [1996] 1 AC 375.

49 At 391-392.

> without provision for their children. Conversely, a disposition which confers an immediate, absolute interest in an item of property does not constitute a settlement of that property. …
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> Beyond this the authorities have consistently given a wide meaning to settlement in this context, and they have spelled out no precise limitations. This seems right, because this approach accords with the purpose of the statutory provision. Financial provision that is appropriate so long as the parties are married will often cease to be appropriate when the marriage ends. In order to promote the best interests of the parties and their children in the fundamentally changed situation, it is desirable that the court should have power to alter the terms of the settlement. The purpose of the section is to give the court this power. This object does not dictate that settlement should be given a narrow meaning. On the contrary, the purpose of the section would be impeded, rather than advanced, by confining its scope. The continuing use of the archaic expressions "ante-nuptial" and "post-nuptial" does not point in the opposite direction. These expressions are apt to embrace all settlements in respect of the particular marriage, whether made before or after the marriage. …
>
> Applying this approach, there is no difficulty with a disposition which creates interests in succession in specified property. Nor is there difficulty where the interests are concurrent but discretionary. Concurrent joint interests are nearer the borderline, such as a case where parties to a marriage hold the matrimonial home as beneficial joint tenants or tenants in common. Even in such a case, however, given the restrictions which would impede any sale of the house while the marriage subsists, this type of case has rightly been held to fall within the scope of the section: see *Brown* v. *Brown* [1959] P 86. Periodical payment provisions have also been controversial. But income provision from settled property would readily qualify, and it is only a short step from this to include income provision which takes the form of an obligation by one party to the marriage to make periodical payments to the other. This was held to be so from the earliest days of this statutory provision whose ancestry stretches back to the Matrimonial Causes Act 1859: see *Worsley v. Worsley* (1869) LR 1 P & D 648. a decision subsequently affirmed in *Bosworthick v. Bosworthick* [1927] P 64.

[154] Lord Nicholls noted that at his retirement, Mr Brooks was entitled to elect to give up a portion of his pension to provide, from the date of his death, a deferred pension for life for his spouse, or for any other person financially dependent on him (r 1(e) of the scheme). Further, a lump sum death benefit was payable if Mr Brooks were to die while still employed, with such death benefits payable at the discretion of the company to the members of a class comprising Mr Brooks' spouse, children, parents and grandparents and the issue of them (r 2(c)). Lord Nicholls noted that:[50]

> If each of these unexceptional features is considered in isolation, it is easy to conclude that the scheme does not constitute a marriage settlement made by Mr Brooks. The primary benefit is a pension payable to him. The option to cut

[50] At 393.

> in a dependant's deferred pension conferred no rights on Mrs Brooks. The discretionary trust in respect of the death benefits should not colour the character of the whole scheme.

[155] Nevertheless, Lord Nicholls did not consider that to be the correct approach:[51]

> In considering the purpose of the husband when entering into the scheme, the scheme must be looked at in the round and in the context of the circumstances then subsisting. Viewed in this light, the husband is to be taken to have entered into this scheme with the intention of providing for the retirement of himself and his wife by the highly tax efficient means afforded by this scheme. His pension would provide financial support for both of them in his retirement. If his wife was still alive when he retired, he could then direct that part of his pension benefit should be used to make separate provision for her after his death. Should he die prematurely, the death benefits would be available for her. In my view, a disposition of this character falls within the wide meaning given to marriage settlement in the matrimonial legislation. The feature which places this scheme on the marriage settlement side of the line is the presence of rules 1(e) and 2(c).

[156] In that case there was no strict "settlement" of property on the wife, and under rule 1(e), Mr Brooks could "elect" to make part of his pension available to her, and under rule 2(c), the distribution of the death benefits was at the discretion of the company.

[157] I have found this issue of some difficulty. On the one hand, many of the authorities discuss the concept of a settlement in the context of a "disposition".[52] Despite this, however, in *Brooks v Brooks*, Mr Brooks' entry into a pension scheme with discretionary benefits available to Mrs Brooks (at Mr Brooks' election or the company's discretion) would not ordinarily suggest a "disposition". Rather, Lord Nicholls gave close attention to the purpose of the arrangement in question, being Mr Brooks' intention of providing for the retirement of himself *and his wife*. And the orthodox position is that a discretionary beneficiary under a trust has no legal or equitable interest in the assets of the trust until the trustees have exercised their discretion in favour of the particular beneficiary.[53] Thus no species of property is conveyed to a discretionary beneficiary. Yet a discretionary family trust is nevertheless a "settlement made *on the parties*" for the purposes of s 182.[54]

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51 At 394.

52 See for example, *Clayton v Clayton*, above n 45, at [36] and *Brooks v Brooks*, above n 48, at 391.

53 *Hunt v Muollo* [2003] 2 NZLR 322 at [11] and *Johns v Johns* [2004] 3 NZLR 202 at [31].

54 See *Chrystall v Chrystall* [1993] NZFLR 772 (FC) at 780 as referred to by the Court of Appeal in *Ward CA*, above n 44, at [28].

Ultimately, Court of Appeal in *Ward* concluded that to come within the term "settlement", "any arrangement" must be one that "makes some form of continuing provision for both or either of the parties to a marriage, *in their capacity as spouses*, with or without provision for their children" (emphasis added).[55]

[158] The Supreme Court in *Clayton* observed that the test may be more difficult to meet where there is a settlement (of a trust) made before marriage and a future spouse is named as a possible beneficiary, but at the time of settlement, there is no particular spouse in contemplation.[56] That difficulty was addressed, however, in the context of whether a settlement in those circumstances would have the necessary connection with the marriage in question. In this case, it is accepted, rightly in my view, that the 1 February 2010 deed did have the necessary connection with Mr and Mrs Preston's forthcoming marriage.

[159] Having regard to the underlying purpose of s 182 and the broad approach mandated to the concept of "settlement", I conclude that the February 2010 deed was a "settlement" for the purposes of the section. Clearly the GPFT itself, when settled in 2004, was not a settlement made in contemplation of any particular marriage. But if the trust had been settled, say, two weeks after marriage and included a provision for a spouse to be a discretionary beneficiary, and the parties were married for a further 20 years and then divorced, there could be no objection to the trust being considered a post-nuptial settlement. But if that trust had been created some years earlier and not in contemplation of any particular marriage, but two weeks after the marriage, the spouse was added as a discretionary beneficiary, and the parties continued to be married for some 20 years before divorcing, it would seem odd, given the purpose of s 182 and the settlor's clear intent in both scenarios, if a materially different outcome were to result. Common to both scenarios is an arrangement which makes some form of continuing provision for both or either party to a marriage *in their capacity as spouses*.

[160] Whether I am correct that the February 2010 deed is an "ante-nuptial settlement" is, however, somewhat moot in this case. This is because, for the reasons

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55 *Ward CA*, above n 44, at [27].
56 *Clayton v Clayton*, above n 45, at [36].

given in the following section of this judgment, I do not consider any relief ought to be awarded under s 182.

Exercise of the discretion under s 182

[161] I have considered the appropriate exercise of the discretion under s 182 largely by reference to the Supreme Court's observations in *Clayton*. In *Clayton*, Glazebrook J (writing for herself, William Young, Arnold and O'Regan JJ) endorsed and reiterated the broader comments made by the Supreme Court in *Ward* as to the premise underlying s 182:[57]

> In *Ward*, this Court made the following comments as to the premise underlying s 182 and the courts' role. It said that both ante and post-nuptial settlements are premised on a continuing marriage. If that premise ceases to apply, Parliament recognised that injustices could arise. Section 182 empowers the courts to review the settlement and make orders to remedy the consequences of the failure of the premise on which the settlement was made – that is, continuation of the marriage. One of the purposes of s 182 is to prevent one party benefitting unfairly from the settlement at the expense of the other in the changed circumstances.
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> The Court referred to numerous English authorities, as well as two New Zealand Court of Appeal decisions, *Coutts v Coutts* and *Preston v Preston.* The Court said that its approach to s 182 was in line with the case law, both from England and New Zealand, over a considerable period. It referred to one of the earliest reported cases in England where Lord Penzance said that the courts would look at the "probable pecuniary position" the parties and their children would have occupied regarding the settlement if the marriage had not failed.
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> [Citations omitted]

[162] The majority in *Clayton* emphasised that while the applicant's subjective expectations may be relevant, care should be taken that not too much weight or emphasis is put on them, given the essential inquiry by the Court is an objective one, involving an assessment of the circumstances overall.[58]

[163] In *Clayton,* Glazebrook J stated that in considering whether there is a basis for intervention, the appropriate approach is a general comparison between the position under the settlement had the marriage continued, and the position that pertains after the dissolution. In this way, the Court noted this is not backward looking to the time

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57 At [44]-[45].
58 At [48], [49] and [72].

of settlement, but rather is *forward* looking, comparing the position under the settlement assuming a continuing marriage against the current position under a dissolved marriage.[59]

[164] In the present case, therefore, a comparison needs to be made between the position under the settlement (namely the conferral on Mrs Preston of discretionary beneficiary status of the GPFT) had her marriage to Mr Preston continued, and the position on their dissolved marriage.

[165] Section 182(3) provides that in exercising its discretion, the Court ought to take into account the circumstances of the parties and any change in those circumstances since the date of the agreement or settlement and "any other matters which the Court considers relevant". While the Supreme Court in *Clayton* cautioned against any comprehensive list of relevant considerations, and held each case will require individual consideration,[60] it nevertheless highlighted certain matters that may be relevant to the exercise of the discretion, including:[61]

(a) the terms of the settlement and how the trustees are exercising or likely to exercise their powers in the changed circumstances;

(b) who established the trust, and the source and character of the assets which have been vested in the trust;

(c) the interests of any children or other beneficiaries; and

(d) the length of the marriage.[62]

[166] In this case, it is reasonable to assume that, had Mr and Mrs Preston's marriage continued, direct and indirect benefits to Mrs Preston from the trust would also have continued, both in terms of the provision of trust assets to assist with her ongoing studies, as well as any direct and indirect benefits relating to day-to-day family and

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59 At [52]–[54].
60 At [57].
61 At [58].
62 At [59].

personal expenditure. This is to be compared with the position after the dissolution of the marriage, where it is reasonable to assume that the trustees (being Mr Preston and Fisher Trustees) will not exercise their discretion in favour of her.

[167] On this approach, there is *prima facie* a basis for the exercise of the discretion under s 182. However, the following matters persuade me that it would be inappropriate to exercise the discretion in this case:

(a) First, the terms of the settlement itself. These are set out at [29] above. While the second aspect of the deed is not framed as limiting a person's status as discretionary beneficiary to while they were living with the settlor, the first part of the deed ("any wife or widow *for the time being* of the settlor") contemplates any such spouse being a discretionary beneficiary only so long as they are married to the settlor.[63]

(b) Second, while the "settlement" in this case (namely the conferral on Mrs Preston the status of discretionary beneficiary), was a nuptial settlement, the GPFT itself was not established either during the marriage or in contemplation of it. Rather, the trust was settled by Mr Preston in 2004, well before he met Mrs Preston, and for the primary purpose of asset preservation for the benefit of his children.

(c) Third, the nature of the trust assets also points against the exercise of the discretion. This is not a case where the trust's assets, or a significant portion of them, were accumulated during the marriage, or relationship property settled on the trust during the marriage. In this case, the trust assets are The Fairway home, purchased and acquired well before the marriage, and 99 shares in EBTL, again acquired prior to the marriage.

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63 Of course, this cannot be determinative, given under any application pursuant to s 182, the marriage will have dissolved, such that the applicant and respondent are no longer married. The relevant point, however, is that the terms of the settlement itself arguably only envisage a spouse *being* a discretionary beneficiary during the term of the marriage, rather than *continuing* to be a discretionary beneficiary after the marriage, but in circumstances where the trustees are unlikely to exercise their discretion in respect of the former spouse.

(d) Fourth, and flowing from the above point, the fact the assets of the trust have been sourced from separate property also points against the exercise of the discretion.[64]

(e) Fifth, for the reasons outlined at [76] to [95] above, I am also satisfied Mrs Preston made no material or substantial contribution to sustaining the trust assets.

(f) Mrs Preston has nevertheless benefited from those trust assets in a not insubstantial and, importantly, enduring manner, given the financial support provided to complete her university studies.

(g) Finally, but of some relevance in my view, is the length of the marriage. By comparison to many authorities in which the discretion under s 182 has been exercised, the marriage in this case is of relatively short duration, being less than five years.[65]

[168] I accordingly decline to exercise my discretion under s 182.

The 031 proceeding

Introduction

[169] Although Mrs Preston in her opening submissions stated "in the context of the likely determinations of the Court in relation to [the 051 proceeding], it may not be necessary for the Court to separately determine the 031 proceeding", Mrs Preston maintains this claim. It is fair to say, however, that relatively scant attention was paid to it in Mrs Preston's closing submissions, it being acknowledged that many of the factual findings in the 051 proceedings will be relevant to the 031 proceeding.

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64 *Clayton v Clayton*, above n 45, at [81].
65 Section 182 does not apply to de facto relationships.

Discussion

[170] Mrs Preston will succeed in her constructive trust claim if she can make out the elements set out by Tipping J in *Lankow v Rose*:[66]

(a) Some contribution, direct or indirect, to the property at issue;

(b) An expectation, on the part of the claimant, of an interest in the property;

(c) Proof, by the claimant, that his or her expectation was reasonable in the circumstances; and

(d) That the defendant should reasonably be expected to yield the asserted interest to the claimant.

[171] The Court of Appeal recently summarised how the principle in *Lankow v Rose* has been interpreted since that judgment.[67] The Court said a claimant must establish that:[68]

(a) More than a minor contribution was made to the acquisition, preservation or enhancement of the defendant's assets, whether directly or indirectly;

(b) In all the circumstances both parties must be taken to reasonably have expected the claimant would share in the assets as a result;

(c) Contributions need not be monetary in nature, but there must be a causal relationship between the contributions and the acquisition, preservation or enhancement of the defendant's assets;

(d) The contributions must manifestly exceed any benefits that the claimant derives from the arrangement.

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66 *Lankow v Rose* [1995] 1 NZLR 277 at 294.
67 *Wakenshaw v Wakenshaw* [2017] NZCA 252.
68 At [25].

[172] Adapted to the circumstances of this case, Mrs Preston must therefore prove that she made a more-than-minor contribution to EBTL and/or The Fairway, in order to (with a requisite causal nexus) acquire, preserve or enhance either or both of those assets. She must also prove that both she and the trustees of GPFT reasonably expected she would share in EBTL and The Fairway as a result. And Mrs Preston's contributions must manifestly exceed any benefit she took from the arrangements.

[173] While for the reasons set out at [79]-[89] above, I am satisfied Mrs Preston made some relatively minor contributions to EBTL over and above her office administration role, her claims in the 031 proceedings in relation to EBTL fall well short of the threshold required to give rise to a proprietory interest in EBTL's shares.

[174] First, as already explained, the contributions Mrs Preston made to EBTL (over and above office administration, for which she was remunerated) were minor in nature. Overall, I would not class them as "more than minor" as described in *Wakenshaw v Wakenshaw*.

[175] Further, I do not consider that at the time of making any such minor contributions, Mrs Preston either expected an interest in EBTL (and certainly not a half share), or that any such expectation would have been reasonable on her part.

[176] Mrs Preston relies on various statements said to have been made to her by Mr Preston to the effect that "we're in this together", and "we own EBTL" (rather than it being for the children). Putting aside how any such statements are to bind the GPFT, any such statements must be considered in context. Mr Preston denied making statements in those terms, but accepted that on occasion there were discussions of the broader relationship, particularly when Mr Preston's daughter had returned to The Fairway. Mr Preston said that any comments he made along the lines suggested by Mrs Preston were to the effect that, "while we are husband and wife, of course you will continue to benefit from and enjoy the fruits of the business". For the reasons set out at [58]-[65] above, I generally prefer Mr Preston's evidence on these matters rather than Mrs Preston's. In addition, a suggestion that Mr Preston made it clear that EBTL was for Mr and Mrs Preston only and not for his children is inconsistent with the steps he had taken to ensure major assets were protected for the final benefit of his children.

[177] One particular comment to which Mrs Preston referred on a number of occasions was that Mr Preston had said to her in August 2015 (being one month before separation) that "we own EBTL". Again, context is important. Mrs Preston said she had a recording of the discussion, but the recording was not produced in evidence. I raised my concern at this; given the reliance being placed on the statement said to have been made by Mr Preston, it would not be appropriate to "cherry pick" one comment out of its broader context. And while Mr Preston accepted he may have said something along those lines to Mrs Preston at that time, he said it was in the context of a very emotional and difficult time for them, and in the context of what he described as a "bizarre discussion", and made to dispel the notion that everything would go to his children.

[178] Finally, I am also satisfied that any contributions made by Mrs Preston were outweighed by the benefits she received from EBTL. She and Mr Preston (and the rest of the family unit) benefited from Mr Preston's significant drawings from EBTL, which I have discussed earlier.[69] Distributions were also made to Mrs Preston, including in relation to her studies. I am not persuaded that Mrs Preston's contributions "manifestly exceeded" the benefits she derived from the arrangement.

[179] The position is even more stark in relation to The Fairway. There is no doubt that by the end of 2007, the property was largely complete, including substantial landscaping. Mr Preston, and his son and partner, had been living in the property for some two years prior to Mrs Preston coming to live there. It is correct that Mrs Preston assisted with some plantings at the back of the property, staining the fencing and helping assemble a kit set garden shed. Once she resided at The Fairway from October 2009, I also accept she carried out most of the housework type duties. But these sorts of contributions fall short of the sort of contribution that might be expected to give rise to a proprietory interest in a property owned by a third party.

[180] Mrs Preston also claimed (faintly) in "unjust enrichment". No substantive submissions were directed to this. There is doubt whether, as New Zealand law presently stands, "unjust enrichment" is a recognised and free-standing cause of

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[69] See [61] above.

action.[70] The present proceedings are not the correct forum in which this issue ought to be considered. For one, no argument was presented on it. But in any event, given the factual findings I have made as to Mrs Preston's contributions and the benefits she received from the arrangement, it is unlikely there would be any "unjust enrichment" or "windfall" to the GPFT in any event.

[181] Mrs Preston's claims in the 031 proceedings are accordingly dismissed.

The 030 proceeding

Introduction

[182] Mrs Preston and Ms Jespersen (Mrs Preston's stepmother) are the trustees of the Huntbos Family Trust (HFT). In that capacity, they sue Mr Preston and Fisher Partners as trustees of the GPFT. HFT says that GPFT breached the terms of a property sharing agreement between the two trusts dated 14 February 2014 (the PSA) by failing to cooperate and comply with the agreement's terms as to the sale of the Pauanui property.

The Pauanui property

[183] As noted, the Pauanui property was purchased in December 2012. Mrs Preston contributed $60,000 to the purchase, which was effected by those funds coming from EBTL, in repayment to her of her earlier advances to it. Mr Preston contributed $10,000. The balance was made up by a bank loan.

[184] The sale and purchase agreement was in Mr and Mrs Preston's own names. On settlement, however, the sale was settled into the name of GPFT. Mr Preston says it was intended from the outset that each of his and Mrs Preston's respective contributions to the property would be maintained as separate property and appropriately "ring-fenced" for that purpose. Mrs Preston disagrees, stating that from

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[70] See *Rod Milner Motors Ltd v Attorney-General* [1992] 2 NZLR 568 (CA) and *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health* (2006) 8 NZBLC 101,739 (HC). Both were applied more recently in *Real Cool Holdings Ltd v Northpower Ltd* [2012] NZHC 1604. Though see *Young v Hunt* [2019] NZHC 2822, where at [16], Associate Judge Johnston noted that it was unnecessary in that case to analyse a cause of action in "unjust enrichment" through the lens of money had and received. It does not appear that *Rod Milner* (or the other cases cited in this footnote) were referred to the Court.

the outset, she simply considered it a joint purchase, though acknowledged that after some time, ownership of the Pauanui property was separated out into GPFT and a new family trust settled by her (the HFT), and the PSA was entered into.

[185] Having heard the evidence and reviewed the contemporaneous documents, I am satisfied it was intended from the outset that the parties' respective contributions to the purchase would be ring-fenced and maintained as separate property. Mrs Preston's father (Mr Jespersen) is a lawyer. Mrs Preston acknowledged that the idea and concept that ownership of the property would be separated out into the two trusts and a property sharing agreement entered into was developed by her father and Mr Preston. Mr Fisher described his staff dealing with Mr Jespersen (and staff in his office) over the Pauanui property as "representatives" of Mrs Preston.

[186] Mr Preston's evidence was consistent with the above. He said that given both parties had come from previous failed relationships, and both had children from prior relationships, they were conscious of the need to keep property separate. Mr Preston's evidence was that he encouraged the ownership structure of Pauanui to accommodate this, so that Mrs Preston's contribution was appropriately ring-fenced.[71]

[187] Importantly, the above is also borne out by the contemporaneous documents. A few months after the purchase had been settled, in April 2013, a member of staff at Fisher Accountants emailed staff at Mr Jespersen's legal office, stating the following:

> Can you please advise progress on set up of the new Trust for Katherine and the subsequent transfer of the Pauanui property and ANZ finance to the Trust partnership (between the new Trust and the Grant Preston Family Trust).
>
> The purchase of the Pauanui property was settled on the 7th of December and nothing appears to have happened since. **We are concerned that Katharine's contribution to the property and subsequent participation in the appreciating value in the property is not ring fenced.** Can you please advise.
>
> [Emphasis added]

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[71] I note this is also consistent with Mr Preston's discussions with Fisher Accountants shortly before his marriage to Mrs Preston, and reflected in the file note discussed at [28] above, which envisaged Mrs Preston settling a trust through which she would invest her relationship property settlement funds.

[188] Further emails ensued in which staff at Mr Jespersen's office confirmed the necessary documentation was being prepared.[72] This demonstrates, in my view, that such "ring-fencing" of each party's separate contributions had been intended from the outset.

[189] Turning back to the property itself, Mr and Mrs Preston set about developing it over the next few years. Mrs Preston confirmed, and there was no dispute, that from the time the property was purchased, she paid $100 per week to Mr Preston's account which then went towards repaying the mortgage.

[190] As noted, in 2014, ownership of the property was transferred to the GPFT and HFT as tenants in common in equal shares. At the same time, the two trusts entered into the PSA. Each of Mr and Mrs Preston also signed a letter of engagement (addressed to "Grant Preston Family Trust; Huntbos Family Trust; Grant Preston Family Trust & Huntbos Family Trust Partnership"), in which Fisher Accountants were engaged to provide accounting and related services to the partnership.

Relevant terms of the PSA

[191] Clause 1 of the PSA deals with preliminary matters and ownership of the property, and records HFT's contribution as $60,000 and GPFT's contribution as $10,000.

[192] Clause 2 of the PSA states:

> We will be registered on the Computer Register for the property as tenants in common in equal shares. This is despite the fact that our individual cash contributions are unequal. This means that each of us will have an equal share (legal interest) in the property.

[193] Clause 3 of the PSA prescribes the process for selling the property:

> (a) We will sell the property if either of us (first party) gives written notice to the other owner (recipient party) of his or her wish to sell the property or his or her share in the property.

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[72] Though for some reason, the HFT and Property Sharing Agreement were not put in place until the following year.

(b) Nothing in this clause shall prevent either of us from purchasing the other's share in the property. If both of us wish to purchase the other party's share in the property, then the person who has made the greatest cash contribution to the cost of purchasing the property shall have first option to purchase.

(c) We will offer the property for sale on the open market if the recipient party does not wish to purchase the first party's share in the property, or if we have not within one month after delivery of the notice in paragraph (a) signed a written agreement between us for the sale and purchase of the first party's share in the property.

(d) We will agree on the sale price, whether for the sale of the first party's share in the property or for the sale of the property on the open market. If we cannot agree on the price, we will obtain a current market valuation of the property from a registered valuer and the property will be offered for sale based on that value. If we cannot agree on a single valuation, we will obtain valuations from 2 registered valuers and the property will be offered for sale at the average of the valuations.

[194] Clause 4 governs the distribution of the sale proceeds:

4. Notwithstanding how we are registered on the Computer Register for the property, the proceeds of any sale will be divided equally between us after payment of the following:

(a) The amount required to discharge any mortgage or mortgages, caveats or other charges registered against the property.

(b) Estate agent's sale commission and/or valuers fee.

(c) Solicitor's fees and other legal costs.

(d) All other expenses normally connected with the sale of such a property.

(e) Repayment to each of us of our individual cash contributions towards the purchase price of the property as detailed in clause 1. These contributions are and will continue to be (in all circumstances) the separate property of the person who made them.

(f) Repayment **to each of us of any other cash contributions which either of us has made concerning the property** and which have been recorded in writing. **These contributions are and will continue to be (in all circumstances) the separate property of the person who made them**.

[Emphasis added]

[195] Clause 5 addresses property expenses:

We will pay an equal share of all expenses (outgoings) concerning the property. Outgoings include all rates, all insurance premiums, all body

> corporate levies, all mortgage payments (both principal and interest), all telephone charges, and all charges for gas, electricity and water used in the property. We will open a bank account in our joint names for these payments.

[196] The bold text in cl 4 above assumes some importance to the later dispute which arose in relation to the partnership accounts. The sub-clause also speaks in terms of "separate property", which has hallmarks of relationship property concepts, although the PSA was between the parties' respective family trusts. As can also be seen from the PSA's terms, each party's contributions were to be kept "separate" and reimbursed on sale. As such, the PSA was premised on each party's original and continuing contributions being kept separate and fully reimbursed on sale, with capital gain (and property expenditure) being shared equally.

[197] Partnership accounts were duly drawn up for the 2014 financial year. Mr Preston did not, however, raise with the accountants the fact that Mrs Preston was contributing $100 per week towards the Pauanui mortgage. For this reason, the 2014 accounts did not record a contribution from HFT. Mrs Preston nevertheless signed those accounts as correct.

[198] Mr Preston said in cross-examination that he had simply forgotten to raise this matter with the accountants, and there was never any intention to "rip anyone off". I accept Mr Preston's evidence in that regard.[73] Once this issue had been raised, the accounts were amended to reflect the payment of $100 per week by Mrs Preston. The 2015 accounts included a sum for HFT's contribution, which reflected its contribution over both the 2014 and 2015 years.

What happened post separation?

[199] Since the parties' separation in September 2015, and after living in rental accommodation for a few weeks, Mrs Preston has had almost exclusive use and occupation of the Pauanui property. Mr Preston accepts that he has been at the property from time to time, including to remove various chattels which he considered

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[73] Mr Hutcheson raised in closing a document relevant to whether this point had been raised with Fisher Accountants at an earlier point in time. However, as the document had not been referred to in opening submissions or by a witness, it does not form part of the evidence before the Court. See High Court Rules 2016, rr 9.5(4) and (5).

his own property. This included a Cedar hot tub, which had been installed a year or two earlier. The hot-tub had been funded by Plumbing World reward points earned by EBTL. Having been funded by EBTL, Mr Preston evidently did not consider the hot-tub to be relationship property.

HFT gives notice of wishing to purchase GPFT's interest in the property

[200] On 20 November 2015, HFT gave notice it wished to purchase the Pauanui property. On 16 February 2016, GPFT accepted that notice of exercise of the option under cl 3(b) had been given.

[201] On 24 March 2016, HFT send GPFT a sale and purchase agreement for the Pauanui property. The vendors were the two family trusts, with HFT as purchaser. The sale price was $315,000, based on a valuation the plaintiffs had obtained from a registered valuer in December 2015. The agreement contained a substantial list of chattels (including the hot tub).

[202] The defendants did not accept that valuation. They provided their own valuation from a real estate agent, which put the Pauanui property at $360,000.

[203] Extensive correspondence then ensued between the trusts' lawyers, debating the value of the property, the chattels to be included in any sale, and whether the sale would need to reflect the contributions made by the parties and set out in the partnership accounts.

[204] The parties have helpfully agreed values for the property in the context of the buy-out of GPFT's share:

(a) $337,000 as at the date of HFT giving notice that it wished to purchase GPFT's share; and

(b) $477,500 as at the date of hearing.

The Partnership accounts

[205] Mr Fisher gave evidence as to the partnership accounts, and each trust's capital account. His evidence can be summarised as follows:

(a) The 2014 accounts were prepared and signed by both GPFT and HFT, though as noted, without including the $100 cash contributions to the mortgage to that time by HFT.

(b) This error was pointed out to Fisher Accountants in a meeting in September 2015, at which the draft 2015 accounts were discussed. Mr Fisher agreed that those draft accounts did not include Mrs Preston's $100 contributions. A "forensic review" was accordingly undertaken, and a new set of accounts for 2015 prepared. These included a "catch up" figure of $10,400 to account for HFT's contributions to that point; additional contributions by GPFT by way of capital expenditure (which included introduction of the hot tub); and further professional fees and other expenses (split equally across the partners). Mrs Preston has never signed these (or any later) accounts.

(c) At least for the 2015 and 2016 years, the trusts' capital accounts, recording each trust's contributions over the relevant financial year, show the source of the contributions. For GPFT, there are three sources in 2015, being Mr Preston's personal account, GPFT's account and EBTL's account. In 2016, all contributions by GPFT are shown as emanating from Mr Preston's personal account. HFT's contributions are shown as emanating from Mrs Preston's personal account.

(d) By the time of the 2016 accounts, it had been established that the hot tub had been funded by EBTL (via reward points). It was therefore removed from GPFT's capital account in the 2016 accounts. There is no dispute HFT's ongoing contributions to the mortgage continued to be captured in these and later accounts.

(e) Mr Fisher confirmed the numerical accuracy of the accounts, and in particular the 2018 partner capital accounts, save for two changes:

(i) To deduct out of GPFT's capital account and add into HFT's capital account the sum of $2,500 (being a small balance remaining of the earlier "missing" contributions of $100 per week by HFT); and

(ii) To add to each partner's capital account the amount of their original contribution (i.e. $60,000 in the case of HFT and $10,000 for GPFT).

[206] No accounting evidence was called by Mrs Preston to challenge the numerical accuracy of the accounts. Mr Smith, called by Mrs Preston, did address the categorisation of advances made by each of the trusts, suggesting that as the funds would have no doubt emanated from Mr and Mrs Preston personally, the underlying source may have been relationship property.

[207] In the absence of any challenge to the (numerical) accuracy of the accounts, I find that the 2018 accounts, including the trusts' respective contributions, are, subject to (1) the point discussed below concerning relationship versus separate property, and (2) those adjustments noted by Mr Fisher at [205](e) above, a numerically accurate reflection of each trust's contributions to that point in time.

The remaining disputes

[208] As noted, GPFT accepts that HFT triggered the buy-out provisions. The buy-out has not been completed, however, due to ongoing disputes in relation to the accounts. And while there is now agreement on the value of the Pauanui property, there is a dispute as to whether the buy-out should be at the value of the property at the time HFT gave notice of its intention to exercise its option, or at the current valuation. HFT's position is that GPFT breached cl 3(d) of the PSA by not enabling the parties to convey the property to HFT in 2016 at a price of $377,000. It accordingly seeks an order for specific performance that GPFT now execute a sale and purchase agreement with HFT in that amount.

[209] There is also the dispute as to whether the further contributions made by each trust pursuant to cl 4 of the PSA should in fact be categorised as Mr and Mrs Preston's relationship property (rather than as separate property as recorded in cl 4). Mr Hutcheson notes that neither Mr or Mrs Preston are parties to the PSA in their personal capacities.

[210] I turn to this last issue first.

Status of partners' contributions

[211] The status of the partners' ongoing contributions to the property is not pleaded by HFT in its statement of claim, nor any relief (such as a declaration) sought in this regard. Rather, the statement of claim is limited to the question of whether GPFT breached clause 3(d) of the PSA and what relief should follow.

[212] The status of each trust's contributions to the Pauanui property accordingly does not arise on the pleadings. But even putting aside this (not insignificant) procedural issue, had the claim been amended to include this point, I would not have found that the trust's contributions should be treated as relationship property.

[213] The intent of the PSA is clear. As between the two trusts, there is a binding agreement that any further cash contributions made by them and recorded in writing (as is the case in the context of the partnership accounts) are in all circumstances to be the separate property of the person (i.e. the trust) who made them. There is also a binding agreement as between the two trusts that, upon sale of the property, these and the original cash contributions are to be repaid in full. The PSA does not envisage that the cash contributions recorded in writing will be reduced, or even removed altogether, because the ultimate source of the funds might have been from Mr or Mrs Preston's personal accounts.

[214] This is also consistent with the parties' agreed treatment of the original contributions made (of $60,000 and $10,000 respectively). The objective intent of cl 4 of the agreement is that the contributions referred to at both cl 4(e) and cl 4(f) are to be treated and accounted for in the same way.

[215] I also note there is no evidence of HFT in particular having any source of funds at the time the PSA was entered into, other than from Mrs Preston herself. In that context, it must have been anticipated that HFT's ongoing contributions would be sourced from Mrs Preston, but were nevertheless intended to be classified as HFT's contributions to the property.

[216] Ultimately, treating each trust's contributions as if they were contributions by each of Mr and Mrs Preston personally (and therefore "backing them out" of the PSA) would be inconsistent with the clear intent and premise of the PSA, namely that all cash contributions were to be treated as contributions made by each trust, and were to be repaid, in full, on the sale of the property. As such, cash contributions which may have emanated from Mr or Mrs Preston were clearly intended to have been made by or on behalf of their respective trusts. Each of Mr and Mrs Preston was aware of and alive to the terms of the PSA, including cl 4(f) – each of them, as a trustee of their respective trust, being a signatory to the PSA. I do not view this as some form of "contracting out" of the Act. Rather, it demonstrates each party's intent for how, as between themselves and their family trust, the contributions were to be treated.

[217] There was also no evidence before me as to the precise source of funds sitting behind each trust's contributions in any event. It cannot be assumed, for example, that *all* GPFT's contributions emanated from Mr Preston, given at least in the 2015 accounts, funds are shown as also coming from EBTL and GPFT bank accounts.

[218] I accordingly decline to make declarations or grant relief in respect of the categorisation or "status" of the contributions made by each trust to the Pauanui property. Those contributions are, save for the points noted at [205](e) above, accurately reflected in the 2018 accounts.

The date at which the valuation of the property should be ascertained

[219] Clause 3 of the PSA sets out a process for *selling* the property, or one party giving notice that it wishes to *sell* its share in it. It would seem that sub-clauses (a), (c) and (d) were drafted as a "set" of clauses dealing with a desired sale, and that sub-clause (b) may have been added later, as it commences with the words "nothing in this clause shall prevent either of us from purchasing the other's share in the property".

On its face, the balance of clause 3 does not apply to the scenario when one party wishes to *purchase* the other's share.

[220] Despite the above, however, it seems tolerably clear that the cl 3(d) process for agreeing a sale price was intended to operate in the context of both a sale and purchase of a share in the property (the latter is essentially the "flip side" of the former). If this were not the case, there would be no process for ascertaining the sale price when the sale comes about through the exercise of the cl 3(b) option.

[221] GPFT's statement of defence accepts there was agreement on sale price, namely $337,500, though states this was a "compromise". The evidence suggests the valuations did not include the hot tub, which was a stumbling block to completing the sale (given dispute over whether the property to be conveyed should include this), and other disputed items.

[222] There is no pleading as to the point in time at which GPFT is said to have been in breach of an obligation to sell at a price of $337,000. I have also not been referred to any evidence of agreement on what that price related to; in other words, what the sale and purchase agreement would convey, including fixtures and chattels, for the price of $337,500. As noted, the parties were also in dispute over the accounting for payments under cl 4 of the PSA.

[223] I accordingly do not consider HFT has made out its case of breach of the PSA. Further, HFT's opening submissions premised HFT's case on breach as being dependant on acceptance of the argument that the trust's contributions to the property ought, either wholly or in part, to be characterised as relationship property. As noted, I have not accepted that argument.

[224] Even assuming, however, that GPFT had breached cl 3(d) of the PSA, I would not have made an order for specific performance, ordering that GPFT (with HFT) now enter into a sale and purchase agreement conveying the property to HFT at a price of $337,000.

[225] As a preliminary point, I note that HFT does not suggest it has suffered any harm, loss or damage as a result of any breach by GPFT. No alternative claim in damages is pleaded. Nor has it been suggested damages would have been an inadequate remedy, often an important premise to an order for specific performance.

[226] Specific performance is an equitable remedy, ordered at the discretion of the Court. An order for specific performance which enables a party to secure, in money terms, more than the performance due to them, will be unjust.[74] The performance due to HFT is to have the property conveyed to it at its market value. The parties are agreed that the property is currently worth $477,500. Were HFT to acquire the property now for $337,000, it would benefit from a substantial windfall by, in effect, securing the entirety of the property's capital gain in the intervening years. That is despite both trusts, as partners, continuing to own and operate the property during that period, including paying their respective shares of outgoings (including the mortgage). Such a windfall would be inconsistent with the PSA's premise of the partners sharing equally in the property's capital gain. Conversely, there is no prejudice to HFT in acquiring 100 per cent of the property now for a sum based on its present agreed value. After all, that simply accords with the parties' underlying bargain.

[227] I accordingly decline to grant the relief sought in HFT's statement of claim. No other relief or orders are sought, though it will be apparent from the above that the parties ought to take prompt steps to settle the sale of the Pauanui property on the basis of the updated agreed price.

Result and next steps

Result

[228] I have largely declined Mrs Preston's claims. In particular:

(a) In the 051 proceedings:

(i) I have declined Mrs Preston's applications pursuant to ss 9A, 15, 17 of the Act, and s 182 of the FPA.

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74 *Co-operative Insurance v Argyll Stores (Holdings) Ltd* [1998] 1 AC 1 at 15.

(ii) I have determined the relationship property pool as set out in the schedule attached to this judgment.[75]

(iii) I have ordered that chattels are to lie where they fall.

(b) I have dismissed Mrs Preston's claims to equitable relief in the 031 proceedings.

(c) I have declined to grant an order for specific performance in the 030 proceedings.

Next steps

[229] The parties will obviously need some time to digest this judgment, and I am conscious of the time of the year it is being delivered. Accordingly, a joint memorandum, or if required, separate memoranda, on any required adjustments to the relationship property pool as a result of my determination of the date of the de facto relationship (as noted at [72] above) is to be filed and served on or before **21 February 2020.**

[230] The parties are encouraged to seek to agree costs. It would be in their interests to do so, rather than incur further costs in argument on costs. In the event they are not able to agree:

(a) Any party seeking costs in any of the proceedings is to file and serve a memorandum as to costs on or before **21 February 2020**;

(b) The other party may file a memorandum in response on or before **6 March 2020**.

(c) Unless I require further information from the parties, I will thereafter determine costs on the papers.

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[75] Formal orders will be made after confirmation by the parties as to the appropriate sums to be included for Kiwisaver. See [141] above. Provisional amounts have been included for present purposes.

[231] No costs memorandum is to exceed **seven pages** in length.

Concluding observations

[232] It is appropriate to make some concluding observations.

[233] As noted at the outset of this judgment, the three sets of proceedings arising from the end of Mr and Mrs Preston's marriage have given rise to a plethora of factual and legal issues. The costs associated with the proceedings will inevitably have been significant, despite the relatively modest sums involved. As Mr McCleary stated at the hearing, "the matter has eaten its head off".

[234] Important values reflected in the Property (Relationships) Act are the desirability of processes for resolving relationship property disputes which are simple, inexpensive and speedy, and minimise the opportunities for animosity, blaming and belittling behaviour. Unfortunately, the nature and progress of these proceedings have been the antithesis of such values. Further, as matters transpired, the predominant proceeding between the parties was the 051 proceeding, which would have ordinarily been dealt with in the Family Court. The 031 proceeding was somewhat of a "fall back" position, and the 030 proceeding gave rise to relatively discrete issues.

[235] I make these observations as it strikes me that careful consideration must be given at the time proceedings are sought to be transferred to this Court as to whether, standing back, that is the most appropriate course in all the circumstances. The Family Court's processes are designed to accommodate the more speedy and simple resolution of disputes arising at the end of a marriage. Careful attention therefore ought to be given as to what truly is the predominant proceeding, reflecting the *real* dispute between the parties, and the most appropriate forum for its resolution.

_____

Fitzgerald J

SCHEDULE
RELATIONSHIP PROPERTY POOL/DIVISION

A.	**Relationship Property Pool**	
1.	Haines Hunter boat	$52,000.00
2.	Kiwisaver – Mr Preston*	[$60,000.00]
3.	ANZ – Mr Preston	$1,895.14
4.	Credit card debt – Mr Preston	($18,455.00)
5.	Smith City debt – Mr Preston	($4,000.00)
6.	Kiwisaver – Mrs Preston	$7,858.00
7.	ANZ Saving Account – Mrs Preston	$5,159.00
8.	ANZ personal account – Mrs Preston	$349.00
9.	ANZ online savings account – Mrs Preston	$9,200.00
10.	Credit card debt – Mrs Preston	($1,161.00)
11.	EBT current account – Mr Preston	$2,158.00
	Total net relationship property	$115,003.14
B.	**Each party's share**	$57,501.50

C.	**Retained by Mr Preston**	
1.	Kiwisaver – Mr Preston*	[$60,000.00]
2.	ANZ – Mr Preston	$1,895.14
3.	Credit card debt – Mr Preston	($18,455.00)
4.	Smith City debt – Mr Preston	($4,000.00)
5.	EBT current account – Mr Preston	$2,158.00
	Total	$41,598.14

D.	**Retained by Mrs Preston**	
1.	Haines Hunter boat	$52,000.00
2.	Kiwisaver – Mrs Preston	$7,858.00
3.	ANZ Saving Account – Mrs Preston	$5,159.00
4.	ANZ personal account – Mrs Preston	$349.00
5.	ANZ online savings account – Mrs Preston	$9,200.00
6.	Credit card debt – Mrs Preston	($1,161.00)
	Total	$73,405.00

Equalising payment due from Mrs Preston to Mr Preston of **$15,903.36.**

* Provisional amount pending confirmation of actual amount.