IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA70/2020
[2020] NZCA 679

BETWEEN	KATHARINE ELIZABETH PRESTON First Appellant
	KATHARINE ELIZABETH PRESTON AND SUZANNE HELEN JESPERSEN AS TRUSTEES OF THE HUNTBOS FAMILY TRUST Second Appellants
AND	GRANT LEE PRESTON First Respondent
	GRANT LEE PRESTON AND FISHER PARTNERS TRUSTEES LIMITED AS TRUSTEES OF THE GRANT PRESTON FAMILY TRUST Second Respondents

Hearing:	2 September 2020 (further submissions received 29 September 2020)
Court:	Kós P, Wylie and Muir JJ
Counsel:	V T M Bruton QC and I M Hutcheson for Appellants J M McCleary and R C Van den Broek for Respondents
Judgment:	21 December 2020 at 11 am

JUDGMENT OF THE COURT

A The appeal is allowed to the extent stated in [37].

B The cross-appeal is dismissed.

C There is no order for costs.

REASONS OF THE COURT

(Given by Kós P)

[1] This claim, concerning modest relationship property, has spawned three sets of High Court proceedings. The judgment below, which is impeccable save in one respect, is 235 paragraphs in length.[1] Delivered promptly by the Judge, it nonetheless came more than four years after separation. In it, the sole relief granted was an equalising payment of $15,903 — to be paid by Mrs Preston. As counsel observed at trial, "the matter has eaten its head off".[2] Having had most of her claims dismissed, Mrs Preston was also required to pay costs and disbursements of $137,233. Result: misery. Commendably, senior counsel for Mrs Preston, who did not appear below, has agreed to take her appeal for a much-reduced fee. That apart, it may be said this case is everything relationship property litigation should not be.

Background

[2] Mr and Mrs Preston met in 2007 and began a de facto relationship in about March 2009. They married in December 2010 and separated slightly less than five years later in September 2015.[3]

[3] Mr Preston owned a contracting company specialising in subsurface groundworks, called Eastern Bay Thrusting Ltd (EBTL). In 2004 — three years before he met Mrs Preston — he settled the Grant Preston Family Trust (GPFT). The final beneficiaries are his two children by an earlier marriage. In 2005 the GPFT purchased a section in The Fairway, Whakatāne, and Mr Preston and the GPFT built a home there which was completed in mid-2007.[4]

[4] In November 2008 — after he had met Mrs Preston but before they had begun their de facto relationship — Mr Preston transferred 99 of the 100 shares he owned in EBTL to the GPFT for $160,000.[5]

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1 *Preston v Preston* [2019] NZHC 3389 [High Court judgment].
2 At [233].
3 At [10], [31], [45] and [72].
4 At [8]–[9] and [13].
5 At [22].

[5] In February 2010 Mr Preston executed a deed adding the following classes as discretionary beneficiaries of the GPFT:

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

[6] This amendment deed reflected advice from his accountants, as Mrs Preston was then benefitting from trust property via contributions and day to day living expenses. In addition, it was seen to have tax efficiencies.

[7] Mrs Preston worked part time for EBTL as an office administrator for which she received a fair wage. She also studied towards gaining a Bachelor's and Honours degree in Psychology at Massey University. In 2015 she enrolled in that university's doctoral programme. She had some funds of her own, some of which she advanced to EBTL to tide it over during cashflow shortages, although the company was profitable. Those advances were all repaid to her.[6]

[8] In December 2012 the couple purchased a holiday property at Pauanui. Mr Preston contributed $10,000, and Mrs Preston $60,000, the remainder being met by way of bank loan. The Judge found the parties intended to ringfence their contributions. The property was settled in the name of GPFT, but Mrs Preston settled a new family trust, the Huntbos Family Trust (HFT) and in 2014 the property was resettled in the names of the GPFT and the HFT as tenants in common in equal shares.[7] The two trusts entered into a property sharing agreement in relation to the Pauanui property, to which we will return.

[9] The parties separated in September 2015. Mrs Preston occupied the Pauanui property. In November 2015 the HFT gave notice exercising its option to purchase that property. We will return to that also. Their marriage was dissolved in November 2018.

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6 At [25]–[28] and [33]–[35]. See [79]–[94] for a full outline of Mrs Preston's contributions to EBTL.

7 At [183]–[190].

Three proceedings

[10] The first proceeding, called the "051 proceeding" was commenced by Mr Preston in the Family Court seeking the definition of relationship property and the division of that between the parties. It was transferred from the Family Court to the High Court in 2017. A consent order was made regarding transfer of a boat in December 2017. Ultimately that proceeding focussed on three matters advanced by Mrs Preston: (1) an order under s 15 of the Property (Relationships) Act 1976 (PRA) for compensation for economic disparity; (2) orders pursuant to ss 9A, 15A and/or 17 of the PRA on the basis her actions contributed to the increase in value of Mr Preston's separate property (being his one share in EBTL); and (3) (most significantly) an award under s 182 of the Family Proceedings Act 1980 (FPA) of a share of the assets owned by the GPFT. That was premised on the proposition that the February 2010 amendment deed was a nuptial settlement for the purposes of s 182. The Judge declined each of the orders sought by Mrs Preston in the 051 proceeding.[8] Only the second and third matters remain in issue in this appeal.

[11] The second proceeding, known as the "031 proceeding" involved a claim by Mrs Preston for an equitable interest in the Fairway home (owned by the GPFT and completed before the relationship began) and shares in EBTL (also largely owned by the GPFT and transferred to it before the relationship began). This claim also failed.[9]

[12] The third proceeding, the "030 proceeding" concerned the Pauanui property. Mrs Preston alleged that the GPFT was in breach of its obligation to sell its share in the property to the HFT, it having triggered the option to purchase in November 2015. The Judge was not satisfied that there was a breach by the GPFT: it was willing to sell, with appropriate adjustments, on the basis of the current market value.[10]

[13] Apart from EBTL (owned as to 99 per cent by the GPFT), the Fairway home (owned also by the GPFT) and the Pauanui property (owned by the two trusts), the relationship property pool was modest, totalling $115,003. In the absence of adequate evidence as to the value of chattels, apart from the aforementioned boat, the Judge

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8 At [118], [121], [133] and [168].
9 At [181].
10 At [219]–[223].

declined to make orders for redistribution of the chattels. They were to lie where they fell.[11] Mrs Preston having received the major asset within the relationship property pool, the boat, the Judge ordered she make an equalising payment to Mr Preston of $15,903, resulting in each party receiving $57,502 in cash or kind.

Issues

[14] Three issues arise for our determination:

(a) Issue 1: Was the February 2010 amendment deed a nuptial settlement for the purposes of s 182 of the FPA and (if so), did the Judge err in the exercise of her discretion under that provision in declining to award relief to Mrs Preston?

(b) Issue 2: Did the Judge err in declining to award Mrs Preston a share in the increase in value in Mr Preston's separate property, being his one share in EBTL, under s 9A of the PRA?

(c) Issue 3: Did the Judge err in declining to allow the HFT to purchase the Pauanui property for $337,000?

Issue 1: The exercise of s 182

[15] This issue arises because of the terms of the February 2010 amendment to the GPFT trust deed.[12] Mrs Preston sought an award of part of the assets of the GPFT pursuant to s 182 of the FPA. That provides:

> **182 Court may make orders as to settled property, etc**
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> (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

[11] At [134]–[137].
[12] At [5] above.

agreement or settlement, either for the benefit of the children of the marriage or civil union 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.

Judgment

[16] The Judge first addressed whether the February 2010 deed was a "nuptial settlement" for the purposes of s 182(1). Mrs Preston said it was, being made in anticipation of marriage and conferring on her the status of a discretionary beneficiary. The Court thus had power under s 182 to vary the settlement and make orders that she continue to benefit from the GPFT despite the parties' separation.[13] Mr Preston accepted that the deed was made in the context of a forthcoming marriage, but denied it was a settlement for the purposes of s 182 or, if it was, that the discretion under s 182 should be exercised to decline relief.[14] The parties maintain those positions on appeal.

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13 High Court judgment, above n 1, at [146]–[147].
14 At [148].

[17] After reviewing the authorities, principally the decisions of the Supreme Court in *Ward v Ward*[15] and in *Clayton v Clayton*,[16] the Judge said the orthodox position was that a discretionary beneficiary under a trust had no legal or equitable interest in the assets of the trust until the trustees had exercised their discretion in favour of a particular beneficiary. No species of property was therefore conveyed to a discretionary beneficiary.[17] But, the Judge held, a discretionary family trust was nonetheless a "settlement made on the parties" for the purposes of s 182.[18] As this Court concluded in *W v W*, 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".[19] The Judge therefore concluded that the February 2010 deed was a "settlement" for the purposes of s 182.[20]

[18] The Judge then turned to consider whether the discretion vested in the Court in s 182 should be exercised. Referring to *Clayton*, the Judge concluded that it should not. The Judge saw the terms of the deed as contemplating continuation of a spouse as a discretionary beneficiary for only so long as she remained married to the settlor. The settlement in this case was limited to the 2010 amendment: the GPFT itself was not established during their marriage or in contemplation of it. It was settled in 2004, long before Mr Preston had met Mrs Preston, and for the primary purpose of preserving assets for the benefit of his children. Neither the GPFT's assets nor any significant portion of them were accumulated during the marriage or from the relationship property settled on the GPFT during the course of the marriage. The GPFT assets were the Fairway home (purchased and acquired before marriage) and 99 of the 100 shares in EBTL (again acquired prior to the marriage). The fact the assets of the GPFT had been sourced from separate property pointed against the exercise of the discretion. The Judge found that Mrs Preston had made no material or substantial contribution to sustaining those assets, but had benefitted from them in a not insubstantial manner. Importantly, she had gained in an enduring manner given

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15 *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31.
16 *Clayton v Clayton* [2016] NZSC 30, [2016] 1 NZLR 590.
17 High Court judgment, above n 1, at [157].
18 At [157] (emphasis omitted).
19 At [157] (emphasis omitted), quoting *Ward v Ward* [2009] NZCA 139, [2009] 3 NZLR 336 at [27].
20 At [159].

the support that had been provided to her to complete her university studies. Finally, the Judge took into account the fact that the marriage was one of relatively short duration, lasting less than five years.[21] In those circumstances she declined to exercise the discretion under s 182.[22]

Submissions

[19] By way of cross-appeal, Mr McCleary (for Mr Preston) submits that s 182 is not engaged at all. There is no nuptial settlement. The GPFT is not connected or proximate to the marriage of the parties and is not a nuptial settlement. No dispositions to the GPFT occurred after marriage or connected to or in proximity to marriage, as the only assets ever settled on it were the Fairway property and the EBTL shares, which in one case pre-dated the relationship altogether and in the other case involved a transfer for value. The 2010 amendment deed was not a covenant to pay, did not make a formal continued provision and did not impress an extant obligation. The creation of a discretionary benefit in anticipation of marriage was not sufficient to give rise to a nuptial settlement.

[20] For Mrs Preston, Ms Bruton QC submits that the Prestons treated their life together, and financial affairs, as a "joint enterprise, even if Mr Preston's desire was that his assets eventually pass to his children" by his former marriage. Mrs Preston was added as a discretionary beneficiary of the GPFT. The Judge was right to determine that the addition of Mrs Preston as a beneficiary of the GPFT was a nuptial settlement for the purposes of s 182. But, Ms Bruton submits, she was wrong in declining to exercise her discretion under that provision. The purpose of the provision was to empower the Courts to remedy the consequences of the failure of a premise (the continuing marriage) on which the settlement was made. It is accepted that the non-exercise of the power under s 182 being challenged involved a true discretion, meaning that Mrs Preston would need to persuade this Court that the Judge made an error of principle, took into account an irrelevant factor, overlooked a relevant factor, or was plainly wrong. Mrs Preston's position under the settlement had the marriage continued and her position post-dissolution needed proper comparison.

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21 At [167].
22 At [168].

Had the marriage continued she would have had a benefit of occupation of the family home in Whakatane, the holiday property at Pauanui and benefits flowing from the EBTL shares, including assistance with living costs and costs of study. Instead she was struggling to make ends meet post-dissolution, living at Pauanui (which simply comprised two caravans and some outbuildings). The correct approach to s 182 was not a constructive trust inquiry, focusing on contributions. The approach taken by the Judge was outdated and did not reflect the modern social context of 21st century New Zealand relationship property law.

Analysis

[21] We do not accept either challenge to the Judge's s 182 decision.

[22] First, the Judge was correct to find the February 2010 deed amending the GPFT deed of trust was a nuptial settlement for the purposes of s 182. It was an arrangement made in contemplation of marriage, which made some form of continuing provision for Mrs Preston in her capacity as a spouse. It is unnecessary for s 182 to be triggered for the settlement to involve any vesting of property on the spouse: the Supreme Court in *Clayton* was clear that discretionary family trusts, creating mere expectations on the part of discretionary beneficiaries, can be nuptial settlements for s 182 purposes.[23] Indeed the majority of s 182 cases now seem to involve discretionary trusts entered into in contemplation of, or following, marriage. In this case, had the GPFT itself been settled on February 2010 it would have been a nuptial settlement for s 182 purposes; the enlargement of the objects of that trust by the February 2010 deed likewise was a nuptial settlement. We reject the cross-appeal.

[23] Secondly, we do not think the Judge erred in exercising her discretion under s 182. That provision has a relatively modest remit. It is not a mechanism to equalise property interests overall; as the Supreme Court said, it is:[24]

> … not underpinned by any entitlement to or presumption of equal sharing. The court's task is not to produce the outcome that would have applied if the relationship property had not gone into a trust.

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23 *Clayton v Clayton*, above n 16, at [33]–[34].
24 *Ward v Ward*, above n 15, at [30].

Certainly s 182 does not authorise a grand march into the respondents' separate property or third party trust property to achieve economic equalisation in the name of contemporary family values. If property has been diverted into trusts, defeating relationship property interests, ss 44 and 44C of the PRA are available. The focus of those provisions is to ensure equal shares in relationship property. That is not s 182's remit. If economic disparity results from the division of functions in a failed marriage, ss 15 and 15A provide a response.

[24] The role of s 182, as the Supreme Court said in *Clayton*, is to review a nuptial settlement and make orders to remedy the consequences of a failure of the premise on which the settlement was made.[25] Historically, that might have been found in a settlement made for the benefit of a spouse who had then left the marriage; that settlement might then be reviewed and revised *against* that spouse.[26] In contemporary circumstances, it is typically applied to a nuptial settlement in the form of a family trust where the applicant spouse is (or is at risk of) exclusion in a manner that is unfair having regard to the circumstances in which the settlement was made and the trust property acquired. Most typically that will occur where relationship property is vested in a trust without intent to defeat (so that ss 44 of the PRA will not assist), s 44C does not apply, but one spouse is left in effective control.

[25] For instance, in both *Clayton* and *Ward*, both parties to the marriage had contributed to the composition of the property now held by trusts. In *Clayton*, Mr Clayton was co-trustee with his business associate; he had the power to remove trustees. Mrs Clayton remained as a discretionary beneficiary, but Mr Clayton had the power to remove her. Whether or not she was removed, she was unlikely to receive further benefits from the trust. Significantly, the assets of the trust acquired during their marriage were not shown to be sourced from Mr Clayton's separate property, a position entirely unlike the present one. The trust assets in *Clayton* were the product of the parties' joint efforts. As the Supreme Court observed, had the *Clayton* case not settled, it would have made orders similar to those in *Ward* to split the trust equally into two separate trusts.[27] In *Ward* the parties had made equal contributions to

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25 *Clayton v Clayton*, above n 16, at [44], citing *Ward v Ward*, above n 15, at [15] and [20].

26 See, for example, *Hall v Hall* (1902) 22 NZLR 226 (CA); and *Soler v Soler* (1898) 17 NZLR 49 (CA). The history of s 182 is analysed in *Ward v Ward*, above n 15, at [13]–[19].

27 *Clayton v Clayton*, above n 16, at [83].

the trust, expected to gain equal benefits from the trust during marriage, and fairness required that similar arrangements continued thereafter. In that case that was achieved by resettlement of the trust assets on two separate, independent trusts.[28]

[26] As the Supreme Court noted in *Ward*:[29]

> [A] nuptial settlement, whether it be ante or post-nuptial, is premised on the continuation of the marriage. When the court is addressing an application under s 182, it must assess whether an order is necessary and, if so, in what terms, to reflect the fact that this fundamental premise no longer applies. The expectations of the parties when the settlement was made may often have been defeated, at least in part, by the dissolution of their marriage. One of the purposes of s 182 is to prevent one party from benefiting unfairly from the settlement at the expense of the other in the changed circumstances. In that situation the order should be directed at eliminating the unfair benefit.

[27] We are not persuaded that the Judge erred in the exercise of her discretion. We agree with her that this is not a case where an order under s 182 is appropriate, given the original objects of the GPFT (Mr Preston's children) remain the fundamental raison d'être for the GPFT, all the GPFT assets were acquired by Mr Preston well ahead of the relationship, were vested in the GPFT by Mr Preston before the de facto relationship with Mrs Preston began, and were not contributed by, or to by, her. It is therefore a case altogether unlike *Ward* or *Clayton* where relationship property shifted after marriage into a trust. Mrs Preston was added as a discretionary beneficiary before marriage, but for the reasons given by the Judge at [167] of her judgment — summarised above at [18] — we are unpersuaded that there is injustice in the state of affairs after dissolution remaining unaltered. To put it another way, reflecting the passage from *Ward* quoted in the preceding paragraph, Mr Preston gains no unfair benefit here.

Issue 2: The exercise of s 9A

[28] Ms Bruton addressed this briefly only. Appropriately. Section 9A(2) of the PRA concerns increase in value to separate property attributable to the actions of the other spouse. The relevant increase in value may then itself be treated as relationship property. In this case the separate property in issue was a single share

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28 *Ward v Ward*, above n 15, at [61]–[62].
29 At [20] (footnote omitted).

retained by Mr Preston in EBTL. The Judge found the gross increase in value of that share during the relationship, regardless of attribution, was just $3,480.[30] Whatever approach might be taken to assessing contribution for attribution purposes, the marginal proportion attributable to Mrs Preston would be de minimis and does not justify appellate re-examination. In any event, we are not persuaded the Judge erred in dismissing this claim in the first place.

Issue 3: The Pauanui property

[29] When the Pauanui property was resettled on the two trusts, a property sharing agreement was entered into. It provided a pre-emptive buy-out right. It is common ground that the HFT exercised that right in November 2015. It is also common ground that the value of the property was $337,000 at the time notice was given, and $477,500 at the time of the hearing. In March 2016 HFT sent a sale and purchase agreement to the GPFT at a price of $315,000, based on a registered valuation. Settlement would have occurred in April 2016. We are satisfied that with family support Mrs Preston could have settled at either $315,000 or $337,000 in April 2016. Settlement did not however occur because the price was not agreed and the parties became bogged down over arguments over the accounts, chattels and relative contributions.

Judgment

[30] We set out next the relevant terms of the property sharing agreement. We draw these from the judgment below:

> [191] Clause 1 of the [property sharing agreement] deals with preliminary matters and ownership of the property, and records HFT's contribution as $60,000 and GPFT's contribution as $10,000.
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> [192] Clause 2 of the [property sharing agreement] states:
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> > 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.
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> [193] Clause 3 of the [property sharing agreement] prescribes the process for selling the property:

[30] High Court judgment, above n 1, at [129].

(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.

(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.

[31] The Judge concluded, rightly in our view, that although on its face cl 3(d) did not apply where one party wished to *purchase* the other's shares, the cl 3(d) process for agreeing a sale price was intended to operate in the context of both a sale and purchase of the share in the property. Otherwise there would be no process for ascertaining the sale price where the sale came about through the exercise of the cl 3(b) option, which is what occurred here.[31]

[32] The Judge held that the intent of the property sharing agreement was clear: a binding agreement that further cash contributions made by the parties and recorded in writing (in the partnership accounts) are the separate property of the person that made them. And that, upon sale of the property, those original cash contributions were to be repaid in full. The Judge concluded that the objective intent of cl 4 of the agreement was that the contributions referred to at *both* cl 4(e) and cl 4(f) were to be treated and accounted for in the same way.[32] Ultimately the Judge accepted that the revised 2018 accounts prepared by a Mr Fisher were correct.[33] That was not the subject of material challenge before us, though it was contested in written submissions. The Judge however concluded that there had been no breach of the property sharing agreement by the GPFT and did not order specific performance. Furthermore:[34]

> 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 [property sharing agreement's] premise of the partners sharing equally in the property's

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31 At [219]–[220].
32 At [213]–[214].
33 At [207].
34 At [226].

> 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.

Submissions

[33] Ms Bruton submits that the Judge erred in not directing specific performance at the common ground value as at the time of triggering the pre-emptive notice of $337,000. It was immaterial that the property had increased in value since the date of notice until settlement, and likewise immaterial if it then increased thereafter. Exercise of the notice accrued a right to settlement at the price applicable under cl 3(d) at the time of giving the notice. Regardless of who was responsible for delays in achieving agreement of settlement, that was the entitlement. It did not represent a windfall to Mrs Preston: other aspects of the relationship property had long since been settled and to require payment at current value instead represents a loss of capital she would have built up had she been able to exploit properly the accrued right achieved by exercising the pre-emptive notice.

[34] Ms Van den Broek submits that the Judge's approach to the Pauanui property was flawless. The sale at $337,000 would represent a windfall for Mrs Preston; Mr Preston had continued to service half the mortgage throughout.

Analysis

[35] We are satisfied that the Judge erred in the approach she took in relation to the Pauanui property. Instead, we take the view that HFT, having triggered the right to purchase the property in November 2015 (with settlement in April 2016), is entitled to transfer at the price agreed (or that should have been agreed): $337,000. Post-obligation dickering over the price does not alter the fact that the cl 3(d) process should have produced a November 2015 price of $337,000 well before settlement in April 2016. Post-obligation dickering over the parties' respective contributions to the property, and the accounts, are immaterial to the obligation to convey. By cl 4 of the property sharing agreement, those issues were to be dealt with post-settlement, by

distribution of the proceeds of sale less repayment of cash contributions. That remains the position.[35]

[36] It is true that the property has increased in value since 2015/16. But unlike the Judge, we do not see that as a windfall to the purchaser given the primary obligation was to transfer the property in 2016. The rise in capital value was a gain the purchaser was entitled to receive; had value instead *fallen*, the price would not have reduced. Any windfall to the purchaser arises only from the delay in having to expend funds: either it may have saved interest costs, had it needed to borrow, although economically that simply shifts cost across time, or if it had funds in hand (which seems unlikely) it could invest those elsewhere in the meantime. This was not explored in evidence, or before us, and we are not satisfied that this uncertain consideration justifies denying specific performance. Very substantial hardship to the vendor might bar specific performance, but that is not demonstrated here.[36] This is not the exceptional case where specific performance should be denied: as Lord Eldon said in *Coles v Trecothick*, "[a]ccidental subsequent advantage made of a bargain is nothing".[37]

[37] The HFT, the second appellant, is entitled to complete the purchase of the property at Pauanui at a price of $337,000, and we so order.

Result

[38] The appeal is allowed to the extent stated in [37].

[39] The cross-appeal is dismissed.

[40] Given substantial dismissal of the appeal, and dismissal of the cross-appeal, there will be no order for costs. Any revision of costs in the High Court in light of the modest adjustment made by this judgment is a matter for that Court to consider.

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35 It is unnecessary, therefore, for us to resolve the continued disagreement between the parties as to the extent of those contributions, and which were the subject of further submissions, post-hearing. If those remain in dispute, parties may apply to the High Court, albeit bearing in mind the prospect of increased or indemnity costs being ordered in that forum if common sense does not finally prevail.

36 *Coles v Trecothick* (1804) 9 Ves Jun 234, 32 ER 592 (Ch) at 597.

37 At 597.

Solicitors:
Jespersen & Associates, Auckland for Appellants
Buddle McCleary Kennedy, Whakatāne for Respondents