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IN THE COURT OF APPEAL OF NEW ZEALAND

CA58/2015
[2016] NZCA 356

BETWEEN	SCOTT Appellant
AND	WILLIAMS Respondent

Hearing:	4 February 2016 (further submissions received 11 March 2016)
Court:	Ellen France P, Harrison and Kós JJ
Counsel:	Appellant in person S L Robertson for Respondent
Judgment:	29 July 2016 at 3 pm

JUDGMENT OF THE COURT

A **The appeal is allowed in part. The quantum of compensation payable under s 15 of the Property (Relationships) Act 1976 is increased from $280,000 to $470,000.**

B **The appeal otherwise is dismissed.**

C **No order for costs is made in this Court.**

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REASONS OF THE COURT

(Given by Kós J)

Ms Scott and Mr Williams separated in June 2007 after 25 years' marriage. Nine years later they are still embroiled in a relationship property dispute. Most issues have now been resolved in the Family Court[1] and High Court.[2] But Ms Scott was

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1 *Williams v Scott* [2014] NZFC 7616 [Family Court judgment].
2 *Williams v Scott* [2014] NZHC 2547, [2015] NZFLR 355 [High Court judgment].

granted leave by the High Court[3] to appeal against four aspects of the High Court judgment:

(a) the correct valuation of Mr Williams' partnership interest in a law firm;

(b) whether there should have been an order that the family home be sold;

(c) the quantum of an award in Ms Scott's favour under s 15 of the Property (Relationships) Act 1976 (PRA) on grounds of economic disparity; and

(d) whether Mr Williams was obliged to pay Ms Scott maintenance under the provisions of the Family Proceedings Act 1980 (FPA).

[2] This judgment anonymises the parties. We are satisfied good reasons exist to maintain the anonymisation directed in the courts below. Essentially that is because of some of the content of the earlier judgments.

Background

[3] The parties married in 1981. Mr Williams is a lawyer, currently aged in his early 60s. He started his own practice in the 1980s. The practice prospered. He eventually merged with another practitioner to form a successful two-partner firm.

[4] Ms Scott, now aged in her mid-50s, trained and worked initially as an accountant. She resigned from that work in 1984. She studied for a law degree, graduated in 1988, and commenced employment with a law firm.

[5] The couple had children in 1990 and 1992. The second child was unwell and required extensive treatment and hospitalisation on several occasions. Ms Scott became primary caregiver and homemaker. She supported Mr Williams' practice by providing accounting services and legal opinions. Ms Scott recommenced work as

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3 *Williams v Scott* [2014] NZHC 3385 [High Court leave judgment].

an accountant in 2001 for about a year. She continued to assist her husband with accounting for his firm.

[6] The parties separated in 2007, and their marriage was dissolved in 2010.

[7] At the time of separation the parties had the following assets:

(a) two properties in Remuera, one containing the family home and the other an adjoining empty section;

(b) commercial property interests in Auckland;

(c) a beach house at Omaha, a half share in a Fiji property, and another property;

(d) Mr Williams' interest in the law firm; and

(e) other personal assets including chattels, vehicles, life insurance policies and cash.

[8] The present appeal, as it relates to specific items of property, concerns (a) and (d). The s 15 claim is for the relationship property generally.

Outcome below

[9] It is convenient to consider the judgments of Judge McHardy and Faire J together when we address the issues that confront us on this appeal. But the final outcome in the High Court (compared with that in the Family Court) may be summarised now:

(a) The Remuera properties were to be sold and the proceeds divided between the parties (rather than vesting in Ms Scott at an adjudicated 2013 value of $4.4 million).

(b) Mr Williams' interest in the law firm was reduced to $300,000 (from $450,000) and Ms Scott was entitled to half of that.

(c) The Family Court's calculation of the super profits derived from Mr Williams' interest in the law firm was confirmed.[4] Ms Scott was entitled to $546,500. This is not now challenged on appeal.

(d) The s 15 economic disparity award was reduced from $850,000 to $280,000.

(e) The Family Court's maintenance award (of $42,032 in respect of unpaid rates for the Remuera properties) was not challenged on appeal by Mr Williams. Ms Scott's cross-appeal claiming further maintenance failed.

Leave for second appeal in relationship property cases

[10] Both parties applied for leave to appeal various aspects of the High Court decision, both in the High Court and then in this Court. Leave to bring a second appeal was granted by Faire J in the High Court only on the following questions:

Orders for sale

(a) Did the High Court err in ordering sale of the Remuera properties?

(b) Do the facts justify any adjustment having regard to the provisions of s 2G of the Property (Relationships) Act 1976?

Valuation of legal practice

(c) Was the High Court determination that the legal practice interest of the appellant had a value of $300,000, correct?

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4 "Super profits" here reflect earnings on capital constituting relationship property less the amount attributable to the earner as an employee in the usual way: see [45] and [50] below.

Section 15 award

(d) Should an order allocating a share of super profits from separation date to hearing date be taken into account in fixing compensation for this period?

(e) Should any award be reduced having regard to a change in the non-claiming party's position brought about by retirement?

(f) Was the High Court in error in the actual calculation undertaken for super profits because it did not take into account a contingency or present value discount?[5]

(g) Is an enhancement award justified in this case?

(h) What considerations should a court take into account in fixing a percentage of property as the basis for a s 15 award?

Maintenance

(i) If a share of super profits is awarded, should that be taken into consideration when determining a party's obligation to maintain and the other partner's entitlement to maintenance?

[11] Section 39B of the PRA permits a second appeal, to this Court, by leave only. In *Waller v Hider*, a relationship property appeal, this Court observed that in such cases a single appeal must usually suffice.[6] As Blanchard J noted:[7]

> Upon a second appeal this Court is not engaged in the general correction of error. Its primary function is then to clarify the law and to determine whether it has been properly construed and applied by the Court below. It is not every alleged error of law that is of such importance, either generally or to the parties, as to justify further pursuit of litigation which has already been twice considered and ruled upon by a Court.

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5 This wording was amended by consent by this Court in its leave judgment: *Scott v Williams* [2015] NZCA 258 [Court of Appeal leave judgment] at [5].

6 *Waller v Hider* [1998] 1 NZLR 412 (CA).

7 At 413. For a recent illustration of the application of this test see *Simon v Wright* [2014] NZCA 199.

> When the disputed matter is entirely or largely a question of fact the task of the applicant under s 67 [of the Judicature Act 1908] is harder. An issue of fact in a matter falling within the jurisdiction of an inferior Court will seldom be of public importance. It is better that we make no attempt to define the circumstances in which a factual context can be taken to have private importance but obviously it may do so if the amount at stake is very substantial or the decision reflects seriously on the character or conduct of the would-be appellant or, as in *Cuff*, the judgment below has special consequences (for example, bankruptcy) for the losing party. Even then, however, leave cannot be anticipated if the applicant is seeking to disturb concurrent findings of fact in the lower Courts.

[12] An "intensely factual inquiry" will not therefore generally be appropriate for a second appeal.[8] However where findings below are non-concurrent, and there is a real issue of law or principle at stake, the threshold may still be met. In addition, a challenge to a first instance discretionary decision is likely to fall well short of the threshold for a second appeal.[9] In all this the principle expressed in s 1N(d) must be borne in mind: questions arising under the PRA should be resolved as inexpensively, simply and speedily as is consistent with justice. The resolution of relationship property cases should not be protracted by second appeals that do not clearly meet the threshold for each question posed.

[13] In the present appeal Faire J (in granting leave) cited *Waller v Hider* (and the passage quoted above) in limiting the questions for which leave to appeal would be granted. In particular, he was dubious that the challenge to the valuation of the law practice — issue (c), where he had reduced value from $450,000 to $300,000 — met the test. But because it was connected to the s 15 claim, he granted leave. We observe that we would not have done so, given the essentially factual nature of the inquiry, the largely common ground in the expert evidence and the absence of significant differences in principle between the Family Court and High Court decisions beyond the multiple to be adopted. We also would not have granted leave for issue (h) either in the very generalised terms posed or at all, given that it was used only as a cross-check in this case.[10]

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8 *Simon v Wright*, above n 7, at [12].
9 At [19].
10 See [112]–[113] below.

[14] For completeness we record that an application to this Court by both parties for leave to add further questions failed.[11]

Orders for sale

[15] Two questions here arise:

(a) Did the High Court err in ordering sale of the Remuera properties?

(b) Do the facts justify any adjustment having regard to the provisions of s 2G of the PRA?

Judgments below

[16] The Remuera properties have increased in value significantly since separation, and again since the first hearing date. Mr Williams wants the properties to be sold and the proceeds shared equally. Ms Scott runs a giftware importing and wholesaling business from them and wishes to retain them. She says the value of the properties as at 2011 should be offset against her share of the overall relationship property settlement.

[17] Judge McHardy noted Ms Scott had offered to sell the properties in 2007, but Mr Williams refused. The Judge considered Ms Scott had been genuine in her desire to reach a resolution, but had been frustrated by Mr Williams' "woolly thinking" and "siege mentality". Mr Williams had later made an application for sale in 2010, but that application contained what Ms Scott considered to be deliberate misrepresentations about his intent to occupy the house. She refused. The Judge said the reasons for the delay in getting to the issue of what to do with the properties were of Mr Williams' making.

[18] The Judge then considered what the date of valuation of the properties should be. Section 2G of the PRA creates a presumption that the date of valuation of property is to be the date of the Family Court hearing. The Judge was not persuaded there was good reason to depart from the presumption. As to value, the Judge

[11] Court of Appeal leave judgment, above n 5.

preferred the evidence of Mr Swan, a Court-appointed expert, to that of Messrs Buckley and Gardner, and said the properties should be valued at a total of $4.4 million.

[19] The Judge did not order sale of the properties. He said Ms Scott had put before the Court "compelling reasons" for being given the option to retain the two properties as part of the decision. So the properties were to be vested in Ms Scott and their value of $4.4 million was to be offset in the overall division.

[20] Faire J disagreed. He began by noting this was an appeal against a discretion not to order sale. He said the best way of valuing the properties was to order sale. All experts agreed it was best to test the market rather than rely on estimates.[12] The increase in value was due to the rising Auckland property market, not the endeavours of Ms Scott in retaining the properties and blocking their sale. She should not get a windfall from the whole increase post-hearing accruing to her. The Judge followed (and declined to distinguish) the decision of this Court in *GFM v JAM*.[13] The reasons why Ms Scott should retain the properties — disruption to her business, preserving her connection with the properties, preserving the interest of the now adult children — were not compelling.[14] Neither party's association with the property outweighed the other's. Faire J ordered sale by auction, at which the parties would be entitled to bid.

Did the High Court err in ordering sale of the Remuera properties?

[21] In relation to the present question — whether the High Court erred in ordering sale of the Remuera properties — Ms Scott advanced 19 particular points of error. The 19 points come down to three of any substance:

(a) That the Family Court Judge's decision to vest was a discretionary decision and could not be altered unless one of the criteria in *May v May* for reversal of a discretionary decision was identified.[15]

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12 High Court judgment, above n 2, at [190]–[192].
13 *GFM v JAM* [2013] NZCA 660, [2014] NZFLR 418 at [116]–[117].
14 High Court judgment, above n 2, at [194]–[195].
15 *May v May* (1982) 1 NZFLR 165 (CA) at 170.

(b) Vesting the Remuera properties in Ms Scott was the appropriate order because she was the party with greater association with the property by reason of contribution, daily occupation and necessity of the premises to run her importing/wholesaling business from.

(c) That it is unfair that some property is in effect valued at 2016/17 (so that Mr Williams will share in post-hearing gains) whereas other property had been "valued in 2011/12".

[22] The last point is best addressed under the next question, concerning whether there should be a s 2G adjustment.

[23] We are not persuaded that Faire J erred.

[24] First, there is no presumption in favour of vesting orders for the family home. To the contrary, s 11(1)(a) provides that each spouse is entitled to share equally in the family home. The power to vest instead is discretionary and found in ss 25(3) and 33(3). Equal sharing remains the overriding objective. In practice, the principal method of implementing a division of relationship property is to vest in each party sufficient assets to constitute the value of that party's equal share in the relationship property division, with an order for payment of money to offset any imbalance.[16]

[25] Factors that will support vesting of the family home in one party include the interests of any children and the relative strengths of associations between parties and the property.[17] Factors favouring sale rather than vesting of the family home will include any significant uncertainty as to its value and the presence of substantial increased value of a passive nature which would represent a windfall to the party taking vesting.[18]

[26] Secondly, it is important that in vesting the court does not override the primary s 11(1) principle, particularly in the context of an inflationary residential

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16 Bill Atkin "Jurisdiction, Orders and Implementation" in Robert Fisher (ed) *Fisher on Matrimonial and Relationship Property* (looseleaf ed, LexisNexis) at [18.29].

17 At [18.43] and [18.54].

18 *GFM v JAM*, above n 13, at [115]–[117].

property market. The intent of the PRA is there be equal sharing. Where values can be attributed to property with confidence, they are to be contemporary values at the hearing date.[19] As William Young J observed in the Supreme Court in *Burgess v Beavan*:[20]

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

In this case, nothing substantial can be pointed to as having been done by Ms Scott in benefiting the property post-2013 which would justify an adjustment under s 18B of the PRA, for instance.

[27] In *GFM v JAM* this Court was dealing with a similar situation to the present one. The order made in the High Court by Woodhouse J was a hybrid between vesting and sale. The order was that the parties have an equal share in the former family home, assessed at current market value. The wife was to have the opportunity to purchase the husband's half interest at a value agreed between them. Absent agreement (or exercise of the opportunity thereafter) the home was to be sold and the net proceeds divided equally.[21] That order was challenged in this Court on the basis that sale would be unjust to the wife and children, would expose them to the risk that they be outbid by a stranger and lose the home to which the children (who lived there) were devoted. The children, it may be noted, were 15, 17 and 19 years old at the time of the High Court hearing.

[28] This Court said it was "firmly of the view" that the orders made were appropriate:[22]

> First, the family home will undoubtedly have increased in value since the hearing of the Family Court, and on appeal in the High Court. This is a substantial family home in a desirable inner suburb of Auckland.
>
> Second, that increase in value is passive. It is the result of the rising Auckland property market, not the endeavours of either party. It would be unjust if the windfall of that increase in value accrued only to the wife.

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19 Property (Relationships) Act 1976, s 2G(1).
20 *Burgess v Beavan* [2012] NZSC 71, [2013] 1 NZLR 129 at [24] (footnote omitted).
21 *GFM v JAM*, above n 13, at [112].
22 At [116]–[117].

The Court agreed that the wife have the opportunity to buy the husband out. But it went on to say:[23]

> But, subject to that, any orders which did not yield the parties an equal share of their most substantial asset would be unjust.

[29] Many of the considerations in *GFM* apply here also. Although the Family Court Judge in this case was able to adjudicate a value based on the evidence of a Court-appointed valuation expert:

(a) There was a substantial disparity in the expert evidence based on a number of uncertainties, including the nature of the comparables to be used and whether a discount ought to apply given the house was built pre-1940 so that a resource consent would be required to demolish or remove it. Differences between the three valuations exceeded $1 million — a spread of some 23 per cent. It is obvious in this context that the best way to test such an inherently uncertain value is by way of sale in the open market.

(b) All three valuers who gave evidence in fact agreed that the open market was the best means to determine values. Mr Gardner, the valuer who was instructed for Ms Scott, said it was "obviously" the case. Mr Swan, the Court-appointed valuer, said:

> I honestly think, why aren't these properties being put on the market? But I am only the valuer.

[30] The combination of significant uncertainty as to value and significant passive increase in value would, all other things being equal, strongly suggest that sale rather than vesting was the preferable means of achieving the overriding goal of equal sharing.

[31] Thirdly, we agree with Faire J that this is not a case where Ms Scott's degree of association with a house so outweighed that of Mr Williams as to call for vesting in her, rather than sale on the open market (at which she could bid). We note, again

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[23] At [119].

the fact that earlier in the piece, after separation in 2007, Ms Scott herself proposed sale. The degree of association was not markedly disparate, although doubtless Ms Scott spent more time at the property than Mr Williams did (both as a result of his working full time and Ms Scott remaining in the property post-separation). The children were 20 and 23 at the date of hearing, and less weight could be placed on their interests than would be the case if they were both minors or dependent children living in the family home. The elder child left home to study in February 2008; the second child left home in February 2011. While Ms Scott ran her importing and wholesaling business from the house, that business plainly was capable of being moved and is an entirely neutral factor. There was, for instance, no goodwill associated with the specific location.

[32] Fourthly, Faire J directed himself correctly that the vesting decision by Judge McHardy was a discretionary one, so that he was dealing with an appeal against discretion.[24] Although Faire J did not expressly refer to *May v May*, the prerequisites for a successful appeal against the exercise of discretion are settled and well known.[25] It may therefore be taken that Faire J was aware that to reverse such a decision an error of principle, a failure to take into account a relevancy or taking into account an irrelevancy, or a finding the decision was plainly wrong (for example, because it is plainly contrary to the overwhelming weight of the evidence) was needed. In this case Faire J found four reasons why the Family Court Judge erred:

(a) The PRA required equal sharing of assets and if a property had the potential to have a significantly greater value, then that is what should be shared. The case of *GFM v JAM* was not distinguishable from the present one.

(b) The value of the Remuera properties was quite uncertain, and all experts agreed that the best means of testing the true value of those properties was by ordering a sale (with both parties having the right to bid). Ms Scott would have half the bid price (which would go round

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[24] High Court judgment, above n 2, at [191].
[25] *May v May*, above n 15, at 170.

in a circle, back to her) plus half the remaining property plus the s 15 award, to bid with.

(c) The relative association of Ms Scott with the property did not, for the reasons just noted, compel vesting in preference of sale.

(d) The Family Court Judge had not reconsidered remedies afresh when he corrected his judgment by a sum of almost $1.1 million in Ms Scott's favour in his recall judgment. That represented additional funds available to Ms Scott to bid for the Remuera property on sale. In other words, she was better placed to do so than the Family Court Judge had originally thought. That difference required remedies to be reconsidered — which in effect is what Faire J did.

We agree with these four considerations. They plainly permitted review of the decision below. The first and last alone would do so. In our view the first instance Judge erred in law. The issue was open to reconsideration afresh in the High Court.

[33] Finally we note that, as we discuss under the next heading, this is not a case where timing of other real property distributions makes a difference — compelling valuation at a common or single date. That is because that other property *was distributed* — and could then have been reinvested by each party.

[34] We therefore answer this question "No".

Do the facts justify any adjustment having regard to the provisions of s 2G of the Property (Relationships) Act 1976?

[35] Neither Judge considered it appropriate to adjust value under s 2G(2) from the hearing date. That provision states:

> **2G Date at which value of property to be determined**
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> (1) For the purposes of this Act, the value of any property to which an application under this Act relates is to be determined as at the date of the hearing of that application by the Court of first instance.

(2) However, the Court of first instance or, on an appeal the High Court, Court of Appeal, or Supreme Court may, in its discretion, decide that the value of the property is to be determined as at another date.

(3) This section is subject to Part 6.

[36] Ms Scott submitted that the Courts below erred in not valuing the Remuera properties as at July 2011 under s 2G(2) by failing to ensure that property received by the parties should be valued at roughly the same time, so that one party's share "is not skewed by the effect of the passage of time on value". Ms Scott refers to a property purchased by Mr Williams in Parnell. That property is not relationship property, was acquired post-separation, and we disregard it accordingly.

[37] We are not persuaded that there is anything in this point.

[38] First, we have upheld the decision of Faire J to set aside the vesting order made in the Family Court and to direct sale of the Remuera properties (with the proceeds to be shared equally). No valuation date adjustment is required. A necessary consequence is that neither party gains a windfall, because the value attributed is different to the value determined on the open market.

[39] Secondly, the gain in value in the two properties since 2011 is due to inflation. That is again inherent in both the properties and the market. It is not attributable to the parties' efforts or contribution of one spouse or the other. Such gains ought to be shared equally.[26] Nor is this a case in which some adjustment based on contribution shall be made under s 18B. That is the primary mechanism to attribute to one party a benefit it has brought about post-separation.[27] No live question as to the application of that provision is before this Court.

[40] Thirdly, we agree with the submissions made by Ms Robertson (on behalf of Mr Williams) that her client has secured no advantage by acquiring his share of matrimonial property as at July 2011. As Ms Robertson submitted, the proceeds of sale of the properties sold prior to the Family Court hearing were divided equally between the parties:

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[26] *GFM v JAM*, above n 13, at [116]–[117].
[27] At [35(e)].

(a) Omaha property: sold for $2.25 million in November 2011. Approximately $600,000 of the proceeds of sale were retained in a solicitor's trust account, earning interest. The balance of the net proceeds were distributed equally.

(b) First Auckland commercial property: sold for $500,000 on 17 January 2012. Net proceeds were distributed equally.

(c) Second Auckland commercial property: sold on 12 July 2012. The net proceeds were distributed equally.

[41] The only other item of real property was the parties' half share in the building from which the legal practice operated. That was valued as at the date of hearing at a relatively modest sum: $275,000. That value was agreed, and is no longer in issue. It was credited to Mr Williams. Nothing turns on its date of valuation.

[42] It follows that there is no "skewing" by one party getting real property early, and the other getting it late. The answer is that *both* parties got the proceeds of some of the real property early (which they could reinvest). And both will get the balance of the property proceeds — the Remuera properties — later. The only skewing that could occur would be if one party alone got the windfall of an inflationary rise in value by vesting at 2011 values when distribution and reinvestment opportunities would occur at a materially different time in a rising market.

[43] We therefore answer this question "No".

Valuation of legal practice

Judgments below

[44] The parties agreed Mr Williams' interest in the law practice was to be valued on the basis of the price that would be agreed between a willing but not anxious

seller and a willing but not anxious buyer.[28] The valuation principles are analogous to those which apply to the valuation of assets for other purposes.[29]

[45] Both lower Courts considered the similarities between this case and *M v B*.[30] It is convenient to summarise that case here. The husband, Mr B, was a partner at a large Auckland law firm. His partnership interest was relationship property. The husband's future maintainable earnings were assessed at $500,000 per annum.[31] It was estimated he would earn at least $250,000 per annum at the independent bar.[32] That figure represented what his own direct industry would command. The differential between his actual earnings and this figure was $250,000. That was the level of super profit available to Mr B on an ongoing basis — the return on his capital interest in the goodwill of the firm. In order to value Mr B's interest in the law firm, the Court multiplied that super profit figure by three. A multiple of three was based on the following facts:[33]

(a) The husband was about 50 years old.

(b) Upon his cessation as partner there was no residual value in the partnership to be paid out to him by the remaining partners.

(c) The firm relied heavily on one client, which generated fees at a lower level of remuneration than many other firms.

(d) There was a degree of capture by this firm of its partners because of the restricted nature of the work undertaken.

The super profit sum multiplied by three ($250,000 x 3 = $750,000) was then reduced to allow for tax to $450,000. That was the value of Mr B's interest in the partnership.

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28 *Powell v Powell* [1987] 1 NZLR 192 (CA) at 196.
29 *Carter v Carter* [2001] NZFLR 180 (HC) at [59].
30 *M v B* [2006] 3 NZLR 660 (CA).
31 At [88].
32 At [77].
33 At [93].

[46] In the present case, Judge McHardy valued Mr Williams' interest in his law firm at $450,000. Ms Scott was entitled to a half share — $225,000. This valuation was based on the following factors:

(a) The experts agreed Mr Williams' future maintainable earnings from the firm were $425,000 per annum.

(b) The appropriate salary for Mr Williams would be about $200,000, based on expert evidence of comparator salaries.

(c) The relevant super profit available on an ongoing basis was, therefore, $225,000. Net of tax, $150,000 approximately.

(d) The appropriate multiple was three, based on the established client base, client loyalty, risks of competition and the forthcoming retirement of Mr Williams and the other partner. The case was comparable to *M v B*.

(e) On that basis Mr Williams' capital interest in the firm was worth $450,000.

[47] In the High Court Faire J agreed the appropriate salary for the purposes of valuation was $200,000.[34] In agreeing with the Family Court on this point, he considered Mr Williams' skills, organisational abilities, ability to attract work, and the value of his interest to the other partner and to Ms Scott if they were to purchase it.[35]

[48] However, Faire J disagreed with Judge McHardy on the appropriate multiple. He considered the risk to a purchaser of the partnership interest was greater than the Family Court Judge suggested, because the client base and loyalty depended on the two partners' reputations, and much more so than for the large firm considered in *M v B*. The risk to Mr Williams or the other partner of taking sole proprietorship of the firm had also been underestimated because of the lack of a succession plan for

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34 High Court judgment, above n 2, at [92].
35 At [87]–[91].

the firm. Faire J therefore said a multiple of two should have been adopted.[36] This meant the Family Court's valuation of the firm of $450,000 was too high. The High Court adopted a figure of $300,000.[37] Ms Scott was awarded half.

[49] Faire J also carried out a reality check on his analysis. He considered what income a new partner to the firm would reasonably forgo if there were a lock-step on the way to becoming a full equity partner. His figure of $300,000 would require a new partner to forgo two years of super profits, which seemed correct.[38]

[50] Separate to a half share of Mr Williams' interest in the capital value of the law firm, the Family Court awarded Ms Scott half Mr Williams' super profits from the firm for the period between separation and the Family Court hearing. The underlying logic is to give a return on her half share in Mr Williams' partnership interest post-separation.[39] It is analogous to redistributing dividends received from shares that one partner retains post-separation. Those dividends are relationship property as well as the shares themselves. Based on the firm's actual earnings less proprietor's income (of $200,000 each for Mr Williams and the other partner), the Judge found Mr Williams' super profit for 2008–2013 was $1,093,000. Ms Scott was entitled to a half share of that, and interest.

[51] The super profit award has not been appealed. However, it is important background for the downstream issues concerning the s 15 award and Mr Williams' liability to pay spousal maintenance, which we address later.

Was the High Court determination that the legal practice interest of the appellant had a value of $300,000, correct?

[52] Ms Scott submitted that valuation of relationship property is a matter of discretion and in reversing the decision of Judge McHardy, Faire J had not identified which *May v May* criterion applied. He also failed to give deference to Judge McHardy's advantage in findings of fact "where credibility was centre stage". And he made a number of errors of fact and of law. The former related to matters such as

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36 At [102]–[105].
37 At [108].
38 At [106].
39 *M v B*, above n 30, at [107].

the degree of leveraging of the legal executives (producing the majority of the fees), the efficiency of the systems in the firm and the under-market rent paid by it.

[53] As we said earlier, this is an issue we would not have granted leave on ourselves.[40] We do not consider Faire J erred in reducing the value of Mr Williams' interest in the legal practice from a figure of $450,000 to $300,000. At the heart of that decision was his disagreement with the multiple used by the Family Court Judge. That had been the same as used in *M v B*, a case concerning a large city firm rather than a small two-partner suburban conveyancing firm.[41]

[54] First, we do not agree with Ms Scott's premise that the Family Court Judge's evaluation of the value of that aspect of relationship property was a discretionary decision. It is true that there is a significant measure of judgment in determining value. Valuation, as has often been said, is an inexact exercise, involving a combination of art and science. If the result is reached using an appropriate methodology and is a reasonable result overall (that is, clearly within the available range and supported by evidence), then an appellate court will not likely interfere with it.[42] But that does not mean that an appeal from the Judge's evaluation of the expert evidence is to be treated as a restricted appeal from the exercise of discretion.

[55] Secondly, in the evaluation of expert evidence the High Court Judge was in as good a position as the Family Court Judge to reach an assessment. Issues of credibility do not apply. There was much common ground between the experts. It was agreed between them that valuation should be based on capitalisation of earnings. The three experts agreed that future obtainable earnings for each partner were $425,000 per annum. They agreed also on adjustments of work in progress and the respondent's loan account. There was disagreement as to the appropriate market salary to be attributed to Mr Williams. The figure of $200,000 adopted by Judge McHardy was based on the evidence of one of the experts. Faire J did not disagree with that sum.

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40 At [13] above.

41 *M v B*, above n 30.

42 *Reid v Reid* [1980] 2 NZLR 270 (CA) at 272; *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [272]–[273].

[56] Thirdly, we are satisfied that Faire J was correct to adopt a multiple of two rather than three. And that the multiple of three adopted by the Family Court was clearly wrong. Three had been the number advanced by Mr Lyne, the expert accounting witness for Ms Scott, primarily because it was consistent with the rate adopted in *M v B*. Altogether apart from the differences between the two practices being compared there were independent difficulties with that analysis. Mr Lyne identified seven factors in his evidence on which to base the multiple. In our view only two of the seven might support a similar multiple to *M v B*. One was neutral and four would suggest a lower multiple.

[57] The other two experts (that is, other than Mr Lyne) supported a multiple of two. That preference was based on the suburban nature of the practice, its focus on conveyancing and the fact that it was a two-partner firm only.

[58] Faire J considered the evidence given in this case with considerable care. He identified nine considerations which tended against the multiple of three adopted by Judge McHardy.[43] These include the suburban nature of the practice, its core work being conveyancing, the practice having been built up on the basis of the personal efforts of its two principals, the absence of a partnership development plan, and the fact that the practice would face an issue in five to eight years' time as the current partners sought ways to exit legal practice. The Judge considered that *M v B*, a case involving a partner aged approximately 50 in a large city firm, was not a good comparator. A greater degree of risk would be factored into acquiring Mr Williams' practice. Consistent with the conclusion of two of the three experts who gave evidence, the Judge adopted a multiple of two instead. We do not consider this analysis can be faulted.

[59] We therefore answer this question "Yes".

Section 15 award

[60] Ms Scott applied for an order under s 15 of the PRA, which provides:

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[43] Family Court judgment, above n 1, at [102].

> **15 Court may award lump sum payments or order transfer of property**
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> (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.

Judgments below

[61] Judge McHardy noted that the s 15 inquiry requires consideration of: whether there is economic disparity between the parties after the relationship ends, whether the disparity is caused by the division of functions within the relationship, and whether it is just to make an order. There were two potential components to an award: first, a recognition of how Ms Scott has enhanced Mr Williams' future earning capacity (the "enhancement" component); second, a recognition of Ms Scott's own career forgone to provide domestic assistance to the relationship (the "diminution" component).[44]

[62] Judge McHardy said there was significant disparity in income. Ms Scott's actual income after separation was $84,000; Mr Williams' "comparator income" was

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[44] *X v X [Economic disparity]* [2009] NZCA 399, [2010] 1 NZLR 601 at [49]–[50].

$200,000 to $300,000. The income disparity meant there was also a disparity in living standards. The Judge found this disparity was caused by the division of functions in the marriage. Ms Scott cared for the children, especially while the second child was unwell.

[63] The Judge said it was just to make an order because the disparity in income is likely to be long term, the division of functions was a significant causative factor, Ms Scott received very little support post-separation, and Mr Williams did not pay spousal maintenance.

[64] These threshold issues were fairly straightforward. In the High Court (and before us) Mr Williams accepted the disparity and causation elements are met.[45] The focus of the dispute was and remains what quantum of award is just.

[65] In assessing the diminution component of the award, Judge McHardy adopted a methodology for assessing quantum based on the decision of this Court in *X v X*. That methodology aims to establish a capital sum reflecting the net present value of future income that would have been earned but for the division of roles in the relationship, which should be halved to give the quantum of the s 15 award.[46] Expressed formulaically, the award is half of:[47]

> Net present value of annual earnings variance after contingencies = ("But for" income – estimated actual income)(1 – tax rate)(time-value discount)(non-collection contingency)

[66] The Judge said Ms Scott's "but for" income was around $330,000, based on expert evidence as to her skills, possible career trajectory and the job market. Her actual earning capacity was likely to stay at about $84,000 per annum until her retirement at age 65 in 2025. This would lead to a cumulative income shortfall of $1,488,877 until retirement. The award for diminution would be half of that, or $744,439.

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45 High Court judgment, above n 2, at [126].
46 *X v X [Economic disparity]*, above n 44, at [172].
47 At [180].

[67] Judge McHardy also considered enhancement. The basis for an award would be that Ms Scott had enhanced Mr Williams' income during the marriage by freeing up his time. The Judge said an allowance for enhancement should be given, because Ms Scott had added value to the law firm by caring for the unwell child, assisting Mr Williams' networking with real estate agent clients, and carrying out accounting work. The firm paid her a small salary, but this did not reflect the full value of her input. Her assistance was a "significant contributing factor" to the success of Mr Williams' practice. As to quantum, the Judge considered evidence from Mr Lyne that the enhancement was $151,000. The Judge then considered a suggestion in a conference paper by Professor Mark Henaghan that a proportion — five to 20 per cent — of the total relationship property should be awarded in cases of disparity.[48] In addition to the diminution award, taking 10 per cent would give a total award of $850,000 to $900,000.

[68] Overall, Judge McHardy concluded the s 15 award should be $850,000. That allowed for diminution and enhancement.

[69] On appeal, the High Court held this award to be excessive.

[70] Faire J agreed with the Judge's findings that Ms Scott's "but for" income was $330,000 and current income $84,000.[49] He did not consider the Judge's adoption of a total relationship property percentage approach (10 per cent) as a reality check was in error.

[71] Faire J was concerned, however, that the Judge did not have a clear picture of the available amount of relationship property.[50] He had altered parts of his decision on a recall application without reconsidering the s 15 analysis. As a result, he had not considered:

(a) that Mr Williams was likely to retire at 65 in 2019, after which there would be no income disparity; and

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48 Mark Henaghan "What can you do about inequality post separation and post division?" (paper presented to New Zealand Law Society Relationship Property Intensive, August 2010) 89 at 105.

49 High Court judgment, above n 2, at [158].

50 At [157] and [159].

(b) the award to Ms Scott of super profits from the firm of $546,500 covering the years 2008–2013.[51]

[72] As to the latter, the Judge said:[52]

> Additionally, I consider that the Judge failed to take into account a relevant consideration, which was the income from the super profits. While super profits are relationship property, and the division of relationship property is considered before the disparity between income and living standards, super profits are properly considered as income. Indeed, as I have already recorded, by definition they are income by virtue of s 8(1)(1) of the [PRA]. For the years 2008 to 2013, the super profits that the respondent is entitled to should have been included in her estimated actual gross earnings.

[73] The Judge therefore made deductions to the diminution component of the s 15 award to reflect the super profits receipt and Mr Williams' forthcoming retirement of $290,448 and $133,596 respectively.[53]

[74] Faire J also disagreed with the enhancement allowance. He said there was no proper foundation for the proposition Ms Scott had enhanced Mr Williams' income. Ms Scott's accounting work had been taken into account in the valuation of the law firm. It was improper double counting to consider it again under s 15. The Judge deducted the enhancement component of the award of $151,000.[54]

[75] Overall, and rounding off the figures, the Judge reduced the award from $850,000 to $280,000.[55]

Appeal

[76] On appeal before us five issues arose under s 15.

[77] Before addressing those specific issues, we note that Ms Scott sought to contend before us that the s 15 award needed to be increased to $2.14 million. Ms Scott produced new Ogden tables showing that Mr Williams' "enhanced

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51 At [159]–[160]. See [50] above as to the latter aspect.
52 At [160].
53 At [164]–[166].
54 At [167].
55 At [169].

earnings" could be calculated at $4.87 million.[56] That is, enhanced against a base of his position and Ms Scott's being, in essence, swapped. It also assumed Mr Williams would work until 70, but earn a post-tax income of only $103,000 from age 66.

[78] We decline to accept this analysis. First, it is evidence rather than submission. It needed to be put to the expert witnesses at trial, but was not. Secondly, no application to adduce it before us was made. And we would have had considerable difficulty accepting it had applications been made. It lacks freshness (as it could have been advanced at trial) and its cogency is unknown given the lack of expert analysis in cross-examination. Thirdly, while aspects of this methodology appear to have been in front of the Family Court Judge, the reality is that Ms Scott's own expert, Mr Lyne, contended for an enhancement award of just $151,000 — a figure Judge McHardy accepted. Fourthly, there was no cross-appeal to the High Court from the Family Court s 15 award of $850,000 (including an enhancement aspect of between $105,000 and $151,000).[57] Rather, Ms Scott cross-appealed on the failure to award full interest on that sum.

Should an order allocating a share of super profits from separation date to hearing date be taken into account in fixing compensation for this period?

[79] Ms Scott submitted that the Judge was wrong to treat super profits as "income". It was never income in her hands. It simply formed part of the relationship property to be divided. In addition the effect of deducting the super profits was that the Judge had given those profits back to Mr Williams, so that she no longer received them. That also meant that, contrary to s 15(3), the effect was that Ms Scott paid for her own income shortfall from her relationship property share, leaving Mr Williams' relationship property untouched.

[80] For Mr Williams, Ms Robertson submitted that the s 15 award was substantially an income shortfall award. The award of super profits between separation and hearing was an income benefit to Ms Scott from the law practice for

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[56] Ogden tables are statistical tables used in the United Kingdom, in particular to estimate loss of earnings in personal injury and fatal accident cases: Harvey McGregor *McGregor on Damages* (19th ed, Sweet & Maxwell, London, 2014) at [38–070]–[38–072]. See also *M v B*, above n 30, at [170], endorsing the use of actuarial methodology.

[57] Judge McHardy did not specify an exact allocation of diminution and enhancement within the $850,000 figure.

the period 2008–2013. That removed the disparity she suffered as a result of division of functions in the marriage. No s 15 compensation was necessary for this period of time, therefore.

[81] We consider the judgment below erred in deducting the super profit sum from the s 15 compensation quantum.

[82] First, the approach to be taken to s 15 involves four stages:

(a) The Court considers, first, whether the disparity in income and living standards post separation of the two parties is likely to be significant.

(b) The Court must then be satisfied that the disparity is caused by the division of functions within the marriage.[58] Disparity due to innate talents or externally-driven fortune or misfortune is disregarded.

(c) If those two criteria are met, the Court has discretion whether to make an award.

(d) If the Court chooses to make an award, compensation quantum must be determined. The usual approach now is to use the formula adopted in the decision of this Court in *X v X*.

[83] However, as O'Regan and Ellen France JJ said there, the methodology suggested is not invariable.[59] It is not to be applied as if it supplanted the statutory constraint of making an award only if just, and to the extent just. As William Young P said in *M v B*, a "broad brush assessment" is necessary to produce a just outcome for the purposes of the Act. And what is just for one must not occur at the expense of what is just for the other.[60] It follows that part of the process of setting compensation quantum is for the Court to stand back and consider whether

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58 *X v X [Economic disparity],* above n 44 at [77].
59 At [175].
60 *M v B*, above n 30, at [179].

application of the *X v X* methodology produces a just outcome for both parties, and fairly meets the objectives of s 15 in the particular case at hand.[61]

[84] Secondly, it is accepted by Mr Williams that the first and second criteria above are met, and that the discretion to make an award should be exercised. The real question for the Court is quantum.

[85] Thirdly, as s 15(1) of the Act makes clear, the first criterion — significant disparity — does require consideration of the relative positions of the two parties, post separation. That stands in contrast to the fourth stage of the inquiry, as we will see. When the first stage is considered, super profits are essentially neutral to the threshold question of whether there is a significant disparity of the kind contemplated in s 15(1).[62] That is because super profits are relationship property, to be shared equally. Distributed, and to the extent they affect income, they increase each party's income by the same amount.

[86] Fourthly, and turning to the fourth stage, the question then becomes whether distribution of the super profits is relevant instead to quantum. The quantum calculations in this case have been based on the conventional *X v X* formula:[63]

> Net present value of annual earnings variance after contingencies = ("but for" income – estimated actual income) (1 – tax rate) (time-value discount) (non-collection contingency)

[87] This methodology is proxy for what is "just" in terms of s 15(3). As we have noted already, the approach is not mechanistic. The Court must stand back and satisfy itself that in all the circumstances of the case the award is a just one. The *X v X* formula aligns with the overall purpose of s 15, which is to compensate for disparity caused by the division of functions. The purpose of s 15 is not to remove the disparity altogether.[64] Thus the formula does not refer to the difference between the actual income levels of the two parties. Rather it focuses only on Ms Scott, and on the gap between her actual and "but for" incomes caused by the division of

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61 *X v X [Economic disparity]*, above n 44, at [239].

62 Unless considering super profits overwhelms the disparity between the parties; see *X v X [Economic disparity]*, above n 44, at [88] and [175].

63 At [180].

64 At [142].

functions. Not on Mr Williams, and not on his income. The issue for this Court accordingly is whether super profits should be considered in assessing Ms Scott's "but for" or "actual" income.

[88] Fifthly, on the present facts, Ms Scott would earn the super profits regardless of the division of functions within the marriage. She will, belatedly, actually earn them for the years 2008 to 2013. And she would have earned them in the "but for" scenario if she had worked as an accountant, lawyer or both and not taken on child care responsibilities. There is no justification for super profits being considered a component of "actual income", but not as a component of the "but for" income.

[89] Sixthly, this Court in *X v X* contemplated that both actual and "but for" income inputs would be limited to income earned from working rather than return on invested relationship property. O'Regan and Ellen France JJ referred to "actual" and "but for" income in these terms:[65]

> The basic methodology of the calculation of the compensation award adopted by Judge Clarkson involved calculating a figure representing the present value of the cumulative difference between the future after-tax income *which Mrs X could have expected to earn* above her role within the relationship and the after-tax income which she is projected *to actually earn if she works* for the full extent of her future income-earning capacity.
>
> (Emphasis added).

Robertson J also treated investment income as a neutral factor for the purposes of s 15 because relationship property assets are to be equally divided.[66]

[90] In summary, drawing these points together, the distribution of super profits did not alter the disparity in income-earning capacity post separation of the two parties. Rather, its effect was neutral. We therefore answer this question "No".

[91] As we noted earlier, however, it is necessary to step back at the end of the mathematical exercise in applying the *X v X* methodology and consider whether the outcome is just to both parties. A broad brush assessment may be necessary.[67]

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65 *X v X [Economic disparity]*, above n 44, at [172].
66 At [88].
67 At [84]

[92] In this case we consider that the scale of the potential award in applying the *X v X* methodology for a term of 14 years, producing an award of $570,000, is too high. In reaching that conclusion we have regard to its gross amount, the proportion of the total relationship property it represents, relativity with other cases,[68] the likelihood that Ms Scott will have a longer working life than Mr Williams (and so will continue to earn for some five years after he retires), the substantial asset pool available to each party after division, and the income that may be generated from investment of the s 15 award.

[93] The approach we take is a broad brush one, but we consider that application of the *X v X* methodology, unadjusted, would produce an excessive award. Rather we consider that applying a 10-year term, in effect running to March 2017, is fair. Mr Williams may be expected to retire within three years of that date, but Ms Scott can be expected to continue working beyond that date for eight years, five more than Mr Williams. The sum produced by a 10-year term (rather than 14) would be approximately $470,000 (as opposed to $570,000).[69] We adopt that sum as the just adjustment required under s 15.

[94] As a consequence of all this the s 15 quantum must be increased from $280,000 to $470,000.

Should any award be reduced having regard to a change in the non-claiming party's position brought about by retirement?

[95] Ms Scott submitted that the High Court erred in saying that Mr Williams was likely to retire at 65 years, when evidence suggested he would go on working until an older age. There was a high chance that he would continue in practice past 70. There was longevity in his family. Further, s 15(2) is concerned with "earning capacity", and that would "not disappear overnight".

[96] This ground has been overtaken by our decision on the first question. But in any event, we do not accept this argument.

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[68] See for example, the cases discussed in Mark Henaghan and others *Family Law in New Zealand* (17th ed, Lexis Nexis, Wellington, 2015) at [7.383].

[69] Using the schedule annexed to the High Court judgment, above n 2

[97] First, a s 15 award is not enduring. It is compensatory, and the extent of compensation is what is just in the circumstances of the case. It is not there to simply split the parties' future earning capacities — which is not relationship property in any event. It is not there to equivalise the income stream of two persons who almost certainly were bound to have had different income earning capacities had they not married in the first place. Or had they both remained in full time employment and divided marital responsibilities evenly all along. The relevant period of compensation will be a matter of impression, but as Robertson J said in *X v X*:[70]

> The period of time over which the compensating payment is to be made will vary, but it should not be assumed that it will continue for the potential working life of either party.

[98] In that case he adopted a 10-year span. Beyond that, the division of responsibilities in that relationship did not need to be further compensated for. The majority did not take such a limited approach and were prepared to assess compensation across a period of 18 years from separation until a projected retirement age of 60. But it should be noted that both experts giving evidence concurred in that course.[71]

[99] Secondly, the approach is, as William Young J said in *M v B*, a broad-brush one.[72] Compensation for income shortfall involves a comparative exercise, contrasting income and living standards of one spouse with the other. Where capital has been divided equally, this is primarily a question of the comparative capacity to generate income and the way that has been affected by the division of roles in the marriage. In these circumstances we consider the Judge was right to confine the potential period of calculation to the 14-year period in which Mr Williams, the older party, is likely to be in employment as a lawyer.[73] On the evidence that is likely to be until he is 65. The evidence is that Mr Williams has a number of serious health issues. And, as Mr Lyne accepted, it is standard accounting practice to generally assume a retirement age of 65. At that point in time the parties will have been

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70 *X v X [Economic disparity]*, above n 44, at [51].
71 At [184(b)].
72 *M v B*, above n 30, at [179].
73 High Court judgment, above n 2, at [165]. The Judge made a deduction of $267,192 for the tax years ending March 2022–March 2025.

separated for 14 years, and the income disparity is likely then to be in favour of Ms Scott, who will likely continue in employment when Mr Williams does not. Even Ms Scott's own enhancement analysis assumed a significantly reduced income on Mr Williams' part from age 66.

[100] In these circumstances we answer this question "Yes, but this has already been accounted for in our decision to increase the s 15 award to $470,000".

Was the High Court in error in the actual calculation undertaken for super profits because it did not take into account a contingency or present value discount?

[101] Ms Scott submitted that the High Court Judge erred in his s 15 calculation by not discounting super profits in the same way that Ms Scott's projected "but for" income had been discounted for risk of non-achievement and time value of money.

[102] This issue has been overtaken by our finding the Judge should not have made a deduction for super profits in his s 15 calculation.[74] Accordingly, it is not necessary to answer this question.

Is an enhancement award justified in this case?

[103] We have rejected already Ms Scott's argument that an enhancement award of $2.14 million ought to be allowed, as opposed to the $151,000 her expert Mr Lyne contended for and the Family Court Judge broadly accepted. The question now is whether the High Court Judge was wrong to reject an enhancement award of that lesser amount.

[104] We record that Faire J rejected such an award primarily because:

(a) To the extent that Ms Scott's efforts in caring for the parties' sick child, hosting functions with real estate agents, and attending drinks at real estate agents' offices (thereby helping build up the firm's conveyancing business) and carrying out accounting tasks, enhanced the value of the practice, that has been reflected already in the

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[74] At [81]–[90] above.

valuation of the practice — which she has received an equal share of. She could not have that twice over — both in a share of the partnership value and an enhancement award.

(b) Turning from enhancement of the practice (for which she cannot receive further compensation) to the husband's personal earning capacity, Faire J could see no evidence that the division of functions between the parties resulted in the husband having opportunities to develop his earning capacity without which he would not have been able to fulfil his potential.[75]

[105] Ms Scott's submissions largely focused on her unsustainable argument that the enhancement award ought to be $2.14 million. But she did submit that the Judge erred in not adequately recognising that Mr Williams' capacity was enhanced by his ability to acquire (in truth, retain) the law partnership interest and continue to earn enhanced income. She also submitted that the Judge erred in reducing the s 15 award by $151,000 when only $105,000 of the $850,000 award represented enhancement.

[106] We are not persuaded by either point.

[107] First, we agree with Faire J that Ms Scott cannot have further credit for enhancement of the practice value given she is to receive an equal share of that as part of the division of relationship property.

[108] Secondly, the question instead then is how Ms Scott enhanced Mr Williams' earning capacity post-separation. Ms Scott's expert, Mr Lyne, was alert to this point. He reached his $151,000 figure in this way: he took Mr Williams' assumed actual notional income of $200,000 between 2008 and 2020. He assumed that that income without the actual division of responsibilities would have been $150,000. He allowed a 20 per cent discount from 2014 for the risk of non-collection and a discount for tax. A net present value discount was also applied. The total value of the disparity was $302,000, half of which was $151,000.

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[75] High Court judgment, above n 2, at [167].

[109] It will be noted that Mr Lyne properly kept the super profit element out of the calculation, and focused on Mr Williams' notional equivalent salary of $200,000. However, we think there is force in Ms Robertson's submission that within this figure there is no enhanced earning by Mr Williams for which Ms Scott ought to be compensated. To put that point another way, Mr Williams could command that salary regardless of whether he was in a relationship or single. Mr Lyne sought, as we have seen, to attribute $50,000 of the $200,000 income to the division of functions. We see no evidential foundation for that assumption. It was a "judgement", as Mr Lyne accepted. There may have been some foundation for it in the earlier years of the marriage when either one of the couple would need to look after immature children at home or obtain home help to do so, but that issue is not material to the period with which Mr Lyne's calculation is concerned. Mr Williams' earning capacity is not enhanced during that period.

[110] Thirdly, and in any event, none of this takes account of the reality that enhancement here was mutual. Mr Williams supported Ms Scott while she returned to university and obtained a law degree. If Ms Scott gave assistance to Mr Williams, enhancing his career, for which she did not receive reward, we agree it should be offset by enhancement to her own career in re-qualifying in law.

[111] We therefore answer this question "No".

What considerations should a court take into account in fixing a percentage of property as the basis for a s 15 award?

[112] This is an unduly generalised question. The 10 per cent figure was used by Judge McHardy as a reality cross-check. We are not convinced it necessarily has utility. There are some cases where it may be just for the s 15 award to exceed 10 or 20 per cent of the total relationship property — for instance, where there is a limited property pool because of debt or the interposition of trusts.[76] In *X v X* the award was regarded as "high in dollar terms" at $240,000 — but that was because the wife's earning potential was also high.[77] But, as the majority noted, it still represented just

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[76] Mark Henaghan and Bill Atkin (ed) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2013) at 245.

[77] *X v X [Economic disparity]*, above n 44, at [240].

three per cent of the total relationship property. Judge McHardy's s 15 award was about 10 per cent of the relationship property in this case. Faire J's was 3.3 per cent. That is about the same as in *X v X*, but that is a matter of sheer coincidence. As amended by this Court it becomes 5.5 per cent. Each case will depend on its own facts, and no rule of thumb can be offered.

[113] We do not consider it either necessary or appropriate to say anything more on this subject in this case.

Maintenance

Judgments below

[114] The final aspect of Judge McHardy's decision concerned Ms Scott's application for maintenance of $269,914.

[115] The basis for this claim was ss 64–71 of the FPA. Shorn of inessentials, the FPA provides that after dissolution of marriage Mr Williams is liable to pay maintenance to meet the reasonable needs of Ms Scott that she cannot practically meet because of the division of functions within the marriage and her likely earning capacity.[78] Ms Scott must, however, assume responsibility for meeting her needs within a reasonable time.[79]

[116] Judge McHardy summarised the following propositions which emerge from the authorities:

(a) The amount necessary to meet "reasonable needs" can be determined based on the shared standard of living before separation.[80]

(b) The period of maintenance may include a period of grace for re-entry and retraining in the workforce.[81]

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78 Family Proceedings Act 1980, s 64.
79 Section 64A.
80 *M v B*, above n 30, at [197].
81 At [256].

(c) An award under s 15 should not be treated as capitalised spousal maintenance, but the two awards are closely linked.[82]

(d) Means deriving from relationship property (such as s 15 awards) are relevant to whether Ms Scott is able to meet her reasonable needs.[83]

(e) Sums awarded from post-separation super profits from the law firm may extinguish any entitlement to maintenance if they effectively provide an income stream.[84]

[117] Judge McHardy largely rejected the application for spousal maintenance. He said Ms Scott had an income shortfall from her "reasonable needs" of $265,245 over a relevant five year period from March 2008 to July 2013. However, the s 15 award exceeded the deficit over that period. Therefore there was no basis for a general spousal maintenance award.

[118] Faire J agreed. Ms Scott's income shortfall in meeting her "reasonable needs" was offset by the s 15 award. It was also offset by the award of super profits, which were an income stream from the firm between the date of separation and the date of hearing.[85]

[119] Judge McHardy did make a limited maintenance order. Mr Williams had stopped contributing to the rates for the Remuera properties in 2008. He should have paid maintenance for the rates. An adjustment of $42,032 was ordered. This was not appealed.

If a share of super profits is awarded, should that be taken into consideration when determining a party's obligation to maintain and the other partner's entitlement to maintenance?

[120] Ms Scott submitted that a finding of liability to pay $269,914 of spousal maintenance between 2008 and 2013 was made by Judge McHardy. We are satisfied that is not a correct statement of what the Judge held. As the judgment makes clear,

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82 *JES v JBC* [2007] NZFLR 472 (HC) at [47].
83 *M v B*, above n 30, at [125] and [128].
84 At [185].
85 High Court judgment, above n 2, at [214], relying on *M v B*, above n 30, at [185].

the relevant passage relied on by Ms Scott is merely an account of the claim she made in the Family Court.

[121] Ms Scott's real objection was that such an award should have been made — and it should not have been offset against either the s 15 award or the super profits allocation. Ms Scott submitted that an award of maintenance is mandatory rather than discretionary and may not be offset in this way. The liability under the FPA is Mr Williams', rather than Ms Scott's. Funds should flow from his share of the division to hers, and not be paid from hers, leaving his income and property division untouched. Neither the s 15 award nor the super profits were "means derived" from relationship property for the purposes of s 65(2)(a)(ii) of the FPA.

[122] We do not accept this submission.

[123] First, the liability to maintain under s 64(1) of the FPA is to the "extent that such maintenance is necessary" to meet reasonable needs where the recipient spouse cannot do so for one of the reasons provided in s 64(2). Those include the division of functions within the marriage — a similar consideration to s 15 of the PRA. It follows in our view that s 64 must reflect alternative means available, as s 65(2)(a) provides. Such means may include the sharing of income via super profits and a s 15 income shortfall award. The list in s 65(2)(a) is inclusive, not exclusive.

[124] Secondly, the effect of the super profits award is to confer a half interest in the practice income received by Mr Williams from 2008 to 2013 over and above his own notional salary. In these circumstances the observations of William Young P in *M v B* are pertinent:[86]

> [184] Those who make periodical payments to former partners sometimes seek to categorise them (either when paid or later) as being on account of relationship property entitlements. For the reasons given by Hammond J, I think that the Courts should be slow to countenance such categorisation where the reality is that the money is required for the former partner's support. If such payments are, in substance, maintenance, they should be so categorised and not taken off relationship property entitlements.
>
> [185] I, nonetheless, see this case as involving a set of circumstances which are atypical because on the basis of our findings the wife has, in

[86] *M v B*, above n 30.

> effect, had an income stream from the firm between the date of separation and the date of hearing, albeit that she did not know it. If it had been appreciated during that period that the wife was in effect sharing in the income of the firm, she could have had no fair entitlement to maintenance and such payments as were made would properly have been regarded as being on account of her eventually assessed entitlement.

[125] The short point is that the existence of this entitlement (which existed from separation, regardless of when division of relationship property occurred) fundamentally affects the extent to which it was "necessary" that further provision be made by way of spousal maintenance.

[126] Thirdly, the same point might also be made in the case of the s 15 economic disparity award. In its final form it was wholly an income shortfall award, based on diminution of income as a result of the division of functions within the marriage. It cannot be the case that the s 15 award does not affect the extent of entitlement to spousal maintenance — at least in the medium to longer term. As s 64(2)(a) of the FPA makes clear, a s 15 income shortfall award may be justified on the same basis as a spousal maintenance award. In such a case it cannot be right that there is a double payment based on a single need. As William Young P said in *M v B*:[87]

> … I am not approaching the case on the basis that s 15 is intended to provide for capitalised maintenance. On the other hand, a s 15 award which has been properly assessed may obviate or reduce the need for maintenance.

In *M v B* the High Court Judge dealt with the interrelationship by awarding spousal maintenance under s 64 for the first four and a half years after separation, and making a s 15 economic disparity award for the five years thereafter. The Court of Appeal saw no need to interfere with that order.

[127] Fourthly, in this case both Judge McHardy and Faire J considered the award of spousal maintenance was not appropriate given that a s 15 economic disparity award based on income shortfall was also being made. In the High Court, Faire J also considered that the super profits award would offset any need for spousal maintenance.[88] We see no flaw in that analysis, which is orthodox and entirely consistent with this Court's earlier decision in *M v B*. But in any event, there is the

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87 *M v B*, above n 30, at [191].

88 High Court judgment, above n 2, at [214].

further point here, which Ms Robertson takes for Mr Williams. The only issue for which leave was granted was the offset of the spousal maintenance claim against super profits. As Ms Robertson submits, even if the appellant were successful in her appeal on that point, there would be no financial consequences because both Courts below had decided that the maintenance award ought to be offset against the s 15 award. No leave to appeal from that finding had been given. Were the Courts below clearly in error in their treatment of the interrelationship between spousal maintenance and the s 15 income shortfall award, we would not have regarded that pleading point as insuperable. However, we do not consider there was such error.

[128] We therefore answer the question posed "Yes, in the circumstances of this case".

Summary

[129] We set out for convenience the questions posed and the answers given to them:

(a) *Did the High Court err in ordering sale of the Remuera properties?*

No.

(b) *Do the facts justify any adjustment having regard to the provisions of s 2G of the Property (Relationships) Act 1976?*

No.

(c) *Was the High Court determination that the legal practice interest of Mr Williams had a value of $300,000, correct?*

Yes.

(d) *Should an order allocating a share of super profits from separation date to hearing date be taken into account in fixing compensation for this period?*

No. As a consequence the s 15 quantum must be increased from $280,000 to $470,000.

(e) *Should any award be reduced having regard to a change in the non-claiming party's position brought about by retirement?*

Yes, but this has already been accounted for in our decision to increase the s 15 award to $470,000.

(f) *Was the High Court in error in the actual calculation undertaken for super profits because it did not take into account a contingency or present value discount?*

Not necessary to answer.

(g) *Is an enhancement award justified in this case?*

No.

(h) *What considerations should a court take into account in fixing a percentage of property as the basis for a s 15 award?*

Not necessary to answer.

(i) *If a share of super profits is awarded, should that be taken into consideration when determining a party's obligation to maintain and the other partner's entitlement to maintenance?*

Yes, in the circumstances of this case.

Costs

[130] We received submissions on costs at the hearing. Leave was sought to make further submissions on costs after the hearing. We have considered the memoranda filed but do not consider we would be assisted by further submissions. No one has

suggested there is a current *Calderbank* offer directly relevant to the hearing before us.[89]

[131] Ms Scott has succeeded in part. As a self-represented litigant, she is not entitled to costs.[90] We add that even if she had been represented, Ms Scott would not have been awarded costs. She succeeded on one of the nine questions on which leave was granted. However, she was unsuccessful on the other eight, towards which much of the argument before us was directed. In the circumstances we consider the just outcome is that costs (including disbursements) in this Court lie where they fall.

[132] Costs in the Courts below are to be dealt with in the High Court in the context of the extant appeal against the costs order in the Family Court.

Result

[133] The appeal is allowed in part. The quantum of compensation payable under s 15 of the Property (Relationships) Act 1976 is increased from $280,000 to $470,000.

[134] The appeal is otherwise dismissed.

[135] No order for costs is made in this Court.

Solicitors:
North Harbour Law, Auckland for Respondent

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89 Those referred to by Ms Scott are dated October 2007, November 2011 and August 2012 — all preceding the Family Court hearing. There is a separate appeal from the costs order in that Court, which has been adjourned.

90 *Re Collier (A Bankrupt)* [1996] 2 NZLR 438 (CA) at 440; *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400, (2010) 24 NZTC 24-500 at [162].