EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM 2016-004-000255
[2019] NZFC 3476

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	ALEKSANDAR DOMAZET Applicant
AND	ELVIRA DOMAZET Respondent

Hearing:	3 May 2019
Appearances:	Applicant self-represented K Swadling for the Respondent
Judgment:	24 May 2019

RESERVED JUDGMENT OF JUDGE I A McHARDY
[re: Relationship property division]

Introduction

[1] The parties have before the Court the following applications for resolution:

(a) the applicant's application dated 14 December 2015 for orders relating to relationship property pursuant to s 25 of the Property (Relationships) Act 1976 ("the Act") and for "occupation rent";

(b) cross-applications for compensation for post separation contributions pursuant to s 18B of the Act;

(c) the respondent's application for an occupation order pursuant to s 27 of the Act; and

(d) the respondent is also seeking an award of economic disparity pursuant to s 15 of the Act.

[2] The parties began living together on 6 April 1992 in their homeland, then known as Yugoslavia. They emigrated to New Zealand in November 1992 and were married on 26 December 1994. During the next two years the applicant supported the respondent both in New Zealand and overseas (financially and otherwise) while she was obtaining her architectural degree overseas. Otherwise both parties worked hard, mainly in the hospitality industry to build up their wealth.

[3] In July 2000 they purchased the family home at [address deleted], Orakei, with some financial assistance from the applicant's parents. Their first child, [child 1], was born soon after, on [date deleted] 2001. In March 2001 the respondent suffered an injury while she was working in the parties' business which was followed by a medical misadventure resulting in a permanent disability. She has not been able to work since then and is receiving on, a permanent basis, entitlements from Accident Compensation Corporation. On [date deleted] 2004 the twins [child 2] and [child 3] were born.

[4] The applicant worked full time until 2014 when he commenced part time work and took a student loan to enable him to study for an MBA diploma. The student loan has been treated as the applicant's liability. Since obtaining his MBA diploma, the

applicant has been able to obtain a well paid contract position. He remains in full employment.

[5] On 24 May 2015 the parties separated. The children have been in the respondent's full time care since that time. The respondent has remained in the family home and has met the outgoings on the home including mortgage interest payments. There have been court proceedings in respect of the children's care arrangements.

[6] It is accepted that the fundamental principle of equal sharing of relationship property apply in this instance. The extent of the parties relationship property can be listed as follows:

(a) the family home at [address deleted] Orakei;

(b) household chattels;

(c) Kiwisaver – both parties have a Kiwisaver;

(d) bank accounts;

(e) a [vehicle] retained by the respondent; and

(f) a tax refund paid to the respondent.

[7] The parties relationship debts comprised:

(a) the mortgage debt;

(b) various credit cards;

(c) various outstanding household accounts at separation;

(d) a tax payment; and

(e) various other outstanding accounts.

[8] The parties had agreed for the purposes of this hearing that the value of the family home is $1.5 million. However the respondent's position at the time of hearing was that there is now evidence to say that the value has increased. The mortgage has remained on an interest only basis since the date of separation so that there has been no reduction of principal. As to division, both parties have provided a calculation as to how division should take place, subject to a number of adjustments sought by both parties that require determination.

[9] Both parties initially wanted to retain ultimate ownership of the family home. However at the hearing the respondent's position changed – she now seeks to have occupation of the family home until 20 December 2022 to enable the children to remain in the family home until the end of their secondary education. After 20 December 2022 she wants the property to be sold and the net sale proceeds to be divided equally subject to the appropriate adjustments.

[10] The family chattels have been divided informally and no adjustment is required in respect of those chattels. It is agreed that an adjustment should be made from the applicant to the respondent for the life insurance payments over his life that the respondent continued to meet after separation.

[11] The following matters accordingly need to be resolved:

(a) what, if any, adjustments should be made under s 18B. This includes the applicant's claim for occupation rent which is opposed by the respondent as to both liability and quantum;

(b) should an occupation order be made in favour of the respondent until the twins have finished secondary school education;

(c) should compensation be paid by the applicant to the respondent pursuant to s 15;

(d) should the property ultimately be vested in one of the parties or sold on the open market;

Occupation order

[12] The respondent wants to remain in occupation of the family home until the twins have finished their secondary education (anticipated to be December 2022). She says that the parties' marriage ended in distressing circumstances and that she suffered a high level of distress as a consequence. All three children are at a stage in their schooling where they are undertaking external examinations and their results matter. The family home is in reasonable proximity to their schools and friends and the support networks they have. The respondent says it would be contrary to their interest for them to have to move at this stage.

[13] The respondent says, that in the event that an occupation order is made, she seeks a direction requiring the applicant to consent to the fixing the interest rate on the loans secured by the mortgage over the family home for a period of no longer than the duration of the occupation order, to sign all necessary documentations with the bank to give effect to this. She is critical of the applicant for this fixing of the interest rate not having yet been done.

[14] The applicant's position is that the best environment for the children is to have two parents who are able to offer the warmth of a home. He says in the last four years he has not been able to provide a homely environment for the children when they are with him because all his capital is locked up in the family home which is controlled by the respondent. Since separation he has been living in small rooms or in one bedroom apartments and he says that the respondent has refused to let the children have proper time with him. This has resulted in the Court having to make a parenting order at his request granting him what he says, is a proper and meaningful contact time with the children at his place of living. However he said this is extremely difficult as he cannot afford more than to rent a small rental while at the same time the respondent is solely enjoying the benefit of his share of the relationship property for free.

[15] The applicant points out that the children are attending schools on an "out of zone" basis, therefore schooling is not an issue. The respondent and the two dependent children are living in a very large house (five bedrooms, three living areas, large kitchen, al fresco entertaining area, wine cellar, office …). The applicant says there is

always an option of renting in the desired area or purchasing a smaller house in a more affluent area.

[16] His view is that owning a house is not a given right - it is a privilege. Also, within the same distance from the children's school is a number of suburbs where prices are much less than in Orakei/Mission Bay where the family home is situated. In addition, most important from the applicant's point of view is that he will be able to provide them with a home as well if the family home does not remain solely in the possession of the respondent.

[17] He argues that it is unreasonable for the respondent to have demanded full use of the family home for the last four years and now into the future and leave him without the ability to have his children properly stay over, due to the size of his accommodation. He says that the respondent has had enough time to adjust to the situation. He was willing to help with her accommodation for the first six months after separation and for that reason is not claiming occupational rental for that period of time but says it is unreasonable for the respondent to seek to remain in the house this large for free – there is a need for everyone to adjust including the respondent.

[18] The applicant makes the submission that after four years of struggle to resolve the issue, to make an occupation order in favour of the respondent would be against principles set out in s 1N(d) of the Act. He says that everyone's life is being put on hold because of the unresolved relationship property and that the only fair and just outcome for everyone is to get a final resolution to this issue and move on with their lives after four years of uncertainty.

[19] He submits that any interests of the children under s 26 of the Act would be preserved without an occupation order in favour of the respondent. It is in their interests that he can also be in a position to house them in a meaningful way. They are attending "out of zone" schools. So regardless of where they live, they would be attending "out of zone". Also he says that the respondent confirmed in cross-examination that not a single friend of the twins live in the area where the family home is located. Living at the current location sometimes puts the children at risk as they must travel some distance to socialise or go to school or come back from school. On several occasions they have not felt comfortable being on public transport or

walking long distances to be with friends or to attend school if their parents are not able to drive them.

[20] It is submitted that the respondent will be left with a significant sum of money if the house is sold and the mortgage paid off. He points out that the sale of the house is the respondent's preferred option. He questions if there is a "hardship" as set out in s 26A of the Act and argues that there are a number of properties in affluent central Auckland suburbs which are four bedroom which the respondent says she requires. Also, there is the option of renting in any area the respondent wishes and he says that it should not be considered a hardship if one is not able to live in a house with six bedrooms and other luxury amenities.

[21] The applicant's present situation is that he has a wife who is suffering from cancer - this he says must be taken into account under s 26A of the Act. They and the children are not able to lead a normal life. He keeps having to move from one flat to another which has been the situation and all because the respondent has had full use of the applicant's asset.

[22] For the respondent the submission is made that when determining matters under the Act the Court must be informed by the purposes set out in s 1M of the Act, in particular s 1M(c) provides that one of the purposes of the Act is:

> **1M Purpose of this Act**
> …
> (c) to provide for a just division of the relationship property between the spouses or partners when their relationship ends by separation or death and in a certain amount of circumstances, while taking account of the interests of any children in the marriage or children of the civil union or children of a de facto relationship.

[23] It is submitted the principles of the Act at s 1N provide guidance to the achievement of the purpose of this Act and in particular in this case:

> **1N Principles**
> …
> (b) the principle that all forms of contribution to the marriage partnership, civil union, or the de facto relationship partnership are treated as equal:
> (c) the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners arising from their marriage, civil union or de facto relationship or from the ending of their marriage, civil union or de facto relationship:

> (d) the principle that questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.

[24] It is argued that s 26(1) of the Act again highlights the interests of any minor or dependent children of the marriage:

> **26 Orders for benefit of children of marriage, civil union, or de facto relationship**
> (1) In proceedings under this Act, the court must have regard to the interests of any minor or dependent children of the marriage, civil union, or de facto relationship and, if it considers it just, may make an order settling the relationship property or any part of that property for the benefit of the children of the marriage, civil union, or de facto relationship or of any of them.

[25] It is submitted that the Act then turns to the issue of occupation orders and specifically provides to record a broad discretion to make occupation orders:

> **27 Occupation orders**
> (1) The court may make an order granting to either spouse or partner, for such period or periods and on such terms and subject to such conditions as the court thinks fit, the right personally to occupy the family home or any other premises forming part of the relationship property.

[26] Further, the Act sets out that the Court must have regard to the need to provide a home for any minor or dependent children of the marriage:

> **28A Factors affecting occupation orders and orders with respect to tenancy**
> (1) The court—
> (a) in determining whether to make an order under section 27(1) or section 28(1); and
> (b) in determining, in relation to an order made under section 27(1), the period or periods, the terms (if any), and the conditions (if any) of the order,—
> shall have particular regard to the need to provide a home for any minor or dependent child of the marriage, civil union, or de facto relationship, and may also have regard to all other relevant circumstances.
> (2) Nothing in this section shall limit the generality of section 26(1).

[27] It is submitted that the importance of these sections is recognised in *Sutton v Bell*.[1] In particular, in that case it was:[2]

> obviously in the children's best interests to be able to live in the family home when they are staying with the parent with whom they live for the majority of the time.

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[1] *Sutton v Bell* [2017] NZHC 2370, [2017] NZFLR 779.
[2] *Sutton v Bell,* Above n 1 at [15].

[28] Counsel accepts that *Sutton v Bell* relates to an interim decision but argues that there is nothing in the Act that limits the making of an occupation order to interim relief, or in fact that limits the Court's discretion as to the appropriate duration of the order.

[29] The Court is referred to *Lawrence v Baker*.[3] On appeal against the making of a lengthy occupation order, the High Court reduced the occupation order from one of six and a half years to one of nearly three years, still a lengthy period of time in circumstances where the parties' children at the date of the appeal were 17 and 14. The appellate Judge noted that if the original occupation order had stood the home would not have been sold for some 8 ½ years after the parties' separation and reduced it by only one year and nine months leaving a significant period of occupation in place.

[30] *S v W* resulted in an occupation order of some four and a half years with an order for sale at the conclusion of that time.[4] The facts of that case are distinguishable on the basis that the respondent had at one stage offered to allow the respondent to remain in the family home, however the High Court considered it was proper to make a s 27 order. The end result of that decision was that the spouse with the care of the children in fact remained in the home for some 13 years after separation. At the time that the matter was before the High Court the children were 17 and 15 years old respectively.

[31] The submission is made that while there has been a variety of cases both granting and refusing occupation orders, the cases and the pronouncements made in various judgments on them largely turn on their own facts. The discretion of the Court is not fettered. The question is what is appropriate in the particular facts of the case. The desirability of a clean break needs to be weighed against the need to provide an appropriate home for the children of the marriage giving consideration to the health and age of the parties and their overall situation.

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[3] *Laurence v Baker* [2013] NZHC 2378.
[4] *S v W* (2009) BCL 256 (HC).

Occupation rent

[32] The applicant considers he is entitled to be credited for occupation rent because he has had to house himself after the parties separated while the respondent has continued to reside in the family home for a period of four years. He says that she has had the benefit of his interest in the relationship property for four years, thus avoiding having to pay a house rental.

[33] The applicant says that this was a significant disadvantage to him as he has been unable to use his capital to benefit his own circumstances. He therefore seeks payment of occupation rent for the period starting six months after separation until now. His calculations are based on a market rental taken as the average for four appraisals in 2018 being; $1450 per week – from 25 November 2015 to 30 April 2019 (50 % of 179 weeks at $1450 which equals $129,775). He claims that from 1 May 2019 onwards he should receive a weekly payment of $725 per week until the family home is sold.

[34] The respondent's position is that she should not be liable for occupation rent but that if she is, it should not be in the sum claimed by the applicant. Rather, it should be calculated on the basis of the market rental as assessed by Prendos, Valuers for the various periods set out in schedule B to the respondent's submissions. For the period sought by the applicant this would result in a figure of $186,600 up to 15 March 2019. From this would be deducted occupancy costs of $98,787.83, leaving a net figure of $87,812.17 (half share being $43,906.09).

Section 15 claim – economic disparity

[35] The respondent seeks a payment pursuant to s 15 of the Act to recognise what she says is a significant disparity in income and living standards between the parties due to divisions of functions of the parties within the relationship. She says that in the last three years of the relationship the applicant undertook tertiary education completing a two year post graduate MBA diploma, whilst being largely supported by her entirely for the last year of study. This has enabled him to significantly increase his income and go onto well paying positions with his income likely to continue to increase in the way it has to date. He has only been able to undertake this study due

to her income and her taking responsibility for the children. No formal calculation has been provided and the Court is being invited to make a broad brush assessment of the appropriate compensation.

[36] The applicant says the respondent has not met the criteria for s 15 of the Act which states:

> **15 Court may award lump sum payments or order transfer of property**
> (1) This section applies if, on the division of relationship property, the court is satisfied that, after the marriage, civil union, or de facto relationship ends, the income and living standards of one spouse or partner **(party B)** are likely to be significantly higher than the other spouse or partner **(party A)** because of the effects of the division of functions within the marriage, civil union, or de facto relationship while the parties were living together.
> (2) In determining whether or not to make an order under this section, the court may have regard to—
> (a) the likely earning capacity of each spouse or partner:
> (b) the responsibilities of each spouse or partner for the ongoing daily care of any minor or dependent children of the marriage, civil union, or de facto relationship:
> (c) any other relevant circumstances.
> (3) If this section applies, the court, if it considers it just, may, for the purpose of compensating party A, —
> (a) order party B to pay party A a sum of money out of party B's relationship property:
> (b) order party B to transfer to party A any other property out of party B's relationship property.
> (4) This section overrides sections 11 to 14A.

[37] At the end of the marriage the respondent had income of around $72,000 gross per annum while the applicant was not in employment but was receiving $80,000 gross per annum working as a contractor. In December 2015 he was able to obtain a full time employment with a salary of $60,000 gross per annum and performance-based commission of $28,000 gross per annum.

[38] Since the end of the marriage the respondent has chosen to use the applicant's share of relationship property and other relationship assets without compensating him in any way. It is claimed by the applicant that the respondent accordingly has maintained her living standards (stayed in the large house with five bedrooms etc) as they were before the marriage ended. At that time the respondent has removed all cash from the joint accounts and has left the applicant penniless. Due to this situation no bank would lend to him any amount of money and he was forced to live in small rooms

3m x 3m with nothing but the bed or in one bedroom flats. This has meant that he has not been able to provide for his children.

[39] The applicant says that this illustrates that at the end of the marriage his income and living standards were not likely be significantly higher than that of the respondent. He in fact claims that the situation was quite the opposite. He says that the evidence suggests that the respondent and the applicant were sharing all duties and responsibilities equally around the house and in the business/work while the parties were living together. There was no such division of functions between the parties which would reduce the ability of one party to advance him or herself as compared to the other party.

[40] The applicant says that even if there was/is the existence of disparity and income and living standards between the respondent and himself there is no evidence that disparity was caused by the division of functions within the marriage while the parties were living together.

[41] Counsel for the respondent refers to the Court of Appeal decision *X v X* where Robertson J provided an overview of the elements required as being:[5]

(a) the jurisdictional foundation is a disparity in both living standards and income;

(b) disparity must be significant between the parties. It is a subjective assessment. What the community at large enjoys is irrelevant as to living standards;

(c) the purpose of the award is compensatory;

(d) the income should be considered in the round from all periodic streams of money. The assessment is of potential income so the actual income may not be the relevant starting point;

[5] *X v X* [2009] NZCA 399, at [77]-[117].

(e) there is no onus of proof in the strict sense, it being for the Court to be satisfied;

(f) the disparity must be caused by the division of functions but is presumed that there is mutuality to the election of roles such that the Court need not enquire under the merits of the decision. Evidence of reluctance to work or preference of leisure may be relevant to the discretion rather than causation;

(g) the exercise is discretionary and therefore not a formulaic one.

[42] It was noted in *Scott v Williams* that the legislation was stated to be "fundamentally about fairness" to "ensure that each partner has a fair division of resources and each is placed on a fair footing to deal with life after separation".[6] The approaches to s 15 have fallen into two broad categories:

(a) the first is to value what the disadvantaged partner might have earned in the future (the diminution method);

(b) the second is to assess how much the advantaged partner's future earning capacity had been enhanced. This is the relevant section in respect of this matter.

[43] The submission is made by the respondent that it is also important to note that the division of functions must be a real and substantial cause of the economic disparity rather than a principal cause so that the award is not precluded solely on the basis of spouse's skill and talent.[7] In particular the Court in *X v X* recognised the need to consider s 15 compensation wherein a person has supported a spouse to obtain qualifications and experience that provides that person with an enhanced future earning capacity.[8]

[44] It is pointed out that it is not necessary to present detailed accounting evidence to justify compensation. The Judges in *Scott v Williams* took varying views as to the

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[6] *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 at [156].
[7] *X v X,* above n 5 at [97].
[8] *X v X,* above n 5 at [49].

range of valuation approaches appropriate. The majority considered that the assessment should be made at the date of separation with the calculation being done once the extent of the relationship property is known.

[45] Amongst the factors that were considered as possibly being appropriate, it is submitted that the Court consider included qualifications of parties, career stage of parties[9] and parental support, separate property resources, re-partnering and other responsibilities regarding the children as well as the age of the partners.

[46] When assessing the overall award different approaches were suggested including:

(a) the assessment should be by looking at the position of the parties at the end of the relationship rather than the economic benefits and detriments.[10] What is needed is to look at the resources available to the parties under the Act and then assess what is just – it is facts specific,[11] noting that the award could be the entire share of relationship property;[12]

(b) the causation is to be assumed unless there is evidence to the contrary; and

(c) it may be appropriate to take into account contingencies but 30 percent is too high.

[47] It is submitted by the respondent that the starting point should be the actual known disparity and that merely because the figures in this case are not extreme does not mean that s 15 compensation should not be applicable. When considered as a percentage, the taxable income received by the respondent is less than 67 percent of the income received by the applicant. It is argued that this is sufficiently significant to meet the significantly higher threshold.

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[9] *Jack v Jack* [2014] NZHC 1495.
[10] *Scott v Williams*, above n 6 per Elias CJ at [348] and [352].
[11] *Scott v Williams*, above n 6 per Elias CJ at [348] – [349 and 357-358].
[12] *Scott v Williams*, above n 6 at [352].

[48] The respondent claims s 15 compensation on the basis that the applicant's earning capacity has been enhanced as a result of the division of functions. In particular, it is pointed out that the applicant moved from running a relatively low key catering business from home (so low key that it did not have any legitimacy in terms of food licencing) to be able to command income in excess of $100,000 per annum.

[49] It is argued the applicant's MBA study was only able to be done due to the respondent's steady income for the household to live on, although the applicant's parents also helped with lending some money. The fact of the matter is that the applicant worked from home and studied part time, initially without much in the way of income. He then moved to full time study for a MBA with "very little" catering in that last year. The applicant's earning capacity was thus been significantly enhanced.

[50] It is said that the applicant's choice of accommodation should not necessarily be seen to be determinative of the living standard he was able to enjoy. He is living in a two earner household. He complained of living in a one bedroom flat despite living in a relationship with the woman whose visit prompted the separation but this was his choice. This will no doubt have contributed to the ability to build up relationship property in a new relationship by way of development of investment properties as well as repayment of his student loan. The applicant's capital position has improved since separation whereas the respondent's has remained essentially the same save for any movement in the value of the family home which is shared. It is submitted that this of itself is sufficient to justify a significant difference in living standards.

[51] It is pointed out that the applicant gave evidence of having recently taken on a new role which he stated had an income of $100,000, although he had no documentation. It is submitted that the Court is entitled to treat the applicant's income at the highest level he has earned as this is his potential as a result of the undertaking of the further education at the end of the relationship. Accordingly his potential income is $104,156 (as per the 17/18 financial year of which there is evidence of the full year before the Court).

[52] It is argued that for that particular year the respondent's income was only 66.67 percent of the applicant's income i.e. approximately two-thirds of the applicant's enhanced income. This disparity is primarily due the course of study that the applicant undertook in the last year of the relationship. It is argued that investment of time and being supported by the respondent is now paying dividends.

[53] By contrast it is said the respondent had to accept charity in order to enable the children to continue with their former activities. She also had to take steps to get the applicant to contribute the necessities for the children such as orthodontic work.

[54] It is argued that level of disparity is exacerbated by the fact that not only has the respondent's income since separation been significantly less than the applicant's, she has had the primary responsibility for the care of the children. Overall the submission is made that it is open to the court to determine that there has been a significant difference in living standard and that the reason for that difference in living standard is the applicant's enhanced ability to earn a significantly greater income than that earlier earned in the marriage due to the gaining of the MBA qualification with the support of the respondent.

[55] To compensate for the difference, it is submitted that the following payment is appropriate, broken down into two parts, firstly actual difference and secondly future difference subject to a contingency amount:

(a) from separation to 15 March 2019: This amounts to $41,196.55, calculated as set out in Schedule C to counsel's opening submissions;

(b) from 15 March 2019 for a period of three years (to allow for the MBA to have been completed post separation and a period of experience). The last known annual difference of $32,123.75 divided in half ($16,061.88) and subject to a contingency of say 25% ie, $12,046.41. For three years that amounts to $36,139.23.

In total the respondent seeks total compensation of $77,335.78 for the disparity.

[56] In respect of the possible suggestion that there was some relevance of the respondent having completed her architectural degree during the marriage, the submission is made that this is of no relevance. That qualification has not impacted on the difference in income or living standards after separation.

Analysis

[57] In respect of the application for an occupation order, a tension exists because of the needs of the parties' children, particularly the twins. The respondent is asking the Court to accept that the property is worth in excess of $1.7 million. She is not able to buy out whatever sum is assessed as being owed to the applicant on the basis of that valuation. However she says that she has made a number of enquiries as to where she would be able to purchase if the property was sold immediately. Her evidence is that she would not be able to repurchase in the immediate area or in the area around the twins' respective schools, being [school deleted – school A] and [school deleted – school B].

[58] She also says that she would not be able to pay rent for a replacement property if she was to have to rent in the area which would enable the twins to remain at those two schools. She says it should be a priority for the children to be able to finish their education at these schools and that both children want to go on to higher education. She does not want to put that in jeopardy at this time and therefore asked that the sale of the property be deferred until the end of the twins' secondary school education at the end of 2022.

[59] The applicant is vehemently opposed to any further delay. He considers that his life has been put on hold because he does not have use of his capital. He wishes to be able to provide a home where the children can come and stay in a way that they are not able to at the present time. He does not consider it to be fair for the respondent to have a home simply because she is able to use his capital at this time and believes that he should now have the ability to use his capital to get on with his life.

[60] The respondent is seemingly questioning the applicant's commitment to his children by suggesting in the past that he has not always made himself available to have the children. The applicant rejects this, his evidence being that the reason he has

not been able to have the children more often is because of the fact that he has not been able to adequately house himself in a situation where the children can stay with him for any length of time. He simply wishes to change that situation.

[61] The evidence does not suggest the applicant has avoided his obligations to the children. He has volunteered a six month rent free period in relation to his occupation rent. There is no evidence to suggest that he has not paid child support. The respondent however is critical of him for the fact that he has not met anything extra in respect of the children's needs. The evidence is not such that any definitive conclusion can be made in respect of that issue. It is apparent that no steps needed to be taken by the respondent to obtain the child support that the legislation provides. The applicant has been mindful of his obligations.

[62] The issue becomes whether or not it is appropriate at this time to order a sale to achieve a clean break or whether consideration should be given to the needs of the children to have some stability at this time to enable them to finish their secondary school education. The reality is that the applicant has been held out of his capital for a lengthy period of time and the question whether this should continue for at least another three years.

[63] A further question is whether he is entitled to compensation for this by way of occupation rent. He has provided to the Court real estate agents' assessments of the market value. He considers these assessments are the best indicator of market value. The respondent on the other hand has sought the opinion of a registered valuer. In the absence of any conflicting opinion from another valuer the Court would prefer the professional opinion of the valuer who provided the rental valuation on behalf of the respondent.

[64] A schedule has been provided by the respondent as to her calculation of rental taking into account the concession that the applicant has made in his claim in respect of the first six months post separation.

[65] From that calculation the respondent wishes to deduct occupation expenses of $98,787.83. These expenses as outlined in the schedule to counsel's submissions included:

(a)	mortgage interests	$74,150.21
(b)	rates	$12,068.76
(c)	insurance	$ 8,337.22
(d)	water rates	$ 4,231.64

Decision

Occupation application

[66] Having considered the merits of each parties' position I do not accept that it is appropriate to grant the application for occupation made by the respondent. The clean break principle underlining this legislation supports the arguments made by the applicant. The usual approach taken by the Court is to direct a sale so that each party can have access to their capital and get on with their new life. Each party would have the financial means to ensure appropriate housing for the children.

[67] I am not persuaded that it is not possible for the respondent with her capital to either re-purchase or rent a property which would see the children's education continue as it is. This would seem to be the main plank on which the respondent seeks occupation. As regards the children's interest, I do, however, consider it is important that the twins' present school year not be disrupted. The order I am therefore making is that the respondent shall be permitted to reside in the family home until 1 December 2019 on the condition that she pay the outgoings on the property including mortgage interest.

[68] The applicant needs to take all steps necessary to ensure that there is a fixing of the mortgage interest rate until the sale of the property.

[69] On 1 December 2019, or such other date this year as the parties may agree, the family home shall be listed for sale and the net proceeds divided equally, subject to the adjustments that need to be made in terms of the decisions made herein.

Economic disparity

[70] The applicant's submissions are focused on the first broad category in respect of any claim under s 15, that is what is seen as the diminution method. However the respondent is clearly basing her claim on the fact that the applicant's earning capacity was enhanced because he was able during the latter part of their marriage to go back and complete an MBA. She is claiming that because of her support the applicant obtained qualifications and experience that have provided him with an enhanced future earning capacity. The point is made that the taxable income received by the respondent is less than 67 percent of the income now received by the applicant and that is sufficiently significant to meet the significant higher threshold. The respondent says that the applicant has been able to move from a low key catering business income to now demand an income in excess of $100,000. She says this was only able to be done due to her steady income.

[71] This significant change in the applicant's ability to earn significant income cannot be ignored. There now exists a difference in living standards which has been created by this further education.

[72] Counsel for the respondent has made a calculation on the basis that the total compensation sought for this claim was $77,135.78. This calculation has been done on the basis that it appropriate to take into account contingencies at a figure of 25 percent. Contingencies are usually incorporated to reflect the potential non-receipt of future income, factors which might have interrupted or prevented attainment of the projected income.[13]

[73] This case is significantly different to that in *Scott v Williams* but the type of case is addressed:[14]

> [294] Most of the s 15 cases to date seem to discuss disparity in terms of the lost or reduced earning power of the non-career partner, although some also address the enhanced earning power of the career partner.[377]
>
> [[377] See *X v X*, above n 364, at [117] and following per Robertson J Henaghan and others, above n 365, note that it is hard to find a s 15 case where

[13] *X v X* supra at [61].
[14] *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507.

> enhancement was the central figure: at [7.383]. See also Law Commission, above n 354, at [18.55] – [18.59]].
>
> Glazebrook J also comments on this matter.[15]
>
> **Enhancement method**
>
> [245] I accept Mr Goddard's submission that s 15 orders can recognise both the definition of earnings of one party and the enhanced earnings of the other, to the extent it required to provide some compensation for the disadvantage party. The two methods are not mutually exclusive[333]. This means that an order under the diminution methodology might be combined with that using the enhancement method. Indeed, in many cases, as Arnold J outlines, that may well be the proper approach.

[74] However, in this case it is the enhanced earning potential of the career partner, the applicant, so it does slightly differ from the approach in *Scott v Williams.*

[75] *Scott v Williams* gives some guidance as to the application of contingency rate generally:[16]

> [243] Moving to Mr Goddard's criticisms of the way the first stage calculations were done in this case, I am inclined to accept his submission that the projected income should be set at a realistic level and that therefore a contingency rate that takes into account the possibility of not achieving the level of income should not be necessary.[17]
>
> It follows that I would be inclined to accept that any contingency discount should largely be designed to take into account the risk of matters such as sickness, death, redundancy and should usually be significantly less than the 35 per cent used in this case. I would also be inclined to accept Mr Goddards submission that no contingency for illness, death or redundancy should be applied from separation to hearing date as none of these events have occurred. I am not prepared to be definitive on these points however given the lack of expert evidence.

[76] The contingency of 25% in the current case is reasonable, considering Glazebrook J comments that it should be significantly less than 35% although this is a figure that should probably be subject to expert evidence, the proposed contingency rate is on the high side to be submitted by the respondent, considering the short duration of time over which this is sought, and the minimal risk of events considered in the contingency coming to fruition.

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[15] Above n 14.
[16] *Scott v Williams*, above n 14 per Glazebrook J.
[17] This is consistent with the views of the majority in *X v X* that an appropriate income figure should be taken so that a further discount to the income amount is not required.

[77] The respondent could well have submitted a contingent rate leading to a higher overall figure but the current percentage seems reasonable in the circumstances. I accept that counsel for the respondent has completed her calculations on the basis of the evidence that the applicant has provided as to his present income.

[78] Taking these factors into account on a broad brush approach given that there is a paucity of information in respect of some relevant evidence, I fix the compensation sought at $77,135.78. This addresses the disparity that arose as a result of the applicant being able to significantly increase his income and consequently his lifestyle.

[79] Both parties provided spreadsheets as to the adjustments that they claim are required between them. Counsel for the respondent comments that some initial disparities were resolved in an initial cross examination in particular:

(a) The tax refund due is accepted to be $7,7057.95 in the light of the tax outstanding;

(b) Similarly, the Contact Energy and house debts at separation were accepted;

(c) The parking fines continue to be disputed, the applicant's position being that the parking fines outstanding at the end of the relationship should be the respondent's personal debt. The fact is that there can be no certainty over who have incurred the fines. It is equally clear that both parties incurred fines from time to time over the course of the relationship when going about daily life, this being evident from the letters attached to the applicants affidavit. As such the submission is made that such debts were part and parcel of the family's daily cost of living and as such any owing at the date of separation should be treated as relationship debts. There is no dispute as to the quantum outstanding at separation and no suggestion that the respondent has not paid the debt she has provided evidence.

In respect of this matter my ruling is that the parking fines should be treated as relationship debt.

(d) The respondents evidence is that there was $140 due at the date of separation to the gardener which she paid. The relevant cheque butt was attached to her evidence. I accept that this is a matter that should be taken into account in respect of adjustments being a relationship debt;

(e) It is argued that there is no basis for the reimbursement of payments for Vodafone and Contact Energy made by the applicant significantly after separation. These are not debts as at the date of separation but were voluntary payments made by the applicant to assist the children and the respondent after separation and are in the nature of maintenance. I accept that this is the right approach in respect of these payments and there should be no adjustment.

[80] In respect of s 18B adjustments the respondent continued to pay the applicant's life insurance. The agreed sum is set out on Schedule A to the respondent's opening submissions at $2,612.08. Reimbursement of this amount needs to be made and factored into the final calculations.

[81] From the respondent's point of view the submission is made that both parties made other contributions to the relationship after separation, in particular:

(a) The respondent cared for the children in what can only be described as difficult circumstances including a visit by the applicant's current wife which precipitated separation and being turned back at the airport as the result of an order preventing removal which the respondent did not know about. Whilst the applicant insists that the respondent was served and knew about the order preventing the removal, no evidence has been provided of this;

(b) Significantly the respondent has continued to be primarily responsible for the 3 children in the relationship. While the children have spent some limited time with the applicant, this has been confined in the main to daytime contact and it is the respondent who has borne the primary parental burden. This has included the financial burden of meeting the

childrens ongoing costs and providing for their emotional and physical needs. She has also continued to meet the outgoings on the home which are set out in Schedule A in her counsel's opening submissions as at March 2019 of $109,771.78. This includes meeting the mortgage interest at a higher rate after it came off term deposit despite the fact that it could have been re-fixed at a lower rate. Interest has continued to accrue since that time.

(c) The applicant has provided child support essentially at the formula rate and has assisted with the provision of accommodation in that the children have been able to continue to reside in the family home. This is said to be an important contribution and one which the applicant himself regarded as contributing to the support of the children. It is argued that to direct occupational rental would negate that support as effectively the respondent would have met the accommodation costs.

[82] The applicant's assuming of the liability for the student loan and funds being made available from his parents cannot be overlooked however when exercising a discretion. They must be factored in. The difficulties that arose at the Airport when the respondent was taking the children overseas is not a relevant consideration here particularly as there remains some confusion as to how matters unfold.

[83] For the respondent it is said any award or occupation rent (without accepting that any should be made) would have to take into account the actual expenses incurred by the respondent including mortgage, interest and house expenses. That is accepted by the Court.

[84] It is argued that given the various post separation contributions by the respective parties, there should be no order for the payment of occupational rental which can appropriately be seen as balanced out by the respondents contribution both financial and non-financial in the parenting of the children. I do not accept this submission.

[85] I have decided, all things considered, that it is appropriate that there be an adjustment in respect of occupation rent. This should be calculated as from six months

post separation until the date that the family home sells. It is to be at the rate fixed by the Prendos valuation. There are to be certain deductions made from the amount, these being listed by counsel for the respondent as set out above, totalling $43,906.09. Occupation rent is to continue to be paid by the respondent to the applicant at the rate of $550 per week, less half the outgoings paid during this period (being mortgage, interest and rates).

[86] All other usual costs relation to the respondent's occupation of the family home are to be met by her.

Other adjustments

[87] The order that I make is to include the following provisions:

(i) the Kiwisaver policies in respect of parties' names be retained by those parties as their separate property;

(ii) all monies in any bank accounts in the parties' separate names be retained as their separate property;

(iii) the [vehicle] be retained by the respondent as her separate property;

(iv) the parking fines owed as at the date of separation are relationship property and are to be shared between the parties equally;

[88] On settlement of the sale of the family home, the sum required to equalise division will need to be credited to the party owed the credit. This figure is to be calculated by counsel for the respondent who is to provide a revised spreadsheet to the applicant taking into account of the various rulings I have now made. If there is any dispute as to the final calculation, leave is reserved to the parties to refer the matter back to me for a ruling.

[89] The sum of $77,135.78 is to be paid by way of compensation to the respondent pursuant to s 15 of the Property (Relationships) Act 1976. Such payment is to be made on the settlement of the sale of the family home.

[90] Leave is reserved to both parties to seek further directions if required in respect to the sale of the family home and the required adjustment. Leave is also reserved for any issue of costs to be raised although it needs to be said that it will be difficult to persuade the Court that an award of costs should be made.

Dated at Auckland this day of

I A McHardy
Family Court Judge