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-2018-004-000053
[2020] NZFC 2960

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[PIPER MOON] Applicant
AND	[LINCOLN MOON] Respondent

Hearing:	20 March 2020
Appearances:	K Hoult and D Mayall for the Applicant The Respondent in Person
Judgment:	22 May 2020

RESERVED JUDGMENT OF JUDGE D A BURNS
[In relation to applications under the Property (Relationships) Act 1976]

Background

[1] On 13 December 2017 the applicant wife filed an application pursuant to the Property (Relationships) Act 1976 ("the Act") for the classification and division of relationship property. The proceedings were defended by the respondent husband and he engaged counsel to assist him.

[2] In April 2018 the applicant applied for particular discovery. The application was opposed and heard before me on 8 August 2018. I granted the application and made an order for "each and every document and category of documents sought by Ms [Moon] in her application for particular discovery dated 20 April 2018 was to be discovered by the husband". I allowed a period of 28 days for that evidence to be provided by the husband. I further ordered that in the event that the husband did not have possession or control of the documents or category of documents sought then he was to file an affidavit within six weeks setting out what steps he had taken to find the documents, provide an explanation as to why he did not have possession or control of the documents and any additional things that he wanted to say in relation to the order for discovery made by the Court.

[3] On 1 October 2018 the respondent filed an application for discovery against the applicant. On 18 November 2018 the applicant filed an application for an order for sale of two properties (the parties are the owners of three properties).

[4] On 18 January 2019 the respondent made a second application for particular discovery against the applicant (this was prior to the first application with respect to discovery being heard).

[5] On 5 April 2019 the interlocutory applications came before His Honour Judge Druce who ordered limited discovery against the applicant with respect to bank accounts. Judge Druce held that the bank accounts were to be retained by the respondent's counsel in chambers or offices and if there is a desire that may be inspected or seen outside his offices then leave would have to be sought from the Court.

[6] By way of reserved decision on 8 July 2019 Judge Druce ordered the sale of the parties' former family home at [address deleted – property A] and a rental property at [address deleted – property B]. Judge Druce, in addition, appointed Mr David Snedden solicitor of Auckland to act as a Court's agent for the purposes of appointing a real agent to market the properties, acting on the sale of the properties and reporting to the Court.

[7] On 31 July 2019 the respondent filed an appeal against the interlocutory decision of Judge Druce dated 8 July 2019 for an order for sale of the two properties and sought an application for stay. The appeal was set down to be heard in the High Court on 4 February 2020. On the 29 January 2020 the respondent filed a notice of discontinuance of the appeal. The husband had failed to comply with Schedule 6 of the High Court Rules 2016. The appeal was dismissed by the High Court.

[8] The applicant following the substantial failure by the respondent to comply with the orders with respect to discovery and production of documents ordered by Judge Druce on 5 April filed and served a notice to produce documents dated 15 August 2019 pursuant to Rule 153 of the Family Court Rules 2002.

[9] As at the hearing the respondent had substantially failed to comply with the Court's order as to discovery and production of documents.

[10] Prior to the hearing before me the respondent filed a change of address for service. He indicted to the Court that his relationship with his counsel had broken down. The matter was placed before me and I directed that counsel had to appear in Court (pursuant to his ethical obligations to the Court) unless a Rule 88 application was filed and granted. On the morning of the hearing the Court received a Rule 88 application. In view of the clear breakdown of the relationship between the respondent and his counsel I granted the Rule 88 application and did not require his lawyer to attend.

[11] At the hearing the respondent renewed his application for adjournment of the proceedings. I declined the application for the reasons set out in the minute that I delivered following the hearing commencing.

[12] A brief factual background relevant to the case is as follows:

(a) The parties married in [date deleted] 2008;

(b) The parties' only child [Jamie Moon] was born on [date deleted] 2011;

(c) On 14 May 2012 the parties purchased the family home at [property A] ("the home");

(d) In 2014 [business details deleted – the business] was formed from [the former business];

(e) On 28 September 2015 the parties purchased a rental property at [property B] ("[property B]");

(f) On 11 February 2016 the company [company details deleted – the company] was incorporated;

(g) On 15 March 2016 [the company] purchased a property at [property C] as an investment property ("[property C]");

(h) On 12 December 2016 the parties separated;

(i) On 9 August 2017 a final protection order was made against the respondent.

[13] In summary, therefore the assets that the parties owned at the date of separation were as follows:

(a) The family home;

(b) [property B];

(c) The shares in [the company];

(d) [The business];

(e) Household chattels;

(f) [car 1 – details deleted];

(g) [car 2 – details deleted];

(h) Various bank accounts;

(i) Ms [Moon]'s ASB Kiwisaver scheme;

(j) Mr [Moon]'s AMP Kiwisaver scheme.

[14] As at the date of separation the parties had the following liabilities:

(a) Mortgage to the ASB Bank secured against the family home. At the date of separation the mortgage outstanding to the ASB Bank was $161,704.21;

(b) Mortgage to the ASB Bank secured against [property B] which as at the date of separation was $270,645.06;

(c) As at the date of separation there was a debt outstanding to visa of approximately $1000;

(d) The company also had a mortgage outstanding to it secured against [property C].

Issues

[15] Ms Hoult submitted that the following were the issues that required the Court's determination:

(a) Classification of relationship assets;

(b) The value of relationship assets and/or the process by which a evaluation to be obtained;

(c) Income earned by the respondent during the relationship which remains undisclosed as relationship property and if so, what is the value of the same;

(d) What is that income and how was it used or saved during the relationship;

(e) How is the applicant to be compensated with the value of any such income taken by the respondent and not disclosed;

(f) Classification of relationship debts;

(g) Whether either party is entitled to receive an adjustment for post-separation contributions and/or occupational rent;

(h) Whether an order should be made in favour of the applicant for unequal division of relationship property pursuant to s 13 of the Act. If so, in what percentage should the relationship property be divided;

(i) Whether an order pursuant to s 17 of the Act should be made in favour of the applicant if the Court finds that she has sustained the respondent's separate property;

(j) Whether any inferences can be taken by the Court arising from the respondent's failure to comply with the Court's order for discovery dated 8 August 2018;

(k) What costs are payable by the respondent to the applicant arising from the interlocutory matters that have been heard and remained unpaid;

(l) Whether interest should be awarded for any amount owing by the respondent to the applicant;

(m) Whether any amount owing by the respondent including interest and costs should be paid directly from the husband's net share of the sale of [property A] and the [property B] before distribution of the funds to the husband;

(n) Whether in the event there are insufficient net funds from the respondent's half share of the net proceeds from sale of the real property to pay the applicant her entitlement should the balance owed be paid directly from the respondent's half share of the value of the shares of [the company] following the sale of real property owned by the company at [property C] before distribution of the funds to the respondent.

[16] Following the hearing I directed closing submissions and allowed the husband to provide one document. Shortly after the hearing the country went into lockdown under Level 4 as a result of the Covid-19 virus pandemic. The respondent applied for an extension of time to file submissions. The respondent did file a memorandum attaching details of his Kiwisaver which I take into account. That was permitted by me to be filed. The application for extension was opposed by the applicant but in addition Ms Hoult sought for a further period of time to be able to file the draft orders for sale of property and occupation order and because of the lockdown and the fact that her office was all having to be relocated to operate from home. The extension applied for by both the respondent and the applicant has been granted by way of separate minute. Dealing with each of the issues in turn:

Family home

[17] I intend to set out the orders with respect to the family home followed by the reasons. I order as follows:

(a) The Court declares that [property A] is the family home;

(b) The order for sale made for [property A] dated 8 July 2019 is discharged;

(c) I grant an occupation order for [property A] in favour of the applicant wife. In accordance with the occupation order the respondent shall give the applicant vacant possession of the property within seven days of the date of the order and/or within seven days of the Covid-19 level moving to Level 2 whichever is the sooner date;

(d) The order for sale of [property A] shall be made on the following additional conditions:

(i) the applicant shall have the sole right to market [property A] for sale with a real estate agent of her choice;

(ii) the applicant shall obtain a registered valuation of [property A]; the valuation shall be as at the present date and as at pre-Covid-19 date. The parties shall share equally for the costs of obtaining that valuation;

(iii) the listing price for the sale shall be met by the applicant in accordance with the registered valuation and in consultation with the real estate agent;

(iv) the respondent shall sign and send back to the applicant's counsel via email, all necessary documentation associated with the valuation, marketing, sale and transfer of [property A] within 48 hours of being asked to do so by the applicant or her counsel;

(v) in the event that the respondent fails to sign all necessary documentation and/or send the same back to the applicant's counsel via email within 48 hours then the Registrar of the Auckland Family Court is empowered to sign all such documentation on behalf of the respondent without the applicant needing to make further application to the Court;

(vi) leave is granted to the applicant to reply on 12 hours' notice for further orders and directions which should be placed before me at first instance if available or another Judge if not;

(e) The conveyancing solicitors for the sale of [property A] shall be Mr David Snedden of Snedden Law, Auckland;

(f) The net proceeds of sale shall be held in the Trust Account of Mr Snedden and distributed in accordance with Court orders;

(g) The net proceeds of sale of [property A] shall either be:

(i) divided equally with the necessary adjustments payable;

(ii) the applicant (in accordance with the orders made by the Court in this judgment) to be made from the respondent's half-share of the net proceeds of sale to have the same disbursed to him.

(h) Leave is granted to the applicant to make application to me for an order directing the respondent to pay one half of the difference between the pre-Covid-19 valuation and the price obtained on the market, should there be a difference between the two. I will give opportunity to the respondent to be heard on this in the event of that being the outcome;

(i) I direct the respondent shall be solely liable for all costs accrued by Mr Snedden up to the date of discharge of the order for sale dated 8 July 2019 such fees to be deducted from the respondent's share of the net proceeds of sale of [property A] prior to the same being disbursed to the respondent;

(j) The respondent shall be solely liable for the outgoings on [property A] up to the date of occupation order in favour of the applicant. Following the date of occupation order the parties shall share equally in the outgoings associated with [property A].

[18] I make these orders for the following reasons:

(a) The property is registered in the names of both parties as joint tenants;

(b) There is no dispute that the property is the former family home of the parties;

(c) There is no dispute that the respondent has had sole possession and residence of [property A] since 12 December 2016 and in my view I consider the only way of implementing the order for sale is by granting an occupation order in favour of the applicant so that she can facilitate the sale of the home. I find that the respondent has prevaricated and

procrastinated on the sale and has not complied with the order for sale made by Judge Druce in July 2019;

(d) I find that he filed the appeal against the judgment in the High Court in order to delay the implementation of the sale and did not prosecute his appeal assiduously;

(e) He did not comply with Schedule 6 and I reached the conclusion after hearing from him that there was a tactical element to the appeal. He was using the possession of the home as leverage in order to try and get an outcome favourable to him in the relationship property proceedings;

(f) The respondent did not provide any reasonable explanation for why the home had not been sold prior to the hearing and I reached the conclusion that if he remained in occupation, it would be likely that there would be further delay in the sale of the property.

[19] For the reasons set out later in this judgment I find that the respondent has received benefit from occupation and it is appropriate to make an adjustment in favour of the applicant pursuant to an occupational rental order. This will equalise the situation between the parties. I am satisfied that the applicant is likely to implement the sale of the property forthwith (subject to the market being affected by the Covid-19 lockdown).

[20] The orders made requiring a valuation to be obtained provides a degree of protection to the respondent so that the property is not undersold. I am satisfied that the failure by the respondent to observe the order made by Judge Druce was deliberate and intentional. The order made by Judge Druce also included an order for sale of the rental property at [property B] and there was a failure by the respondent to do that. As he did not live in that property there was no justification for that order not to be observed and the respondent failed to provide any satisfactory explanation to me at the hearing. I consider the costs incurred by Mr Snedden as a result of the failure by the respondent to observe the order for sale should be met solely by him because they were incurred as a result of his default.

[21] When I look at the grounds for appeal to the High Court I consider they were without merit. There was no basis for deferring the sale of [property A]. The respondent says that he was in a position to buy out the applicant from her share but he has not provided to the Court any proof of loans being available. I am not satisfied that he was in fact in a position to acquire the applicant's interest in the home. There is already a significant mortgage registered against the home and I would be very doubtful that a bank would advance sufficient monies to him to enable him to acquire her interest. I also take into account his failure to comply with the order for discovery which reinforces my view that the respondent has largely put his head in the sand and hoped that the whole situation would go away. I do not accept his assertion that it is his lawyer's fault. No evidence has been provided to support that and his lawyer was not given an opportunity to be heard on those allegations.

[22] In my view the relationship property issues apart from the inferences to be drawn to comply with discovery are very straightforward and entirely capable of agreement between the parties and the only reason that the matter has proceeded to a hearing is because of the respondent intransigence and failure to observe Court orders.

[23] I find that the applicant at all times had observed the Court orders and I find her frustration about the delays is understandable. The only way of preventing further delays in my view is to take the matter out of his hands and give the authority to the applicant to implement the order for sale. The delays which have occurred may result in a loss due to the effect on the market of the pandemic. Those facts are unknown at this stage and I am not prepared to make an order as sought by Ms Hoult for that to be ordered now but I do give her leave to make an application for a further order should it be justified. In order to comply with natural justice principles the respondent has to have the right to be heard on that.

[24] I am satisfied that the Court has the authority and power to make an order for sale. That is set out specifically in s 33(3)(a), (b) and (c) PRA.

Family home occupation order

[25] I am satisfied that the Court has jurisdiction to grant an occupation order pursuant to s 27 of the Act. I set out s 27 of the Act which provides the Court to have a wide jurisdiction and to be able to grant an occupation order to one spouse "in terms such terms and subject to such conditions as the Court thinks fit":

> (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.
>
> (2) Where an order is made under subsection (1) of this section, the person in whose favour it is made shall be entitled, to the exclusion of the other spouse or partner, personally to occupy the family home or the other premises to which the order relates.
>
> (3) An order made under subsection (1) of this section against a spouse or partner shall be enforceable against the personal representative of the person against whom it is made, unless the Court otherwise directs.
>
> (4) An order made under subsection (1) by the District Court or the Family Court is enforceable as if it were an order for recovery of land made pursuant to section 79(2)(c) of the District Court Act 2016.
>
> (5) In proceedings commenced after the death of 1 of the spouses or partners, this section is modified by section 91.

[26] I find that the respondent has adopted a tactical approach to the litigation and has caused delays which are not justified. He has procrastinated and prevaricated in his response and has not faced up to the issues. The only way of resolving the impasse that has been in existence for some time is to grant sole occupation in favour of the applicant so that she can implement the order for sale. I am satisfied that if the Court does not make this order then it is likely the respondent will not implement the order for sale. It is unlikely he will prepare the house in a proper condition for sale and liaise with the professionals that are involved to effect the sale.

Occupation rent

[27] I grant the application for occupation/rent as sought. This can effectively be made by consent. At 82, lines 25-30 of the Notes of Evidence the respondent

confirmed that he understood the nature of the claim for occupation/rent and said he had decided to settle the matter and had no objection to the claim. As of the date of hearing before me the amount claimed by the applicant against the respondent for occupation/rent of $17,598 which was calculated by Ms Hoult on the basis set out in paragraph 35(a) – (f) of her submissions and paragraphs 36 – 40 of the submissions which I set out in full as follows:

> 35. (a) On 5 April 2019, His Honour Judge Druce calculated that the fortnightly outgoings on [property A] were $681.00 (see page 384 of Your Honour's notes and p384 bundle). Accordingly, the outgoings on a weekly basis are calculated by counsel as being $340.50.
>
> (b) The period between separation on 12 December 2016 and 19 March 2020 was 168 weeks.
>
> (c) The rental appraisal provided by Harcourts dated 9 August 2019, put in evidence by Mr [Moon] (see page 447 of bundle), suggests a rental range between $500.00 and $550.00 per week.
>
> (d) Deducting the $340.50 weekly expenses from rent of $550.00 a week, the remaining total income is $209.50 per week (see page 81, lines 14-20 Your Honour's notes).
>
> (e) $209.50 per week multiplied by 168 weeks gives a total of $35,196.00.
>
> (f) Half of $35,196.00 is $17,598.00 (see page 82, lines 15-30 of Your Honour's notes).
>
> 36. In addition to the $17,598.00 sought by Ms [Moon] on 20 March 2020 counsel submits that it would be appropriate for the Court to also award additional $104.75 per week to Ms [Moon] from 19 March 2020 up to the date of an Occupation Order made in her favour and/or another order of sale being made.
>
> 37. Counsel acknowledges that at trial, Mr [Moon] said under cross-examination that in "early February" he gave three weeks' notice to Ms [Moon]'s Counsel that he was "moving out" of [property A] (see page 78, lines 5-10 Your Honour's notes).
>
> 38. Under cross-examination, Mr [Moon] did, however, confirm that there were still various chattels at the property, including a television, couch, bed, and "a few cutleries" (see page 78, lines 15-20 Your Honour's notes).
>
> 39. It is Ms [Moon]'s position that as at 20 March 2020 Mr [Moon] had not vacated [property A]. It is submitted that it is appropriate for the Court to draw the inference that Mr [Moon] has had sole possession, occupation, and benefit of [property A] since separation on 12 December 2016 up until the current date.

40. Further, it is submitted that the Court can therefore Order that Mr [Moon] pays Ms [Moon] occupation rent of:

(a) $17,598.00 up to 20 March 2020; and

(b) $104.75 per week up until the Court makes an Order for Occupation in favour of Ms [Moon].

[28] I accept the calculations made by Ms Hoult as set out. These numbers were put to Mr [Moon] and he accepted them and I therefore make the orders with his consent. In addition I order $104.75 per week for each week beyond the 20 March 2020 to the date of this judgment.

Bank accounts

[29] The applicant's evidence was that until approximately 2010 any income that she earned during the relationship was paid into the joint accounts. After 2010 the joint accounts were closed and the applicant operated three separate accounts in her sole name being:

(a) [Account 1]

(b) [Account 2]

(c) [Account 3]

[30] I am satisfied that the applicant has provided the Court with copies of bank statements for all of the above accounts throughout the parties' relationship and provided the same to the respondent. In addition she has provided the Court with copies of her IRD tax statement from 1 April 2011 to 31 March 2017 setting out all the income that she earned throughout that period.

[31] I am also satisfied that despite the Court order the respondent has refused to provide to the Court and to the applicant copies of his bank statements. He has failed to comply with the Court order and in addition has failed to comply with the notice to produce documents dated 15 August 2019. I am also satisfied that I provided a clear warning to the respondent in the minute that I delivered of 8 August that in the event of a failure to comply with the discovery orders the Court will consider what

inferences could be drawn from his default. As a result I am invited to draw inferences by Ms Hoult. Ms Hoult therefore in paragraphs 46 – 55 of her closing submissions sets out the inferences and factual findings that should be drawn as a result of the default due to the non-compliance of the Court orders, with the notice and the answers that he gave in cross-examination which give a basis for those inferences to be drawn. For the reasons set out later in this judgment in relation to the company I was completely dissatisfied with the evidence given by Mr [Moon] in relation to the ownership of the shares in [the business]. His answers were implausible. I deal with this issue in the next paragraph. I put a number of facts together which provided an overwhelming case that in my view he had endeavoured to hide the true facts from the Court and the applicant. I am satisfied that he did earn income during the marriage which was not disclosed and should have been in existence at the date of separation as an asset. If the income was spent he has not provided any evidence to demonstrate that. In view of the secretive nature of his approach to the situation I find that he has put money aside which he has seen as his separate property and not wished to share with the applicant. He has done so because of his underlying attitude to not sharing in property and I am satisfied that the inferences that Ms Hoult invites me to draw are appropriate. I consider that the applicant has been quite circumspect and conservative in her estimate. I find there is a factual basis for the finding as she set out in her submissions. I therefore order that the respondent pay $216,666.66 being a half share of the income obtained by him during the relationship and not applied to the relationship property. I find therefore it must have been in existence as an asset at the date of separation. I direct that that sum be paid out of the respondent's share of relationship property as ordered by this Court and that it be deducted first prior to him receiving any funds.

[The business]

[32] It is clear from the respondent's evidence that he accepted that [the business] formerly known as [the former business] was operated during the parties' relationship. The respondent was extensively cross-examined about the issue relating to this business. The respondent gave evidence before me[1] that he urged me to accept that he

[1] Page 59 Notes of Evidence lines 15-22.

did not have ownership of [the former business] or [the business] before or during the relationship. He said that [the former business] was a business that belonged to his father and that after his father passed away in 2010 he had no idea "which person from his extended family was running the business". At the hearing his evidence was that he was "looking after part-time marketing department" for [the business]. Ms Hoult invites me to make a finding that his evidence should be rejected as implausible. The reasons for that are set out in paragraphs 60 – 66 of her submissions which I set out in full as follows:

> 60. Counsel submits that Mr [Moon]'s evidence where he denies his ownership of [the former business] and [the business] is quite frankly nonsense and amounts to a deliberate attempt by Mr [Moon] to mislead the Court.
>
> 61. Of particular relevance is Exhibit "A", which was produced by Ms [Moon] and was a print-out of a website for [the business] that had existed up until 2018. It is submitted that it is quite clear from Exhibit "A", from Ms [Moon]'s evidence and Mr [Moon]'s evidence at trial that [the business] (formerly [the former business]) have been owned and operated by Mr [Moon] for at least 15 years (see page 49, lines 20-30 of Your Honour's notes).
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> 62. Mr [Moon] has failed to comply with His Honour Judge Burns' Order for discovery with respect to [the business]. Mr [Moon] has not provided the Court with a valuation for the business.
>
> 63. Mr [Moon]'s failure to provide evidence with respect to [the business] is wholly to Ms [Moon]'s disadvantage. It is submitted that Ms [Moon] took all reasonable steps being an application to the Court for Discovery and service of a Notice to Produce Documents, in an attempt to obtain necessary information regarding [the business] and a valuation of that business.
>
> 64. In the circumstances, Ms [Moon] asks the Court to draw the inference that [the business] does have a value as a going concern.
>
> 65. It is respectfully submitted that if the Court is prepared to draw the inferences asked for above with respect to Mr [Moon]'s income during the relationship and to make the appropriate cash adjustment to Ms [Moon] ($216,666.66 as calculated above), then a further inference must be drawn for the value of [the business].
>
> 66. Unfortunately, due to the complete failure by Mr [Moon] to comply with the Court's Order as to discovery, counsel can only suggest an arbitrary award in favour of Ms [Moon] for the business and suggests an amount of $50,000.00 to Ms [Moon] from Mr [Moon] would be appropriate. Mr [Moon] would then take the business of [the business] as his separate property.

[33] Ms Hoult therefore seeks two remedies: one is the payment of adjustments for the money earned and held in bank accounts undisclosed and also to place an arbitrary value on the business. In my view the order that I have made to adjust for one half of the income earned from the business is a sufficient remedy for the applicant to produce a just outcome in this case. I do not think the business would have any value as at the date of hearing before me. It appears to have not been operating for a period and in assessing the respondent's lack of organisation and lack of direction particularly since the parties separated I consider it unlikely that it has any ongoing value. Certainly I am not aware of any physical assets and the only value that could be ascribed would be goodwill. I would be very surprised that it would have any saleable value on the marketplace and there is a huge gap in the evidence to justify any finding of a goodwill figure. Whilst I accept that that is because of the failure by the husband providing the information so that an evaluation could be obtained I have to do my best and take a fairly robust approach in assessing the evidence before the Court. In listening and assessing his evidence in relation to the business I reached the conclusion that it is probably only marginally viable now and I cannot see any other person paying any sum of any significance for the right to take over its name and obligations. I am satisfied that the significant sum awarded for the undisclosed money from the income provides sufficient remedy. I am satisfied the business did generate income during the marriage. If it did not I think the husband would have disclosed the bank accounts.

[The company]

[34] This company was incorporated on 11 February 2016 during the parties' relationship. The company acquired [property C]. Both parties are shareholders of the company and the respondent is the sole director. The respondent has failed to produce any evidence for the Court as to the value of the property and what income the company has received from the property and value of the shares. The applicant's position is that the value of the shares will be entirely contingent on the net value of [property C] because it is accepted that the only asset of the company is the property. I consider that an appropriate acknowledgment and concession the applicant has made an offer to the respondent that he can take the shares of the company as his separate property provided he pays the compensation of $125,000. Ms Hoult has calculated this on the basis that [property C] is worth $440,000 and the borrowing as at November

2018 was $190,000 resulting in a net value of the property of $250,000. This equates to her half share in terms of the value of the shares at $125,000.

[35] I find that the shares in [the company] are relationship property and in order to realise that relationship property ancillary orders will have to be made pursuant to s 33 of the Act.

[36] I direct that [property C] be valued by way of registered valuation. The registered valuation is to be assessed as at the date of hearing before me 20 March 2020. I direct that the costs of obtaining that valuation is to be shared equally between the parties.

[37] I direct that the valuation is to be obtained by the applicant with the assistance of her counsel.

[38] The value of the shares of [the company] shall be set at the net value of [property C] as at 20 March 2020 taking the amount outstanding on the mortgage or $250,000 whichever is the greater amount (this is because an offer was made on an open basis prior to Court by the applicant and the respondent did not take advantage of it). Therefore he should bear the risk in the event that the property is worth less. It was also taken into account the fact that he has had control of the company and has not accounted to the applicant for the rental received on the property since separation.

[39] I direct that Mr David Snedden of Snedden Law in Auckland undertake the conveyancing for the property in terms of transfer of any shares and any related conveyancing work required.

[40] I direct that the net value of [property C] shall be calculated by Mr Snedden. In the event that the respondent has increased the borrowing against the property since 12 December 2016 then the calculation of the net value of the property shall be registered valuation less the amount borrowed as at 12 December 2016. In the event that the borrowing has not increased since 12 December 2016 then the net value of the property shall be calculated by deduction of the amount outstanding borrowed as at the date of the calculation.

[41] Once the financial adjustments are made between the parties the applicant's shares in [the company] are to be transferred to the respondent and become his sole and separate property. I direct the respondent shall pay the applicant half share of the value of the shares in [the company] or $125,000 (being her half share as calculated as at November 201) whichever is the greater amount.

[42] I consider that it is appropriate to value the property as at the date of hearing before me in terms of the normal principles applicable. This is not a case where the property should be valued at any other date and there is no reason to exercise any discretion under s 2G of the Act.

[Property B]

[43] I make a declaration that [property B] is relationship property.

[44] I discharge the order made by Judge Druce for sale of the property dated 8 July 2019.

[45] I make an occupation order in favour of the applicant for the [property B] property so that she can facilitate and manage its sale. I direct all income received as at the date of order from the Court relating to [property B] shall be directed into an account in the name of the applicant. I make an order for sale of the [property B] property with the same directions as the order for sale made for the family home ([property A]). I make an order that the net proceeds of sale from the [property B] property together with any rent received by the applicant since the date of the order shall be divided in the same way as the net proceeds of sale from [property A] already ordered.

Motor vehicles

[46] I order that the applicant shall take [car 1] or the proceeds of sale thereof as her separate property. I directed the value of [car 1] at $4000.

[47] I direct that the respondent shall take [car 2] or the proceeds thereof as his separate property. I order that [car 2] is valued at the sum of $9000. I order that the

respondent pay to the applicant the sum of $2500 being half the difference of the value of the motor vehicles to equalise the position between them.

Chattels

[48] I order that each party keeps the chattels in their possession and control as at the date of hearing before me 20 March 2020. All chattels in possession and control of the respondent as at date are to become his sole and separate property and similarly all chattels in the possession and control of the applicant at that date shall be her sole and separate property.

Kiwisaver

[49] I order that the Kiwisavers in the name of each party are to be declared relationship property. I value the applicant's Kiwisaver policy at $26,991.84. I direct that the Kiwisaver policy in her name becomes her sole and separate property. I value the respondent's Kiwisaver policy at $8393.48. I order that the respondent shall retain his Kiwisaver policy as his sole and separate property. I further order that the applicant shall pay to the respondent $9299.18 being half share of the difference in value between the two policies to equalise.

Section 13 application

[50] Ms Hoult has said in her submissions that if the orders sought for the payment of the bank accounts undisclosed was made as sought and $50,000 for her share in the business together with occupation/rent then she would not pursue any further the s 13 application. The Court has made two out of three of those orders. However in my view it is does not equates to full acknowledgement made by Ms Hoult on her client's behalf. Nevertheless I am going to dismiss the application under s 13. I consider that the orders made produce a just outcome between the parties and I would not be persuaded that the very high threshold required for s 13 to be established would be met in this case because of an absence of an order re goodwill. As I understand from the submissions Ms Hoult was seeking a declaration that the business was valued at $50,000 which would mean an adjustment in favour of the applicant of $25,000. She

has succeeded on all other matters before the Court and any prejudice to her in the extra costs which she has had to incur in getting to that position (which should have occurred by way of settlement between the parties because it is so straightforward) can be cured by an order for costs. I consider it inappropriate to give an unequal division of relationship property between the parties in this case and would not be persuaded that $25,000 is a sufficient sum to make a significant difference. I take into account the authorities that Ms Hoult has referred to me which reinforced the high threshold that has to be achieved and there is simply no justification in this case with the orders to warrant disturbing the equal sharing provisions of the Act.

Interest

[51] I decline to order any interest on the adjustment between the parties for the following reasons. I consider that the Wellington property market has increased and the applicant has benefitted by that and similarly so has the Auckland property market and Tauranga property market. The delay therefore whilst frustrating for the applicant has not produced a prejudice to her because there has been an increase in value. Also I take into account the occupation/rent that has been ordered for family home which produces an adjustment between the parties which I think results in a fair division. With the orders made in relation to the order for sale there should not be any further undue delay. However if there is undue delay caused by the respondent further after this judgment has issued then I grant leave to the applicant to seek further adjustment directly arising out of any inappropriate delay and/or costs.

[52] The applicant has largely succeeded in these proceedings and is entitled to costs. I order costs to be on a 2B basis with a 25% uplift. The uplift is because of the failure by the respondent to comply with Court orders causing greater costs and also for the delay caused by not prosecuting his appeal. This is a case where the issues should have been settled by agreement and the tactical delay approach by the respondent has caused the applicant to incur extra costs as a result. The uplift recognises that. The respondent chose to be in person thus saving him costs in paying a lawyer. The result has been that Ms Hoult has had to do extra work to assist the Court in finalising this matter and it is only fair that some of the costs of that work be paid for by the respondent. I invite Ms Hoult to prepare a schedule in a 2B form

calculating the costs. In the event that the parties cannot agree on the quantum leave is reserved to apply back to the Court to be placed before me to resolve the quantum.

[53] The Court has waited for submissions from Mr [Moon]. He has not filed within the timeframe even with extensions granted.

Dated at Auckland this 22nd day of May 2020 at am/pm.

D A Burns
Family Court Judge