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

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IN THE FAMILY COURT
AT NORTH SHORE

I TE KŌTI WHĀNAU
KI ŌKAHUKURA

FAM-2020-044-000300
[2020] NZFC 8877

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	MURRAY LESLIE HING Applicant
AND	SUSAN GREEN First Respondent
AND	ALLAN YEP, SUSAN HING (AKA SUSAN GREEN) AND GORDON YEP TARM AS THE TRUSTEES OF THE YEP FAMILY TRUST Second Respondent

Hearing:	6 October 2020
Appearances:	G Illingworth QC for the Applicant D Chambers QC for the First and Second Respondents
Judgment:	13 October 2020

RESERVED JUDGMENT OF JUDGE S J MAUDE
[Application to strike out application under s 182 of the Family Proceedings Act 1980]

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[1] Application has been made by Susan Green to strike out application made by her former husband, Murray Hing, for intervention pursuant to s 182 of the Family Proceedings Act 1980 (the Act).

[2] Mr Hing's application is for resettlement of the assets of the YEP Family Trust.

[3] The parties are already engaged in relationship property proceedings subsequent to their 2011 separation and application by Ms Green for intervention with relation to the Tsubi Investment Trust pursuant to s 182 of the Act, which Trust holds certain business assets developed pre and post separation and dissolution of marriage by Mr Hing.

[4] Mr Hing seeks intervention with relation to two settlements:

(a) Settlement of the YEP Family Trust settled by Ms Green's parents.

(b) Settlement of residential property situated at [address deleted – "the property"], Omaha in February 2008 on the Trust.

[5] Ms Green opposes Mr Hing's application and at hearing before me on 6 October sought strike out of Mr Hing's application.

Background

[6] The parties married on 23 February 1991.

[7] The parties separated on 8 December 2011.

[8] Their marriage was dissolved on 23 July 2015.

[9] The YEP Family Trust was settled by Ms Green's parents on 23 December 2003.

[10] The Trust's initial trustees were Mr and Mrs Yep, Ms Green and her brother, Gordon.

[11] The Trust's final beneficiaries are Mr and Mrs Yep's two children, the respondent Susan Green and her brother Gordon Tarm.

[12] The Trust's discretionary beneficiaries are defined as being:

(a) The settlors.

(b) The final beneficiaries.

(c) Any issue of any final beneficiary.

(d) Any Trust which includes for the time being among its beneficiaries (contingent or otherwise) any beneficiary.

(e) Any association, club, institution, society, organisation or Trust not carried on for the private profit of any person whose funds are applied wholly or principally to any civic, community, charitable, philanthropic, religious, benevolent or cultural purpose, whether within New Zealand or elsewhere.

(f) Any person appointed pursuant to clause 7.1(a) of the Trust's deed (which provided for the settlors to have the discretion to appoint or remove discretionary beneficiaries).

[13] [The property], Omaha north of Auckland was purchased by the trustees in February 2008.

[14] On 7 September 2009, the Hing Family Trust was settled by Ms Green, the trustees, she, Mr Hing and JT Trustee Co Ltd.

[15] The Trust acquired the home used by the parties as their family home.

[16] On 3 March 2010, the Tsubi Investment Trust was settled by Mr Hing's lawyer, James Thomson.

[17] The Trust owns the business interests managed or operated by Mr Hing.

[18] On 16 December 2016, the trustees of the YEP Family Trust sold [the property].

[19] The proceeds were distributed to Ms Green, who has subsequently invested the funds received by her into refurbishment of she and her new husband, David Green's, family home.

[20] Ms Green commenced relationship property proceedings in this court in February of this year.

[21] She also sought intervention pursuant to s 182 of the Act in respect of the Tsubi Investment Trust in June of this year.

[22] In June 2020, Mr Hing filed application in respect of the YEP Family Trust.

Ms Green's case as to strike out

[23] Ms Chambers QC on behalf of Ms Green argued that Mr Hing's application for provision pursuant to s 182 of the Act should be struck out because:

(a) There had been undue delay in the bringing of the application.

(b) There exists no merit in Mr Hing's application or prospect of success in respect of either:

(i) The Trust settlement.

(ii) Acquisition of [the property].

[24] As to delay, Ms Chambers argued that s 182 required that an application be brought within "a reasonable time after dissolution", Mr Hing's application brought four years and 11 months after dissolution of marriage.

[25] To intervene would, Ms Chambers urged, create material prejudice to Ms Green and her husband, who have introduced the sale proceeds received from [the property] into refurbishment of their family home.

[26] As to merit of Mr Hing's claim, Ms Chambers argued that:

(a) The Trust was not a nuptial settlement, being rather a "dynastic Trust" settled to preserve Yep family funds and to pass them through the Yep family to the exclusion of marriage or relationship partners.

(b) The Trust settlement and/or the [property] acquisition must, she urged, be nuptial by characteristic, or to put it another way, have direct nexus to the parties' marriage to justify intervention.

(c) In the event that either settlement (the Trust or the [property] acquisition) was found to be a nuptial settlement, the court would not exercise its discretion to intervene.

Mr Hing's case

[27] As to the issue of delay, Mr Illingworth QC urged that Ms Green's applications under the Property (Relationships) Act and pursuant to s 182 of the Act were not themselves issued until 2019, with negotiation until then occurring premised on the prospect that Ms Green would not make any claim against Mr Hing's business interests (the Tsubi Investment Trust). The issue of Ms Green's proceedings, Mr Illingworth urged, triggered Mr Hing's application.

[28] Mr Illingworth stressed that any findings as to merit with relation to Mr Hing's claims (or as Ms Chambers put it, absence of merit) were dependent upon:

(a) Findings of fact as to disputed evidence.

(b) Determinations based on evolving law.

(c) That both should be determined at substantive hearing.

[29] Mr Illingworth urged that [the property] had been acquired as a result of Mr Hing and Ms Green's decision that they wanted to acquire a home at Omaha for use of their family.

[30] He urged that although the proceeds received by the trustees from the sale of [the property] had been already distributed to Ms Green, the court had a broad discretion available to it as to intervention including, he proffered, remedial orders requiring repayment of funds by a beneficiary to the Trust or the granting of a declaration of relief "to enable separate proceedings to be initiated in the High Court".

[31] Ms Green needed to establish that Mr Hing's claim was untenable and that anything less demanded not strike out but consideration at substantive hearing.

Section 182

[32] Section 182 reads as follows:

> **182 Court may make orders as to settled property, etc**
>
> (1) On, or within a reasonable time after, the making of an order under Part 4 of this Act or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963, the Family Court may inquire into the existence of any agreement between the parties to the marriage or civil union for the payment of maintenance or relating to the property of the parties or either of them, or any ante-nuptial or post-nuptial settlement made on the parties, and may make such orders with reference to the application of the whole or any part of any property settled or the variation of the terms of any such agreement or settlement, either for the benefit of the children of the marriage or civil union or of the parties to the marriage or civil union or either of them, as the court thinks fit.
>
> (2) Where an order under Part 4 of this Act, or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963, has been made and the parties have entered into an agreement for the payment of maintenance, the Family Court may at any time, on the application of either party or of the personal representative of the party liable for the payments under the agreement, cancel or vary the agreement or remit any arrears due under the agreement.
>
> (3) In the exercise of its discretion under this section, the court may take into account the circumstances of the parties and any change in those circumstances since the date of the agreement or settlement and any other matters which the court considers relevant.

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

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

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

Strike out

[33] The law is clear and well settled as to the very high bar that must be reached before the strike out of an application.

[34] Mr Illingworth referred me to various authorities.

[35] I note particularly that in the decision of *Attorney-General v Prince & Gardner* it was observed that:[1]

> A striking out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed.

[36] I am particularly drawn to the simplicity of then Chief Justice Elias' comments in *Couch v Attorney-General*[2], where she said:

> It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed. The case must be "so certainly or clearly bad" that it should be precluded from going forward. Particular care is required in areas where the law is confused or developing.

[37] In short, it must be clear to me in order to strike out Mr Hing's application that there exists no prospect of success for him.

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[1] *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262.
[2] *Couch v Attorney-General* [2008] 3 NZLR 725 at [33].

[38] I will return to the above very high bar after considering the other arguments of counsel.

Does Mr Hing's delay in commencing proceedings present as a bar to his progression?

[39] There can be little doubt that a delay of approximately five years is a long delay, particularly given s 182's injunction that proceedings must be brought within a reasonable time of dissolution of marriage.

[40] The above observed, Ms Green's relationship property proceedings and her own s 182 proceedings were not commenced until February and June of this year respectively.

[41] Mr Hing explained that there had been developed an anticipation that Ms Green might forego breaking into his business interests contained within the Tsubi Investment Trust delaying his own intervention.

[42] Parties to a broken marriage often delay issuing of proceedings while they:

(a) recover from separation; and/or

(b) negotiate.

[43] I must consider all of the circumstances applicable.

[44] The reality is that these proceedings (Mr Hing's and Ms Green's) were all brought within months of each other.

[45] I decline to speculate, as invited by both counsel, as to whether either of their clients applies for provision or applies to strike out for tactical gain.

[46] In the context of the above circumstances, I do not form the view that there has been unacceptable delay by Mr Hing in bringing his proceedings, though I will return

to the issue raised of material prejudice that might result if the court intervenes pursuant to s 182 of the Act later in this decision.

Is the YEP Family Trust a nuptial Trust?

The law

[47] In the decision of *Ward v Ward*, the Court of Appeal observed as to the breadth of the definition of a nuptial settlement as follows:[3]

> [22] There should be a generous approach to the interpretation of the term settlement and this has been the traditional approach. For example, in *Blood v Blood* [1902] P 78 Gorell Barnes J, when dealing with an application to vary a nuptial settlement under the predecessor to the Matrimonial Causes Act 1973, noted that the words of the section are extremely wide. He said that he was anxious that they should not, by any construction the court may put upon them, be narrowed in any way. To narrow the words would be undesirable because the various circumstances which come before the court are so diverse that it is important that, so far as possible, the court should have power to deal with all the cases that come before it, and in dealing with them, to meet the justice of the case.
>
> [23] The particular form of the settlement does not matter. It may be a settlement in the strict sense of the term. It may be a covenant to pay by one spouse to the other, or by a third person to a spouse. What is essential is that the settlement should provide for the financial benefit of one or other or both of the spouses as spouses and with reference to their married state: *Prinsep v Prinsep* [1929] P 225 at 232 per Hill J. The section is thus intended to embrace a large number of transactions which might not appear to be settlements in a conveyancer's eyes: *Melvill v Melvill* [1930] P 159 (CA) per Lord Hanworth MR.

[48] The decision in *Ward v Ward* referenced the decision in *Blood v Blood*, where it was said:[4]

> Those words (nuptial settlement) are extremely wide, and I am anxious that they should not, by any construction the court may put upon them, be narrowed in any way. To narrow them would be undesirable for this reason: the various circumstances which come before the court, and for which this section is brought into operation, are so diverse that it is to my mind extremely important that, so far as possible, the court should have power to deal with all of the cases that come before it, and, in dealing with them, to meet the justice of the case. I, therefore, do not desire to see any narrow interpretation placed on the words of the section.

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[3] *Ward v Ward* [2009] NZCA 139.
[4] *Blood v Blood* (1902) P 78.

[49] In *Clayton v Clayton* it was said:[5]

> [34] We agree with the analysis of the Court of Appeal in Ward. We add that we see the requirement that the settlement be for both or either of the parties "in their capacity as spouses" as meaning only that there must be a connection or proximity between the settlement and the marriage. Where there is a family trust (whether discretionary or otherwise) set up during the currency of a marriage with either or both parties to the marriage as beneficiaries, there will almost inevitably be that connection. As Lord Penzance said in Worsley v Worsley:
>
> > The Court would have a great difficulty in saying that any deed which is a settlement of property, made after marriage, and on the parties to the marriage, is not a post-nuptial settlement.

[50] The Supreme Court went on to say:

> [35] An exception may be where the trust is set up by a third party and there are substantial other beneficiaries apart from the parties to the marriage and their children. The other view may be that, as long as the trust has the relevant connection to the marriage and one or both of the parties are beneficiaries, the trust will be a nuptial settlement. But we do not need to decide this point. In this case the trust was set up by Mr Clayton during the marriage and there were no substantial other beneficiaries.
>
> [36] The test may be more difficult to meet where there is a settlement made before marriage and a future spouse is named as a possible beneficiary but, at the time of settlement, there is no particular spouse in contemplation. One view may be that once a marriage has taken place and the spouse identified, then there will be the necessary connection with the marriage. Even if that is not the case, however, it may be that each disposition of property to such a trust after marriage could constitute a post nuptial settlement.
>
> [37] A settlement does not cease to be a nuptial settlement because other parties may benefit from it. Indeed, the fact that the children of a marriage may benefit has been seen as a strong indication of a nuptial trust. It has been held that a settlement does not cease to be nuptial because a spouse by a later marriage might benefit. The same can be said where children of any future marriage could benefit. It has even been held that the fact that a settlement is expressed to terminate on divorce is irrelevant.

[51] Ms Chambers QC for Ms Green sought to exclude the YEP Family Trust from the category of "nuptial Trust".

[52] Her reasoning was:

(a) The Trust had been settled by Ms Green's parents.

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[5] *Clayton v Clayton* [2016] NZSC 30 at para [34].

(b) The initial trustees on settlement were Mr and Mrs Yep, Ms Green and her brother, Gordon.

(c) The discretionary beneficiaries provided for in the Trust deed did not include Mr Hing either by name or by class (as a spouse).

(d) The final beneficiaries were the settlors' children.

(e) Power of appointment of trustees lay with Mr and Mrs Yep and at no stage was Mr Hing added as a trustee, nor was he added as a discretionary beneficiary, a power that Mr and Mrs Yep also had.

(f) The above approach was consistent with Mr and Mrs Yep's other Trusts.

(g) Post separation, Mr Hing had not sought to use the Trust's [property], Ms Chambers urging that if he believed he had an interest in it, or an expectation of an interest in it, he would have.

[53] On its face it appears to be, using Ms Chambers' colloquial expression that the YEP Trust was a "dynastic Trust" intended very specifically to benefit Mr and Mrs Yep and their direct descendants.

[54] Mr Illingworth, however, argued that Mr Hing was captured as a discretionary beneficiary of the YEP Family Trust by virtue of the inclusion as discretionary beneficiaries of:

> any Trust which includes for the time being among its beneficiaries (contingent or otherwise) any beneficiary.

[55] Mr Illingworth pointed me to the reality that Mr Hing was a named discretionary beneficiary in the Hing Family Trust that owns the parties' former family home and both a discretionary and final beneficiary in the Tsubi Investment Trust, the Trust from which his businesses operate.

[56] Mr Illingworth urged that the three Trusts needed to be seen as a triad of Trusts inter-related.

[57] The inference drawn from Mr Illingworth, of course, was that the YEP Family Trust Deed includes as discretionary beneficiaries' beneficiaries of other Trusts, Mr Hing being exactly that (beneficiaries of the other two named Trusts).

[58] Ms Chambers argued that Mr Illingworth's view was flawed because in reality the Tsubi Investment Trust and Hing Family Trust were all settled after the YEP Family Trust, and I note not by Mr and Mrs Yep.

[59] Ms Chambers urged that a route or pathway to inclusion of Mr Hing as a discretionary beneficiary in the YEP Family Trust through the other two Trusts could not have been in Mr and Mrs Yep's contemplation when settling the YEP Family Trust, the other Trusts not yet having been formulated.

[60] Were it not for later settlement of the Hing Family Trust and Tsubi Investment Trust and the presence of the provision in the YEP Family Trust to include as beneficiaries' beneficiaries in other Trusts, it would in my view be incontestable that, to borrow Ms Chamber's expression, the YEP Family Trust was a dynastic Trust and not a nuptial Trust.

[61] A settlement, however, can change in flavour over time and plainly by inclusion of provision in the YEP Family Trust of the ability of beneficiaries in other Trusts to be included at the discretion of the trustees, they (Mr and Mrs Yep) must have had contemplation of a widening of the pool of discretionary beneficiaries beyond the named ones.

[62] While arguably remote in my view, it is arguable that the pathway argued for by Mr Illingworth could bear fruit, particularly if discovery or disclosure in the proceedings before the court now reveal any correspondence throwing further light on the intentions of the settlors when settling the YEP Family Trust.

[63] For the above reasons, I do not form the view that it is unarguable that the YEP Family Trust is a nuptial Trust, albeit prospects of success not appearing significant at this point.

Was the acquisition by the YEP Family Trust of [the property] a nuptial settlement?

[64] Mr Illingworth appropriately referred me to the wide definition referred to in *Ward v Ward* of what constitutes, or may constitute, a nuptial Trust. The court's comments are referred to above.

[65] Ms Chambers appropriately urged that I see such observation in light of the further observations by the Court of Appeal in *Ward v Ward* at para [23], reading:

> … What is essential is that the settlement should provide for the financial benefit of one or other or both of the spouses **as spouses and with reference to their married state**.

[66] That there was a settlement on the trustees of [the property] is clear and not contested.

[67] That there was a settlement on one of the parties (Ms Green) is clear, she being a discretionary and final beneficiary of the Trust.

[68] The issue first and forefront before me is were either of the settlements:

(a) the settlement of the Trust;

(b) acquisition of [the property]

settlements for the financial benefit of one of the parties **with reference to their marital state**.

[69] If the answer to the above question is yes, then there exists a nuptial Trust enabling proceedings under s 182 to proceed.

[70] Mr Hing has argued that he and Ms Green in their marriage determined that they wanted a holiday home at Omaha.

[71] He urged that the acquisition flowed from that determination and his engagement in negotiation of the purchase price of the property and that the following other engagements corroborate that:

(a) For the first two years subsequent to acquisition of the property the parties and their daughter used the property almost weekly and in all public and school holidays using it for 100 days, or 25 percent of 2010.

(b) He or the parties paid for the contents insurance in respect of the property.

(c) He being engaged when the property had a mouse infestation, he facilitating the insurance claim and engaged in correspondence as to the property's cleaning.

(d) There was a payment of funds into the Omaha bank account from the parties in respect of outgoings in 2010 to the extent of $2,519.62 and in 2011 to the extent of $5,572.75 (inclusive of $2,608.17 for cleaning).

(e) He had been physically engaged in the landscaping of the property.

(f) From his business account payments were made for a maintenance person for landscaping.

(g) He had prepared a budget for the furnishing of the property.

(h) He or the couple purchased chattels for the property, including:

Gas bottles

Heat pump

Outdoor furniture

Barbeque

Deep freeze

Gardening and beach equipment

Outdoor entertainment equipment

Washing machine

Coffee machine

Kitchenware

Bedroom furniture and linen

(i) Correspondence had been directed to either he and Ms Green or he alone as to cleaning.

[72] His case is accordingly that the purchase of [the property] amounted to a settlement upon the YEP Family Trust trustees for its beneficiaries, including Susan Green, with reference to the parties' married state and that he, following dissolution of marriage, had a reasonable expectation that he would benefit from the property.

[73] Ms Green flatly denied Mr Hing's assertions, urging that the Trust was simply a dynastic Trust for the YEP family and that as to the [property] settlement, in support of it not being a nuptial one, Mr Hing had not sought to use the property subsequent to the parties' separation.

[74] I remind myself that a strike out hearing was not, and is not, for the purpose of determining disputes of fact.

[75] I must, unless plainly untrue, accept Mr Hing's assertions of fact for the purpose of considering strike out.

[76] I was referred by Ms Chambers to a number of leading authorities as to the issue of whether a settlement amounts to a nuptial settlement.

[77] The authorities address the issue of asset use as a factor in determining whether a settlement is nuptial or not.

[78] In the decision of *Da Silva* v *Da Silva* the High Court dealt with a Trust similar to the YEP Family Trust settled by the wife's mother. [6]

[79] Ms Da Silva, the parties' five children and the settlor were all beneficiaries, but Mr Da Silva, Ms Da Silva's husband, was not.

[80] The Trust's sole asset was Awakeri Holdings Ltd, owner of land from which Mr Da Silva operated his business.

[81] Mr and Mrs Da Silva were directors of Awakeri Holdings Ltd until post-separation Mr Da Silva was removed as trustee.

[82] Most income was drawn by Mr and Mrs Da Silva from the business.

[83] Peters J in *Da Silva* determined that there was no nuptial flavour to the Trust settlement notwithstanding that the company owned by its land was used, it appears, to benefit both Mr and Mrs Da Silva.

[84] Peters J observed that prior to the settlor's death she had taken no steps in exercise of the power that she had to add either party as a trustee and that Mr Da Silva was never added as a discretionary beneficiary.

[85] In short, use of the company's land did not confer an expectation of sharing in the Trust's assets.

[86] Mr Da Silva's claim failed.

[87] In *Dyer v Gardiner* the Court of Appeal dealt with a Trust that had been settled by wife Ms Gardiner to protect assets pre-marriage that she held from professional liability and so as to provide a mechanism to support her son with special needs. [7]

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[6] *Da Silva v Da Silva* [2016] NZHC 2064.
[7] *Dyer v Gardiner* [2020] NZCA 385.

[88] Ms Gardiner and a specialist trustee were trustees.

[89] Power of appointment of trustees rested in Ms Gardiner.

[90] Power to exclude discretionary beneficiaries lay with the trustees.

[91] Ms Gardiner and any future husband of hers (she was not then married to Mr Dyer) were entitled to be considered as discretionary beneficiaries.

[92] Her son and other children of hers as born were the Trust's final beneficiaries.

[93] The Trust acquired a Karaka Bay cottage in Wellington.

[94] Ms Gardiner and Mr Dyer lived in the property when married.

[95] Mr Dyer sold some shares which he had to the Trust.

[96] Mr Dyer was appointed a trustee until removed by Ms Gardiner pursuant to the power that she had shortly before separation.

[97] Delivering the decision of the Court of Appeal, Collins J observed at para [169](c):

> Had the marriage not ended, Mr Dyer would have continued to live in the Ventnor Street home or any other property the Trust acquired during the course of the parties' marriage. Living in a family home is, however, not the same as having an interest in that home or a genuine expectation of an interest in the property …

[98] The Court found that had the parties remained living together:

> (a) It is highly unlikely that Ms Gardiner and Mr Clark would have exercised their discretion as trustees to confer Trust property upon Mr Dyer. This is because the primary beneficiary of the Trust was, and always has been, Kevin. A key reason for establishing the Trust was to ensure that resources existed to ensure provision for his long-term care and welfare.
>
> (b) Furthermore, the trustees had not exercised their discretion to confer Trust property in favour of Mr Dyer during the parties' 12 and a half year marriage. It is therefore highly unlikely the trustees would do so had the parties remained married post June 2012.

(c) The duration of the marriage and Mr Dyer's role as a trustee are unlikely to have caused Ms Gardiner and Mr Clark to adopt a course that is different from that which we have summarised in (a) and (b).

[99] The Court found that acquisition by the Trust of the Karaka Bay cottage was a qualifying settlement pursuant to s 182 of the Act; however, it found against Mr Dyer's claim for resettlement on the basis that Mr Dyer could have had a reasonable expectation for provision post-dissolution of marriage.

[100] In short, the Court of Appeal in *Dyer v Gardiner* repeated the conclusion reached in *Da Silva v Da Silva* that occupation is not sufficient to found an interest.

[101] I have observed that on its face it would appear that settlement of the YEP Family Trust was not nuptial but that a case that it was, was arguable.

[102] My analysis now proceeds as to whether it is arguable that settlement of [the property] on the Trust was a nuptial settlement and, if so, whether no prospect existed for the Court to exercise its discretion in favour of intervention under s 182.

[103] In *Da Silva* there was plain and clear use of the Trust's beneficiary's land by Mr Da Silva for family, yet the Court concluded that intervention should not occur.

[104] In *Dyer v Gardiner* Collins J delivering the judgment of the Court of Appeal made it clear that living in a home was not the same as having an interest in a property or having a reasonable expectation of an interest.

[105] I turn to consider whether either it is unarguable that [the property] acquisition could be a settlement that was nuptial or, in the alternative, whether it is arguable that it was.

[106] In considering the above I observe:

(a) The parties decided that they wanted to acquire a holiday home at Omaha.

(b) Mr Hing engaged in the negotiation of the purchase price for the acquired property.

(c) Mr Hing engaged in the preparation of a budget for acquisition of its contents.

(d) Mr Hing engaged in employment of a maintenance person for the property who corresponded with he and Ms Green.

(e) Mr Hing engaged in the acquiring of chattels for the home.

(f) The family used the holiday home extensively.

(g) There was arguably a pattern for this couple that emerged with relation to acquisition of properties using the mechanisms of a Trust:

The Tsubi Invest Trust for business assets.

The Hing Family Trust for the family home.

The YEP Family Trust for the holiday home. (It acknowledged that the YEP Family Trust was not settled for the purposes of acquiring a holiday home but used as a vehicle for a vehicle for its acquisition.)

[107] There is clear authority that would suggest that occupancy itself is not sufficient to establish an expectation of an interest sufficient to classify a settlement as a nuptial settlement or for the exercise of a discretion for intervention pursuant to s 182 of the Act; however, as Mr Illingworth pointed out, all such determinations in the Higher Courts have been made at substantive hearing and not at hearing of applications to strike out proceedings where evidence is not tested.

[108] While Ms Green and her brother's evidence is adamantly that [the property] was not acquired for the Hing family, such evidence must be weighed against that of Mr Hing's evidence at hearing.

[109] I am satisfied that it cannot be said that Mr Hing does not have an arguable case to put as to whether or not acquisition of [the property] was a nuptial settlement.

Is it arguable that the Court in considering application under s 182 would choose to exercise its discretion to intervene and make provision for Mr Hing?

[110] Ms Chambers argued that following the authorities of *Da Silva* and *Dyer v Gardiner* it is clear that the Court would not exercise its discretion in favour of intervention.

[111] While there might appear mounted a strong argument based on the view that this acquisition was an acquisition in the context of placement of property within a "dynastic Trust" for a blood family line and a further argument that "use" does not amount to the creation of an expectation of an interest in property, I cannot conclude that Mr Hing's argument for exercise of a discretion is not arguable.

[112] I indicated at the outset of this decision that I would return to consider how the issue of material prejudice might impact on the decision by the court as to whether to exercise its discretion or not in favour of intervention.

[113] There can be little doubt that having received distribution from the Trust of the entirety of its assets and having invested the entirety of such assets or funds in she and Mr Green's family home, material prejudice could likely flow from the court's successful intervention in requiring return of a portion of the funds so as to provide for Mr Hing.

[114] Ms Chambers fairly commented that Mr Illingworth had but proffered some possibilities with relation to the ability of the court to claw back for the Trust the funds distributed to Ms Green, and further that he had been imprecise as to the causes of action that might exist or the manner in which the court could exercise its s 182 discretion.

[115] Notwithstanding Ms Chamber's criticism of Mr Illingworth's vagueness, I must remind myself that the onus lies with Ms Green to establish that there is no possibility of success for Mr Hing so as to achieve strike out of his application.

[116] Mr Illingworth is correct to observe that the discretion contained within s 182 of the Act is wide. I observe that it directs that the Family Court may:

(a) Enquire into the existence of any settlement.

(b) Make such orders with relation to the settlement property as it chooses to.

(c) Vary the terms of settlement.

all as the Court thinks fit.

[117] In my view, it is not appropriate for the court to withhold from Mr Hing the opportunity to have his application for provision considered at substantive hearing and for there to be properly teased out the options for intervention if nuptial settlement is established, weighing then at hearing the severity of such intervention with the material prejudice that would be occasioned for Ms Green an Mr Green.

[118] I decline to strike out Mr Hing's application.

S J Maude
Family Court Judge

Signed 13 October 2020 at pm