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IN THE FAMILY COURT
AT WHANGAREI

I TE KŌTI WHĀNAU
KI WHANGĀREI-TERENGA-PARĀOA

FAM-2017-088-000386
[2019] NZFC 7268

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	PHYLLIS MARGARET HOLROYD Applicant
AND	AARON MICHAEL HOLROYD Respondent

Hearing:	22 and 23 August 2019
Appearances:	M Miles for the Applicant Respondent appears in person
Judgment:	12 September 2019

RESERVED JUDGMENT OF JUDGE L KING

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[1] This matter concerns an application pursuant to s23 Property (Relationships) Act 1976 for orders determining the nature and extent of the parties relationship property, their respective shares in such property and to give effect to the division of relationship property.

[2] The parties met in April 1996. Earlier that year in February, the applicant returned from the United Kingdom after a four-year OE. At that time, the applicant was a qualified enrolled nurse employed as a health care assistant and the respondent was employed at the Marsden Point Oil Refinery as a control room operator. On 1 January 1998 the parties started living together, became engaged on 1 January 1999 and married on 27 March 1999. The couple had two children from that relationship, [name deleted] born [date deleted] 2000 and [name deleted] born [date deleted] 2002.

[3] The parties agreed that the date of separation was 7 July 2016. Both parties continued to live in the family home at [address deleted] with their children until 8 October 2016 when Mrs Holroyd vacated the family home. Mr Holroyd continued in occupation of the family home. The care of their children from the date of separation was essentially shared.

[4] In 2017 the parties, with the assistance of their respective lawyers, entered into negotiations regarding the division of their relationship property. As part of those discussions, each party was required to make full disclosure to progress discussions around settlement of relationship property matters. In response to information requested by the applicant's lawyer regarding any shares or bank accounts held in Australia, the respondent's lawyers advised the applicant's lawyers that their instructions were that there were no funds or shares held in Australia. On 8 June 2017, the applicant's lawyer wrote to the respondent's lawyer advising their enquiries had identified a significant share portfolio in Australia operated by the respondent valued at $621,668.86 as at 30 June 2016, as well as a sum of $20,271.19 held in an Australian bank account. Both the share portfolio and bank account were in the joint name of the parties but solely operated by the respondent[1]. Unsurprisingly the lack of disclosure by the respondent raised serious concern for the applicant.

[5] On 13 July 2017 the parties entered into a s 21A interim relationship property agreement that recorded terms of agreement regarding an interim settlement of division of some of their relationship property.

[1] Page 39 BOD

[6] On 10 August 2017 Mrs Holroyd applied pursuant to s 23 for the division of the remaining relationship property. On 12 December 2017, Mr Holroyd filed a notice of defence. Various affidavits have been filed.

[7] At an issues conference held 11 February 2019 the parties reached a further agreement regarding certain assets and liabilities. At that conference the matter was then timetabled to a two day hearing which commenced 22 August 2019.

[8] At the commencement of the hearing, I initiated discussions as it appeared that the parties were in broad agreement regarding some of the property in dispute. At the conclusion of those discussions the following agreement was reached between the parties:

(a) The applicant will transfer her half share in the 529 Fletcher shares to the respondent upon the payment of $2,518.04 and those shares shall then become the respondent's separate property.

(b) The shares held in the various companies in the Computershare print-out[2] with a combined value of $138,937.51 shall be sold and the proceeds divided equally between the parties.

(c) The Bank Direct bank account numbers [number deleted] ($3,548.74) and [number deleted] ($378,164.68) shall be closed and the proceeds divided equally between the parties subject to the court's findings in respect of the various claims brought by the applicant.

(d) Any Quintis shares and monies relating to Quintis dividends shall become the separate property of the applicant. The respondent will do all that is required to be done to give effect to the transfer of the shares and will assist and take any steps necessary to secure the transfer of the shares.

[2] Notes of Evidence, Exhibit 1

(e) The applicant shall be compensated to the amount of $2,496.00 in settlement of her s 18B claim for occupation rent.

(f) The applicant's s 18B claim for compensation for rental income to the value of $1,950.00 is withdrawn.

(g) The ANZ account [number deleted] with a balance of AUD$599.49, is to be closed and the proceeds divided equally between the parties.

[9] The parties agreed that the above agreement would be recorded by way of formal court order given the matter was now before the court for determination.

[10] This then left the following three issues for determination by the court:

(a) The applicant's claim pursuant to s 9A or alternatively, s 17 regarding the respondent's interest in a marina berth at Tutukaka held by the respondent prior to the commencement of the parties' relationship;

(b) The applicant's s 15 claim for compensation for economic disparity; and

(c) The applicant's s 18B claim for compensation for legal fees incurred as a result of the respondent's non-disclosure in relation to funds and shares held in Australia.

Marina berth

[11] The applicant made two claims in respect of the marina berth. Firstly, the applicant claimed pursuant to s 9A that the increase in value in the marina berth was relationship property.

[12] In the event that the s 9A claim is unsuccessful, then an alternative claim pursuant to s 17 that the marina berth was sustained as a result of the application of relationship property income.

[13] The parties accept that at the time they commenced their relationship Mr Holroyd had an interest in a marina berth at the Tutukaka Marina. The applicant did not have evidence of ownership of the marina berth but her evidence was that she had understood that the berth was purchased by Mr Holroyd around 1994 to 1995 for $10,000. As it unfolded, Mr Holroyd produced at the hearing the original deed of licence between himself and the Far North District Council regarding the licence of the marina berth. The deed of licence is dated 15 November 1991 with a final expiry date of 30 September 2035. The purchase price paid by Mr Holroyd in 1991 was $16,500. Under the terms of the licence an annual service fee is payable which includes the annual local council levy fee. Mr Holroyd's evidence was that the annual service fee was paid out of the parties' joint bank account which he accepted was relationship property.

[14] The applicant accepted that the only payments made towards the marina berth was the annual service fee. The applicant in her evidence attached a copy of the tax invoice dated 7 October 2013[3].

[15] After counsel for the applicant had the opportunity to review the deed of licence and accepting that the only payments of relationship income towards the marina berth was the annual service fee, the applicant abandoned her claims under ss 9A and 17. Instead, the applicant sought compensation pursuant to s 18B.

[16] The applicant's evidence was that during the relationship "we would have paid out approximately $16,000 in annual service fees as approximately $1,000 would have been paid by us for the period 1998 when our relationship commenced until 2014"[4] when the berth went back into the marina pool. From that point onwards, there was no annual service fee payable under the deed of license as the licensor had exercised its right to rent out the vacant berth and to retain all funds received in lieu of the licensee, the respondent, being required to pay the annual service fee.

[17] Unfortunately, the respondent failed to provide any evidence in respect of total payments made from 1998 until 2014. Mr Holroyd's explanation for not providing

[3] Page 240 BOD
[4] Page 235 Paragraph 3 BOD

these details was that he did not consider such information was necessary for the Court. Mr Holroyd's position was that his interest in the marina berth was his separate property and rejected the applicant's various claims. He went on to say that the fees paid to the Marina Trust were no different than paying fees to a sports or social club. Mr Holroyd was quite insistent on this point. However there is a difference. Firstly, Mr Holroyd accepted the annual service fee was paid out of the parties' joint bank account. He also accepted that this account was relationship property.

[18] Secondly, the payments were being made on the basis of an asset that was Mr Holroyd's separate property. That asset was the licence that he held to occupy a berth at Tutukaka Marina. The annual fee was required to be paid to ensure that Mr Holroyd's property right in the licence continued and also, to ensure that he was not in breach of his obligations under the Deed of Licence.

[19] I gave Mr Holroyd the opportunity to have extra time to provide evidence to the Court but Mr Holroyd said he could not. This lack of information regarding costs by Mr Holroyd leaves the Court in the position of making a determination based on the evidence provided by Mrs Holroyd.

[20] The applicant provided a copy of the invoice for the year ending 30 September 2014[5]. This shows a total annual payment of $1,070.50.

[21] In these circumstances, I calculate the total amount paid for the 16-year period from 1998 to 2014 at $14,000. This figure recognises that the payments from 1998 onwards increased each year as opposed to being set at the 2014 annual fee.

[22] The applicant's s 18B claim is successful. I make an order that the respondent pay the applicant $7,000 by way of compensation.

Section 15 – Economic Disparity

[23] The applicant's position is that as a direct result of the division of roles and functions within their marriage, the income and living standards of the respondent

[5] Page 240 BOD

upon separation are significantly higher than hers and therefore seeks compensation pursuant to s15.

The Law

[24] Section 15 Property (Relationships) Act 1976 provides:

> **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.

[25] Section 15 provides for compensation for disparity to be paid from relationship property[6]. It authorises the Court to provide compensation from relationship property where the income and living standards of one party is significantly higher than the other party as a result of the division of functions within the relationship.[7]

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[6] *Scott v Williams* [2017] NZSC 185 at [201] per Glazebrook J.
[7] At [141] per Glazebrook J.

[26] Section 15(1) does not provide a mechanism by which a s 15 order should be calculated.[8] Rather, it is a threshold which must be satisfied before s 15 can apply. Under s 15, there must be a comparative assessment

> "Whether the income and living standards of one partner are likely to be significantly higher than those of the other partner."[9]

[27] Following this, another assessment is conducted as to

> "Whether this disparity arose because of the divisions of functions within the marriage, civil union or de facto marriage."[10]

[28] Section 15(2) states factors which may be considered when deciding whether or not a s 15 order should be made. Section 15(2)(a) suggests a comparison should be made between the likely earning capacity of each partner in the future in the circumstances they find themselves in at the date of hearing.[11] It is suggested that the wording of s 15(2)(a) contemplates that the compensation should relate to different future earning capacities of each partner to the extent that the difference was caused by the division of functions in the relationship.[12] As per s 15(2)(b), this assessment can consider whether one partner will have an ongoing primary care role over any children.[13] It is also accepted that s 15(2)(c) could include events that occurred during the relationship by its reference to "any other relevant circumstances".[14]

[29] Section 15(3) grants the Court authority, if it considers it just, to order the transfer of relationship property to one partner or, alternatively, to pay a sum of money of that partner's relationship property to the disadvantaged partner for compensatory purposes i.e. being compensation for the disparity in income and living standards to the extent that the difference is caused by the division of functions in the relationship.[15]

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[8] At [192] per Glazebrook J.
[9] At [192] per Glazebrook J.
[10] At [192] per Glazebrook J.
[11] At [194] per Glazebrook J.
[12] At [197] per Glazebrook J.
[13] At [194] per Glazebrook J.
[14] At [194] per Glazebrook J.
[15] At [195] per Glazebrook J.

[30] In *X v X*[16], the parties had been married for 21 years. Mrs X, from the birth of their first child, was primarily responsible in managing the household and looking after the children, thus, was not in paid employment for the majority of the marriage (she was in paid employment for 7 of the 21 years of marriage). After separation, Mrs X remained the primary caregiver for the couple's children. She only obtained full-time employment three years after separation.

[31] A crucial issue in that case was Mrs X's claim under s 15 of the Property (Relationships) Act 1976 (PRA). Mrs X claimed that she was entitled to a s 15 award as she had been economically disadvantaged given she had been out of the work force for approximately 14 years (due to caring for the children and managing the household). The type of claim in *X v X* was an "income shortfall" claim.

[32] The Court reiterated that a broad brush assessment was necessary to produce a just outcome for the parties and that a just division requires the Court to have regard to any economic advantages one party may have experienced which arose from the marriage and its ending.

[33] Robertson J held that s 15 was enacted to address remaining economic disparities, thus, the date of assessment will be the date of separation.[17] However, the calculation will only be made once it is known what the division of relationship property will be as it would be artificial to make an assessment which ignored the economic position of each party after the division of relationship property.[18]

[34] Furthermore, Robertson J considered that there were three discrete elements to a s 15 assessment which must be met before the Court has jurisdiction to make a s 15 award:[19]

(a) The likely income and living standards of each party (a prospective test);

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[16] *X v X [Economic Disparity]* [2009] NZCA 399, [2010] 1 NZLR 601 at [54].
[17] At [75].
[18] At [75]-[76].
[19] At [77].

(b) There must be a "significant disparity" between the income and living standards of one party relative to the other; and

(c) There must be a sufficient causal relationship between the disparity and the division of functions in the relationship.

[35] Both the income and living standards elements must be satisfied before a s 15 award is made.[20] It is not necessary that two separate analyses are carried out (as one will often affect the other), however, both requirements must still be satisfied.[21]

> "A party's income, considered in the round, includes all periodic streams of money".[22]

[36] In regard to the standard of living

> "A person's standard of living is understood to include the amount and quality of their possessions, the facilities and services available to them, the social, travel and daily lifestyle opportunities to which they have access, and their net leisure time… the comparative test under s 15 is between the parties themselves, not between one (or both) of the parties and the community at large."[23]

[37] In regard to whether there is "significant disparity", significant disparity is "one that will have a material impact on the life of one party", which is a factual question.[24] The parties' (potential) income will need to be determined before the significance of the disparity is assessed. This is because, if both parties are modest earners, the disparity may be more significant than if both parties were high-income earners (as the disparity may be overwhelmed by the total income available to each party in the latter case).[25]

[38] The Court reiterated that there was no burden on any particular party to discharge a particular level of proof – the evidence which the Court must be satisfied is a general reference to the material before the Court.[26]

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[20] At [78].
[21] At [81].
[22] At [88].
[23] At [94].
[24] At [83].
[25] At [88].
[26] At [96].

[39] Once the jurisdictional requirements have been met, the Court has a discretion to grant an award under s 15 if it considers it just.[27]

The present case

[40] The applicant qualified as an enrolled nurse in 1987 and worked in that capacity for 10 years including four years in the UK where she worked as a qualified health care assistant, the equivalent of a New Zealand enrolled nurse.[28]

[41] The applicant's evidence was that in the early 1990's, the New Zealand Nursing Council started taking steps to disestablish the enrolled nurse qualification and to encourage those persons to retrain as a registered nurse. This required a two-year course in an academic style setting through training places like North Tec.

[42] The applicant returned to New Zealand in February 1996. She commenced part time studies through Massey University with a view to completing two papers, one each year, to meet the pre-requisites to enable her to train as an occupational therapist.

[43] When the parties met in April 1996, the applicant was employed as a healthcare assistant at Oak Haven rest home and had commenced her part time studies. Mr Holroyd was employed as a control room operator at Marsden Point Oil Refinery. The respondent was a shift worker, something he maintained throughout the parties' relationship.

[44] At some point during 1997 the applicant was made redundant. Around this time, the parties started planning their future together noting that they commenced living together on 1 January 1998. The applicant established a company called Access Healthcare Limited with the respondent's assistance. The business involved selling products such as incontinence pads and other products designed for people living at home who needed assistance. The respondent continued with continued with his employment whilst the applicant, using her skills as an enrolled nurse and healthcare

[27] At [110].
[28] Page 301 paragraph 3 BOD

assistant, worked on the business. The applicant continued in this role until around mid-1999 when the business closed down. Ms Holroyd then commenced a starter business course at Regent Training Centre in which she says she was financially supported by the respondent.

[45] By that stage, the parties were married. Their [first son] was born on [date deleted] 2000, some 14 months after the parties were married. Their second son was born two years later [name of second son deleted] on [date deleted] 2002.

[46] Around January 2000, the applicant commenced employment as a medical alarm installer and continued in this role until just before their second child was born in [mid-2002].

[47] The applicant's position is that her career path changed once the parties committed to an ongoing relationship. Her primary role in the relationship became that of a stay at home Mum caring for the parties' two young children and ensuring the smooth running of the Holroyd household with all the many and varied chores associated with the same. The applicant did have part time work at a book store at one point when the children started attending school, but that was on a casual basis and worked around the children and her husband's work commitments. That work came to an end when her employer wanted her to be available for work at times that did not work in with family commitments.

[48] The applicant's evidence was that during the relationship the respondent did not encourage her plans for her to train towards either becoming a registered nurse or occupational therapist. She said that each time this was raised by her, she was told about the problems this would cause with the respondent's shift work. Essentially, her evidence was that her own career plans were put on hold to enable the respondent to continue to earn good money to provide for the Holroyd family.

[49] The applicant went on to say that when she suggested the boys attend child care to allow her to work the respondent's response was that if she wanted to put the boys into childcare then she would have to meet the fees for childcare from her own

wages. Mrs Holroyd said that she eventually gave up on plans to pursue further training and any meaningful career.

[50] The respondent accepted that for the first few years following the birth of their two children, the applicant needed to be at home to care for their children and therefore could not work. However, he considered the applicant could have gone back to nursing if that is what she wanted to do. He did not believe that she wanted to be a nurse. His evidence was that she often told him this. He therefore did not accept that but for the division of the roles and functions within the household, his wife would have been either a registered nurse or occupational therapist.

[51] Furthermore, the respondent said that he would have supported their children being cared for by the applicant's parents who lived nearby, thus freeing the applicant up to pursue further training and/or employment. The applicant's evidence on this was that she did not enjoy a good relationship with her parents and would never have approached them to care for their children. When questioned by me, the respondent stated he did not speak with either of the applicant's parents about the possibility of them assisting with childcare and nor did he approach anyone else about this[29].

[52] The respondent also said that his comment regarding childcare was when the applicant worked at the bookstore, was paid on a casual basis and her weekly earnings would not have been much more than childcare costs[30]. Although he said that at one point, he had enquired about the costs involved for the children to attend a local childcare centre, he did not let the applicant know or discuss this with her[31].

[53] In terms of the respondent's shift work, his evidence was that this in fact enabled him to have more time at home and to assist with the care of the children as shift workers were given additional leave over and above leave entitlements for non-shift workers. This was not accepted by the applicant. Her evidence was that as well as his work commitments, the respondent spent many hours in his "man cave" when he was at home. The applicant knew that the respondent traded in shares on the stock

[29] Page 129 of the Notes of Evidence
[30] Ibid at p129
[31] Ibid at p129

market and although they did not discuss his activities, the applicant's evidence was that for much of the time that the respondent was at home, he was not emotionally available for her and the children[32].

[54] The Court heard conflicting evidence from the parties about how much time the applicant spent caring for the children versus the respondent. It is unnecessary for me to determine the exact amount of time that the applicant cared for the children or ran the house versus the respondent. What is clear to me is that the division of roles that worked for this family was for the applicant to stay at home, attend to the children's day to day needs and the smooth running of the family home whilst the respondent continued to work as a shift worker where he earned good money, as well as assuming responsibility for all financial matters. This arrangement continued throughout the parties' relationship at least from the time the children were born through to the parties' separation in July 2016. Now that their relationship has ended both parties are questioning the validity of the arrangements that they had in place for the many years they were together.

[55] What is also clear from the evidence is that the applicant's ability to continue as an enrolled nurse or to train as an occupational therapist or to consider upskilling as a registered nurse were all put to one side in favour of the shared goal the parties had which was for her to be a stay at home mum and for Mr Holroyd to continue to support the family financially.

Share trading

[56] I asked the respondent about his share trading activities.

[57] The respondent's evidence was that he started investing in shares before he was 20 years old. He is now 58 years old. He called himself a share investor and that he told the applicant this when they first met. He said their home was full of books on shares and that it was obvious what he was doing. He says that she said "it was your

[32] Ibid at p130

money, you deal with it". He said her would tell her "It's our money but I will deal with it".[33]

[58] The respondent's evidence was that he started off with a small sum of money when he was an apprentice fitter and turner probably a few thousand dollars and that he had the standard Brierley Investments. His interest in share trading continued and he used money earnt from his share trading activities to purchase a property at [address deleted]. This was before he met the applicant. The parties lived in that home until it was sold in September 2000 for $111,586.19. The respondent said the net proceeds of the sale of the [second] property, an amount of approximately $110,000, was applied towards the purchase of the parties' family home at [address deleted] which they bought for $200,000[34]. The balance of the purchase price was paid from the sale of shares. The respondent said that left about $50,000 in his share trading account which he used to continue trading in shares. Given the initial sum available for share trading was $50,000 in September 2000, the respondent has done extremely well to have a share portfolio valued at $621,000 in July 2017.

[59] The respondent's activities as a share trader are important and will be referred to further on.

[60] The parties have provided evidence about their income since separation. The respondent's income for the 2017 tax year was $150,000[35]. The applicant's income for the same period was $11,500[36] which represented Work and Income benefit payments from 7 October 2016[37]. Her evidence is that upon separation she struggled to find work, that she had undertaken every course possible to try and better her chances of obtaining employment, completed work experience and received good feedback but "the reality is that I am now 53, have no current skills given that I have not nursed for 20 years, and in order to have any hope of obtaining more than minimum wage, I will need retraining and during the time of retraining, will be on a student allowance earning minimum income"[38].

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[33] Notes of Evidence at 112
[34] Page 316 BOD
[35] Page 333 BOD
[36] ibid at p 279
[37] ibid at p 6 para 42 and p 36
[38] Ibid at p 238 paras 23-24

[61] The applicant provided evidence of the costs involved for her to train as either an occupational therapist or a registered nurse[39].

[62] I find jurisdiction is established for a s 15 claim for compensation brought by the applicant. I find that the income and living standards of the respondent are significantly higher than the applicant's because of the effects of the division of functions within their marriage.

[63] Whilst both parties, as a result of an interim settlement of some of their relationship property, each own their own home, household chattels and vehicle/s, the applicant's living standard moving forward is likely to be much less than that of the respondent simply as a result of her significantly lower income earning ability.

[64] In any event, the respondent accepted a payment for economic disparity ought to be made to the applicant but considered it should be at the level assessed by his expert, Mr Moriarty[40]. At page 3 of the Moriarty report, he opines that:

> "The economic disparity based on the applicant's diminished income calculated in accordance with the X v X approach is $108,000 half of which is $54,000"[41].

[65] When this statement was put to Mr Holroyd, he accepted Moriarty's payment of $54,000 was appropriate.

Calculating the amount of compensation to be paid

[66] There is no dispute between the parties that s 15 compensation should be paid. However, the areas of disagreement, as identified by each parties' expert, are:

(a) the appropriate calculation approach to be adopted in this matter (*X v X* all *Scott v Williams*);

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[39] Ibid at paras 28-31
[40] NOE at pp 125-126
[41] Page 321 paragraph 11(b) BOD

(b) whether, but for the division of functions, the applicant would have continued in her career as an enrolled nurse or would have qualified as a registered nurse;

(c) whether the respondent has enjoyed any enhancement to his career and earnings as a result of the division of functions within their relationship;

(d) Whether the applicant's receipt of benefit assistance should be treated as income in the calculations.

[67] Initially, the parties' experts disagreed as to how the contingency discount should be applied however agreement was subsequently reached on that issue and a second joint report was filed and formed part of the evidence.

[68] In submissions from counsel for the applicant the court was urged to follow the *X v X* approach. Ms Miles submitted that but for the division of functions within the parties' marriage, the applicant would have pursued training to become a qualified registered nurse. Furthermore, the respondent's career was enhanced as a direct result of the division of roles within their marriage.

[69] The respondent rejected the submission that the applicant would have gone on to train as a qualified registered nurse. Whilst the respondent accepted that the applicant had the intellectual ability to train as a registered nurse, his evidence was that the applicant did not wish to continue in the field of nursing. On the matter of his career being enhanced, the respondent's position was that he was employed in the same position at the end of their marriage in July 2016 as when the parties first met in 1996. He therefore rejected any notion that his career was enhanced as a result of the division of functions within the parties' marriage.

The correct approach

[70] Having considered both *Scott v Williams* and *X v X,* I am of the view that *X v X* still applies when determining the methodology to be adopted where the s 15 claim is that the disadvantaged party suffered an economic shortfall. The Supreme Court

did not expressly overrule *X v X* on this point as that court also found that there were a number of methods available to calculate the quantum for a s 15 award. The overriding consideration for the Court is that the award must be just. Finally, *Scott v Williams* did not consider it was necessary that the final award be halved in every case, although the majority in *X v X* considered it to be an appropriate step to reflect the division of roles being a joint decision in the relationship.

"But For" career

[71] The applicant's position is that she would have continued to upskill and become a registered nurse. I accept that Mrs Holroyd was capable of doing extra study. That was evident through her completing the psychology 101 paper in 1996 and planning to do the second paper and train as an occupational therapist. Mrs Holroyd's evidence was that during the parties' relationship, nursing was ruled out because it required shift work, something that would not be available to her given Mr Holroyd's shift-work commitments which took priority and their children's needs.

[72] I accept that on balance the applicant is likely to have continued with further study but for the division of functions within their marriage. However, I am not satisfied the applicant would have gone on to become a registered nurse given her evidence was that the focus for her upon her return to New Zealand in 1996 was to pursue training as an occupational therapist. That appears to be the career that the applicant intended to pursue. It is therefore unfortunate that the applicant's expert was not asked to provide calculations with a "but for" career as a qualified occupational therapist.

[73] The applicant has provided some evidence regarding the costs involved for her to train for three years as an occupational therapist together with loss of wages for that period. Her evidence is that the total disparity based on the training and loss of wages whilst training, to achieve being an entry-level occupational therapist totals $152,072.20[42].

Enhancement

[42] Page 239 paragraph 31 BOD

[74] In support of her argument that the respondent's career has been enhanced by the division of roles within their marriage, the applicant relies upon the increase in the respondent's annual income from $65,000 in 1997 to $150,000 at the time the parties separated 19 years later. The applicant's evidence was that she was led to believe by repeated statements made by Mr Holroyd over the years that he changed positions, moving to different parts of the oil refinery, on average, every two and a half years. She said he never discussed any of the intricacies of his job, but the clear impression left by him was that he was advancing up the ladder. The applicant said that a frequent phrase he used was that he had to develop his career to make him more valuable, more employable and learn new skills to become better at that job. As well as a shift worker, he was a union delegate. In that role, the respondent participated in union meetings in Whangarei and Australia as well as regular wage negotiations, which at times were very involved.

[75] Mr Holroyd, in rejecting the applicant's claim, provided a printout of what he says records his employment and pay rate from 2010 through to 2018[43]. He said he was unable to provide any details prior to 2010 as that was the only information that he was able to obtain from his employer. That printout Mr Holroyd's salary in 2010 at $65,000 and the time the parties separated in July 2016 as $81,744 with an increase to $84,198 on 22 June 2017. This compares with page 10 of the Moriarty report which records the respondent's earning for the tax year ending March 2017 as $150,000[44].

[76] The respondent explained the difference was due to the printout recording the base salary only. On top of the base salary there were various allowances paid out. The respondent's evidence was that a shift worker was essentially given an additional 50% on top of their base salary. The two payslips tendered as evidence by the respondent support his claim. Therefore, the evidence contained within the tax return regarding his income for the 2017 years is preferred.

[77] When asked questions by Counsel for the applicant regarding the increase in his salary, Mr Holroyd's response was that it was due to good union negotiations. Mr Holroyd is a union delegate and said that some of those shift allowances have been in

[43] Page 358 BOD
[44] Ibid at p 333

place for many years and have simply continued. His evidence was that he is still employed in the same position and that really it is due to these extra payments over and above the base salary that has seen his annual earnings increase.

[78] Mr Holroyd's evidence is confirmed by his work history which shows the hourly rate. Each time there is an increase in the hourly rate it is set out in the printout referred to above. This matches Mr Holroyd's statement about increases being due to negotiated rates as a result of being unionised.

[79] Mr Moriarty at pages 10 and 11 of his report stated:

> Over the 18 years and nine months of the relationship the respondent's earnings as a control room operator increased by circa 4.7% per annum (on a compounding basis); and general wage inflation over the same period was 3% per annum.
>
> The general wage inflation figure sourced from the RBNZ website reflects the national average and it is reasonable to accept that private sector pay rises (such as those at Refining NZ) would have been higher than public sector pay rises; the respondent's earnings growth over the relationship can thus be attributed to inflationary increases rather than any earnings enhancement from career progression (of which there was none).
>
> The respondent has not experienced any identifiable enhanced income over the period of the relationship and the benefit of any support received during the relationship, which did no more than allow the respondent to maintain his employment position, is already reflected in the pool of relationship property assets (being the value of assets accumulated during the relationship).

[80] Again, the respondent's evidence was that it was simply down to good wage negotiations.

[81] I too struggle with the notion that the respondent's career has been enhanced when he is employed in the same position at the end of the relationship. I also accept that whilst the annual increase in salary on a compounding basis was higher than the average wage increase for the same period, there has been no evidence provided to the court to rebut the evidence of Mr Moriarty that it is reasonable that wage increases in the private sector are likely to be higher than in the public sector. I also accept that given the respondent is a member of a union which has negotiated extra allowances he has benefited from such negotiations.

[82] A matter that was not pursued by the applicant was the respondent's enhanced earnings as a result of his continued share trading during the period of the relationship. The respondent has benefited from building his experience as a share trader during the entire period of the parties' relationship. That is evident from the fact that since the parties purchased their Kamo property in 2000, the share trading account increased in value from $50,000 to over $620,000.

Assessing quantum

[83] In *Scott v Williams* the Supreme Court held that valuation methodologies should ensure that a fair and just division of relationship property is achieved, thus the methodology used will depend on the type of business to be valued.[45] The essential question is not whether the right valuation method was used but whether the right result (being a result that achieves fair and just division of relationship property) was achieved.[46]

[84] In *X v X*, Robinson J was wary to lock the court into any particular calculation of quantum.[47] His Honour said that:

> [i]n determining quantum, what is important is the overall circumstances that gave rise to the disparity between the parties and what will be "just between them" going into the future. A court should be transparent in its assessment of the factors that contribute to its decision to make an award, and it must be robust in responding to the evidence that is available. However, in the final analysis under s 15(3) there is limited assistance to be garnered from experts' projections. No rote formulae can reliably throw up award sums that are just. The court must determine the justice of an award on the basis of its assessments of the parties' overall financial circumstances, the value of the loss sustained by the claimant party, and the future earning potential of each party.[48]

[85] In regard to whether the award should be halved, Robinson J did not accept that a s 15 award was relationship property. It is a compensatory award to a party who is disadvantaged at the end of the relationship, thus, was not satisfied the award should be halved in this case.[49] His Honour noted that a s 15 award will diminish the

[45] At [105] per Glazebrook J.
[46] At [108] per Glazebrook J.
[47] At [125].
[48] At [129].
[49] At [143]

respondent's share of relationship property, however, the court should ensure that the awards "do not invert the parties' relative levels of income and standard of living and create fresh unfairness".[50]

[86] O'Regan and Ellen France JJ took a different approach to quantum, the only issue the Judges differed on. Whilst they acknowledged that a s 15 award was not relationship property, however,

> The reality is that the division of roles within a relationship is a matter of joint decision".[51] "The object of the award under s 15 should be to ensure that the disadvantaged partner is not worse off after the end of the relationship than he or she was during the relationship. In effect, what he or she lost is the ability to continue the position that applied during the relationship, i.e. the sharing of the ongoing consequences to the disadvantaged partner as a result of the division of roles.[52]

[87] Their Honours considered it appropriate because it avoided the outcome where the disparity was reversed,[53] halving reflects the fact that (in cases such as *X v X*), the disadvantaged party required compensation for the part of the ongoing effect of their future diminished income-earning capacity resulting from the division of roles which they were not already bearing during the relationships.[54] Their Honours stressed that not every calculation of a s 15 quantum would need to be halved.[55]

[88] Applying the law, I calculate the quantum at $100,000 taking into account the following factors:

(a) the parties agree that a payment on the basis that the applicant's career as an enrolled nurse is appropriate.

(b) The compensation as an enrolled nurse was assessed by the respondent's experts at $108,000, half of which is $54,000.

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[50] At [145].
[51] At [231].
[52] At [233].
[53] See the example in [234].
[54] At [235].
[55] At [236].

(c) Having found that the applicant would have gone on to undertake further study to become a trained occupational therapist, recognition of the same is appropriate.

(d) The respondents earning ability as a share trader over the period of time the parties were together and moving forward.

(e) That a payment under s 15 is a compensatory award to a party who is disadvantaged at the end of the relationship.

(f) There is nothing in the wording of s 15 that requires a payment to be halved. Instead, a fair and just division of relationship property must be achieved.

(g) The total value of the respondent's share of the relationship property from which compensation will be paid is around $250,000;

(h) This payment represents around 40% of the respondent's share of the pool of relationship property available for distribution.

S 18B Compensation for legal costs

[89] The applicant has brought a claim seeking compensation to the amount of $7,358.85 being legal fees incurred by her as a result of Mr Holroyd's failure to disclose the significant amount of money held in the parties' share trading account together with the funds held in the Bank Direct account in Australia. The applicant has provided the time records for the relevant period together with a summary of those invoices that relate to the work undertaken to identify and follow on the undisclosed share trading account and bank account[56].

[90] Mr Holroyd's position was that the amount claimed was excessive. His view was that half the enquiries made by the applicant's lawyers were unnecessary and that her lawyers had no idea financially what they were to look for. I put it to Mr Holroyd that the fact that he had been dishonest in not disclosing relationship property in excess

[56] Pages 256 to 275 BOD

of $640,000 is what led to these increased costs. Whilst accepting he was dishonest he did not accept that he should be responsible for the full amount.

[91] I reject Mr Holroyd's submission. His dishonesty and failure to disclose when specifically requested to do so causes me real concern. His lawyer was specifically asked to confirm whether there were funds on investment in Australia or any monies in Australia to which his lawyer on his instructions answered no. Mr Holroyd in his evidence accepted that he had failed to disclose and said he did that because he was angry.

[92] I find that these costs were incurred as a direct result of Mr Holroyd's dishonesty. The applicant should be reimbursed.

[93] Accordingly, I make the following orders:

i. An order pursuant to s 18B that the respondent pay the applicant the sum of $14,358.85 for compensation made up as follows:

    a. An amount of $7,000 for payments made in respect of the respondent's property interest in a marina berth at Tutukaka;

    b. An amount of $7,358.85 being legal fees incurred by the applicant as a result of Mr Holroyd's failure to make disclosure.

ii. An order pursuant to s 15 that the respondent pay the applicant the sum of $100,000.

iii. Orders made in terms of para 8 (a), (b), (d), (e), (f) and (g) herein, subject to the respondent's obligation to make the payments set out at (i) and (ii) above.

L King
Family Court Judge