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-2018-044-000510
FAM-2020-044-000300
[2021] NZFC 4687

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	SUSAN GREEN Applicant
AND	MURRAY LESLIE HING TZUBI INVESTMENT TRUSTEE COMPANY LIMITED Respondents

Hearing:	19 May 2021
Appearances:	Lady D Chambers QC for the Applicant G Illingworth QC for the Respondent Hing M Phillipps for the Respondent Tzubi Investment Trustee Company Limited
Judgment:	5 July 2021

RESERVED JUDGMENT OF JUDGE K MUIR

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[1] Ms Green and Mr Hing separated in December 2011. Their marriage was dissolved in August 2015. The net proceeds of sale of the family home, which was owned by the Hing Family Trust, have sat undistributed since that property was sold in December 2016. Mr Hing has retained control of the Tzubi Investment Trust, which owns business assets and commercial properties. There have been no distributions by the Tzubi Trust to the trust's beneficiary, the Hing Trust.

[2] Ms Green seeks a restraining order under s 43 of the Property (Relationships) Act 1976 (PRA) over the assets of the Tzubi Trust. She was not told that the commercial properties owned by the Tzubi Trust had been sold. She fears that the proceeds of sale will be disposed of in order to defeat claims she is bringing under the PRA. She seeks orders replacing the trustee of that trust, Tzubi Investment Trustee Company Limited (Tzubi Trustee), which is a company controlled by Mr Hing.

[3] Mr Hing and Tzubi Trustee say that her application under the PRA is out of time. They submit that the orders Ms Green seeks ought not be granted because they are not necessary or proper. They say her claims in relation to the two trusts should not proceed, largely because of jurisdictional and procedural issues they raise.

[4] This is a procedural morass. The Family Court Rules 2002 are intended to ensure that proceedings are dealt with as fairly, inexpensively and speedily as is consistent with justice. The progress of this case so far is the antitheses of that intention.[1]

[5] I must decide the following:

(a) Should I grant Ms Green's application pursuant to s 24(2) of the PRA for an extension of time to bring her application under that Act? – Her application ought to have been filed within 12 months of the date of dissolution, ie: by 24 August 2016. If I decline that application, then Ms Green's other applications under the PRA, including her application for a freezing order and discovery, cannot proceed.

[1] Family Court Rules 2002, r 3: see also Property (Relationships) Act 1976, s 1N(d).

(b) Should I grant Ms Green's application for a declaration that she may bring an application under s 182 of the Family Proceedings Act 1980 (FPA) against the trustees of the Hing Trust? – Section 182 provides that such an application should be brought *"on, or within a reasonable time after the making of an order (for dissolution of marriage)"*. Mr Hing and Tzubi Trustee say I have no jurisdiction to make a declaration.

(c) Should Mr Hing's application to strike out Ms Green's applications under s 182 of the FPA be granted? – Mr Hing says that her application to join the trustees of the Hing Family Trust for the claim under s 182 is procedurally flawed. Tzubi Trustee says it will suffer prejudice and a miscarriage of justice as a result of a new cause of action being added to existing proceedings in a way which they submit falls outside the requirements of s 182 and the Rules of Court.

(d) Are Mr Hing and Tzubi Trustee right that Ms Green has failed to comply with s 37 of the PRA which requires notice to be given to any person having any interest in property before orders are made affecting that property? If so, does that mean her claims cannot proceed or that I cannot grant the orders she is seeking?

(e) Has Ms Green also failed to comply with s 33A of the Trustee Act 1956?[2] And if so, is that fatal to her interlocutory applications? – Section 33A (now s 137 of the Trusts Act 2019) permits a trustee to sue themselves and their fellow trustees in a capacity other than that of trustee, but it requires the claiming trustee to obtain the directions *"of the Court in which the proceeding is taken about the way in which the opposing interests are to be represented"*.

(f) Are undertakings which were offered by Mr Hing and Tzubi Trustees during the hearing sufficient to protect the relevant assets of Tzubi Trust pending resolution of these proceedings? – If they are, I may not need to decide whether to grant the freezing order or remove the trustee.

[2] Now s 137 of the Trusts Act 2019.

(g) Should Ms Green's application for a restraining order under s 43, be granted? – I may not need to consider this issue if the undertakings offer sufficient protection.

(h) Should Ms Green's application under s 141 and s 114 of the Trusts Act 2019 for an order removing Tzubi Trustee as sole trustee of the Tzubi Trust be granted? – Is the removal and replacement of the trustees "necessary" for reasons other than preservation of assets, even if the undertakings are sufficient? – Mr Hing and Tzubi Trustee say that the Family Court does not have jurisdiction to make an order removing a trustee. Tzubi Trustee applied to strike out the application to remove the trustees.

Mr Hing and Tzubi Trustee also say that the removal of the existing trustee may put the Tzubi Trust and its associated entities in breach of covenants that they gave as tenants on the sale of the commercial premises in relation to their new landlord of those premises.

(i) Should all of Ms Green's applications for discovery against Mr Hing and Tzubi Trustee be granted?

The Trusts and Assets

[6] Ms Green and Mr Hing were married on 21 February 1991. Ms Green is a lawyer who has principally worked in corporate roles for banks. Mr Hing has focused on his profession as a physiotherapist and on the management of the assets owned by the Tzubi Trust which include most of the shares in Tzubi Investments Limited (Tzubi Investments), a company incorporated on 10 March 2005. Mr Hing and Ms Green then each owned 50% of the shares. They were both directors.

[7] The Tzubi Trust also owns most of the shares in companies which run physiotherapy practices or associated businesses. Flexa Physio Limited was incorporated on 17 May 2001. Flexa Clinic Limited was incorporated on 6 June 2006.

[8] Tzubi Trustee was incorporated on 3 March 2010. Mr Hing is the sole shareholder and was the sole director of Tzubi Trustee until January 2021 when Mr Gareth Hoole was appointed as an additional director.[3] In March 2010 Tzubi Investments purchased three neighbouring commercial properties in Northcote, 158A Lake Road, 160 Lake Road and 1/59 Greenslade Crescent. They are the principal premises where Mr Hing practices as a physiotherapist and operates the Flexa Group companies.

[9] On 1 June 2011, 99% of the shares in Flexa Physio Limited and Flexa Clinic Limited and Tzubi Investments were transferred to Tzubi Trustee.

[10] Ms Green and Mr Hing are both trustees of the Hing Family Trust which was settled on 7 September 2009. Mr Hing, Ms Green, [their daughter – name deleted] and any spouses are discretionary beneficiaries; [their daughter] is the final beneficiary. JT Trustee Co Limited is a third trustee.[4] In March 2010, the Hing Family Trust purchased the family home at [address deleted] from Ms Green and Mr Hing for $2.1 million with a debt back to them for that amount. Mr Hing has said only two years of gifting was completed and the balance of the debt remains due to the parties. Mr Hing continued living in that home for several years after separation until it was remediated and sold.

[11] It is Mr Hing's evidence that at the time of separation he and Ms Green "… *entered into an informal arrangement/oral agreement regarding the division of our assets upon which I have relied*". He said there was a discussion in about April 2013 in a face to face meeting. He said the oral agreement "*assured me of complete ownership and control of whatever interest I may have in my physiotherapy/sports medicine business, and real estate owned or leased by the Tzubi Investment Group as my separate property*".

[12] Mr Hing says that he has relied on that agreement since separation and persevered with the business "*which was running at a loss of many years, protecting*

[3] There was a fourth "Flexa" company, Flexa Apollo Limited, which no longer trades. The "Flexa" companies will be collectively referred to as Flexa Group where appropriate.

both the applicant and myself, from bankruptcy". He says that he has operated without receiving any salary or wage, although he admits he did receive some benefits directly from the businesses including overseas travel where it could be business related. He believes that the reason the assets of the Tzubi Trust have any value now is that he worked to develop those assets, and he believes that he should be entitled to retain that value.

[13] On 13 September 2013, Ms Green resigned as a director of Tzubi Investment. Mr Hing says that was as a result of the alleged oral agreement. Ms Green denies that there was any such agreement and says that she resigned because Mr Hing was not consulting her as to the operation of the business at all.

Should I Grant Ms Green an Extension of Time Under s 24(2) PRA?

[14] Ms Green says that she started making settlement offers to Mr Hing in 2014. Mr Hing denies this. The marriage was dissolved on 24 August 2015. Ms Green says that she made a formal settlement offer to Mr Hing on 30 November 2016. Mr Hing denies this.

[15] From April 2016 until September 2019, Ms Green was living and working in Singapore. The family home sold for $3 million on 2 September 2016, and the net proceeds held in the solicitor's trust account are $1,190,000 plus accrued interest.

[16] On 13 September 2018, Ms Green made an application for pre-commencement discovery to this Court indicating that she intended to pursue a claim under the PRA.

[17] On 6 November 2019, Ms Green first applied for orders under the PRA in this Court. She also applied for leave to file proceedings out of time. She included Tzubi Trustee as second respondent, even though her claim at that time was solely under the PRA.

[18] In January 2020, Tzubi Investment sold the commercial properties in Northcote. Ms Green was not informed about the sale.

[19] On 26 June 2020, Ms Green filed a particularised application under the PRA and under the FPA. In that application Tzubi Trustee remains the second respondent.

Extension of Time: Principles

[20] Under s 24(2) PRA I have a discretion to extend the time for making an application. The factors set out in *Beuker v Beuker* remain a touchstone for decisions as to whether or not to grant an extension of time.[5] The factors are:

(a) The length of time between the expiry of the statutory time limit and the bringing of the application;

(b) The adequacy of the explanation offered for the delay;

(c) The merits of the case; and

(d) Any prejudice to the respondent.

[21] The High Court in *Ritchie v Ritchie* and later in *Wang v Ma* have warned against viewing the four *Beuker* factors as a comprehensive code.[6] No undue weight should be placed on any of the factors.

[22] Ultimately, the Court needs to stand back and consider the justice of the situation. Factors such as the time of delay are relevant to the issue of whether an injustice arises against the respondent.

[23] Each case turns on its own facts. Extensions of time have been granted despite delays of up to 15 years.[7] On the other hand applications have been declined in cases where the delay between the expiry of the limitation period and filing has been as little as five to six months.[8]

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[5] *Beuker v Beuker* (1977) 1 MPC 20 (SC) at 21.
[6] *Ritchie v Ritchie* (1991) 8 FRNZ 197 (HC); and *Wang v Ma* [2019] NZHC 821.
[7] *JNL v DN* FC Wanganui FAM-2004-083-363, 21 August 2006.
[8] For example, *Aschenbrenner v Williams* [2015] NZFC 3602; and *Lee v Thompson* [2016] NZFC 3048.

[24] From a review of the most relevant cases it appears that unmeritorious cases, that is cases where the likelihood of success with the substantive application is low or the matters at issue are not significant, are unlikely to be well received. Conversely, in situations where it is clear that there are extensive property rights or issues arising out of the relationship which have not yet been resolved, and which are unlikely to be justly resolved without the Court's assistance, it is unlikely that a Court will refuse leave, unless the delay is particularly egregious, or unless there is significant prejudice to the respondent established as a result of the delay.

Length of Delay

[25] While much of the evidence and submissions focused on the period between separation and dissolution of marriage, the relevant period for the purposes of s 24(2) is the time that has elapsed since the expiry of 12 months after dissolution, which would have been 24 August 2016.

[26] Ms Green applied for pre-litigation discovery on 13 September 2018, just over two years after the expiry of the limitation period. Her substantive application for orders under the PRA was filed on 6 November 2019. The delay of between just over two years and just over three years is not remarkable in terms of the range of time in the reported cases. That delay itself is not a disqualifying factor.

The Explanation for the Delay

[27] Mr Hing says that Ms Green was a lawyer and ought to have known better. Ms Green on the other hand says not only had she never practised in this area; she had not studied Family Law. I find nothing in particular hinges on her profession, particularly given her consistent employment in corporate roles.

[28] On 13 November 2016, Ms Green's lawyer wrote to Mr Hing with a proposal to resolve relationship property. Mr Hing then engaged a lawyer who raised issues about valuation and date of separation. The family home sold in December 2016 after extensive renovations. Ms Green says that negotiations broke down over issues as to the level of bank debt that should be repaid.

[29] Ms Green says that Mr Hing changed his position and resiled from positions previously agreed upon. Mr Hing denies this and says that he acted in accordance with the oral agreement he claims was reached that he would maintain control of the business assets and that the proceeds of [the family home] would be divided equally.

[30] I cannot resolve that evidential difference between the parties now. It is enough to note that it was clear to both parties that there were major issues between them which were yet to be resolved.

[31] Ms Green says that there were significant delays in obtaining relevant information. The affidavit filed in support of the application for pre-commencement discovery includes correspondence between Ms Green's then lawyer, Ms Fisher QC, and Mr Hing's then lawyer, Ms Blackford, between March 2018 and September 2018. Ms Green had engaged a forensic accountant, Mr Hussey, who requested a range of information. It is apparent from the ensuing correspondence that Ms Fisher believed that a significant part of the information requested had not been provided. The correspondence annexed concludes with a letter dated 4 September 2018 from Ms Blackford which simply says there have been delays due to Mr Hing's "*pre-existing commitments in travel schedule"* and a substantive response to a proposal was anticipated *"after September 2018*".

[32] The pre-commencement discovery application was then filed. Costs were later sought in relation to the pre-commencement discovery and memoranda addressing the cost issue were exchanged through to the end of March 2019.

[33] That narrative provides some explanation for the delay in filing proceedings in November 2019.

[34] While limitation periods ought to be complied with parties should not be penalised for responsibly endeavouring to resolve matters by negotiation nor for responsible attempts to exchange or obtain information prior to issuing proceedings. While I find that Ms Green could have filed her application earlier, I am satisfied there is an adequate explanation for most of the delay.

The Merits of the Case

[35] It is often difficult to assess merits at an interlocutory stage. However, this was a 20-year marriage up to the date of separation. Clearly the parties acquired significant assets in the course of their relationship. A significant part of those relationship assets was settled on the two trusts during the relationship. There has been no s 21A agreement or other written agreement formally resolving property issues between the parties. There are significant property issues that remain unresolved.

[36] Mr Hing claims that there was an informal agreement. Such an informal agreement would not be binding to protect against PRA claims unless it was approved by the Court under s 21H. That would require an application to this Court.

[37] The actual quantum of relationship property owned by the parties (as opposed to the trusts) which remains undivided may not significant.[9] There are, however, significant issues raised in relation to the assets of the Hing Family Trust and the Tzubi Trust.

[38] The "particularised" application by Ms Green for orders under the PRA dated 26 June 2020 seeks:

(a) General orders determining the status of property owned by the parties "*on the assumption the parties agree that the assets of the Hing Family Trust are to be treated as if they were relationship property*".

(b) A determination of the valuation of those properties and the shares the parties have in their properties.

(c) Compensation for a "*disposition of relationship property to Tzubi Investment Trust*" pursuant to s 44C of the PRA.

(d) A claim under s 182 of the FPA is also pleaded.[10]

[9] It is likely any remaining balance of the "debt back" from Hing Trust to the parties is relationship property.

[10] Ms Green has also filed an "(a)mended application for orders pursuant to s 182 of the Family

[39] Ms Green has not pleaded a particularised application for relief under s 44 of the PRA. To grant relief under s 44 a Court would need to conclude that property had been disposed of – presumably to the Hing Family Trust and/or Tzubi Trust – with the intention of defeating a claim under the Act. There is a lower bar to relief under s 44C (which is pleaded) of establishing that the disposal of relationship property to a trust has had the effect of defeating the claim or rights of one of the spouses under the Act. The distinction may be important for relief purposes. A claim under s 44C would only render trustees potentially liable to account for the payment of income from the trust as compensation. A successful claim under s 44 could potentially lead to the setting aside of any relevant dispositions of property to the trustees.

[40] It became apparent only during submissions that Ms Green was also seeking relief under s 44 of the Act. It also then became apparent that Ms Green was alleging to that "… *her and Mr Hing's rights in the Hing Family Trust and the Tzubi Investment Trust are "property" for the purposes of the Property (Relationships) Act 1976. Their rights are indistinguishable from ownership*."[11]

[41] Ms Green says their interests in the two trusts give them the power to distribute the trust fund to themselves without any effective restraints, and that these powers or rights amount to property. That argument is consistent with an approach adopted by the Supreme Court in *Clayton v Clayton*.[12]

[42] In response to the s 44 or s 44C claims, Mr Hing and Tzubi Trustee raise several issues. Their arguments and my responses are:

(a) Assets that were transferred to the trust were part of a rational reorganisation of the party's affairs as a result of accounting and legal advice.[13] The intention was to separate the business assets from the family's personal assets with an element of "risk protection". Ms Green knowingly participated in this exercise.

Proceedings Act 1980" in a separate application under this FAM number naming Tzubi Trustees as second respondent and the trustees of the Hing Trust as third respondent.

[11] Ms Green's written submissions paragraph.

[12] *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551.

[13] Although there is no indication that either party received independent advice before this significant step was undertaken.

Response:

For the purposes of relief under s 44C, it is not necessary to show that there was an intention to dispose of property, merely that the disposition has had the effect of defeating the claim of one of the spouses.

For s 44 purposes *Regal Castings Limited v Lightbody* has established that it is sufficient if a party knows that the effect of a disposition will be to defeat a claim under the Act.[14] "*Knowledge of a consequence can be equated with an intention to bring it about*".[15] *Regal Castings* has been applied in the property relationship context in a number of cases including *Ryan v Unkovich* and more recently *Horsfall v Potter*.[16,17]

The fact that there were other "legitimate" motives for the transfer of the family home to the Hing Family Trust and the transfer of the relationship property business assets to the Tzubi Trust may not be a bar to Ms Green's claims.

(b) The assets were valued and transferred to the trusts at market value. The respondents say that supports their contention that there was no intention to defeat Ms Green's claim and that there was no "disposition" of property. They say the value of the property was retained by the parties through the consideration paid – albeit that "payment" was in the form of a debt owed to the transferors.

[14] *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433.
[15] *Ryan v Unkovich* [2010] 1 NZLR 434 (HC) at [33]; per French J.
[16] *Horsfall v Potter* [2017] NZSC 196, [2008] 1 NZLR 638.
[17] See also *Potter v Horsfall* [2016] NZCA 514 at [41]: "The inquiry is directed to the disposing party's knowledge of the effect the disposal will have on the other party's rights, from which an intention may be inferred, rather than to whether that party was motivated by a desire to bring about that consequence."

Response:

A transfer at value will not necessarily be a barrier to relief under s 44 or s 44C. The appropriate measure of compensation may be the increase in value from the date of disposition to the date of hearing.[18]

(c) The current value attributed to the shares transferred to the Tzubi Trust "*… is solely the product of almost nine years of post-separation efforts on the part of (Mr Hing) carried out in order to save and re-establish the businesses of the Flexa companies*". Mr Hing says he has "*temporarily foregone payment of any remuneration for his work over that period*".

Response:

If it is established that through his post-separation efforts, Mr Hing has significantly increased the value of relationship property assets, he may be entitled to compensation, for example under s 18B of the PRA. That is another matter that may have to be determined in the substantive proceedings. The allegation of extensive post-separation work on a relationship asset is not a bar to a claim under s 11, s 44 or s 44C.

[43] The respondent's submissions do not directly address Ms Green's claim that the parties possess a "bundle" or "package" of rights in the trusts which itself is valuable property although that was an issue that was raised in submissions by Ms Green, rather than in the pleadings.[19] It remains to be determined whether there is a bundle or package of rights in either trust which might be relationship property and if so what its value is.

[44] If Mr Hing's evidence is correct, it may be that Mr Hing and Ms Green are still owed a substantial debt by the Hing Family Trust which exceeds the value of the remaining proceeds of sale of the family home. That may render this part of Ms

[18] *Nation v Nation* [2005] 3 NZLR 46 (CA).
[19] See the definition of "Property" in s 2 of the PRA as including "(e) any other right or interest".

Green's claim against the Hing Trust assets otiose. However, the assistance of the Court may still be needed to secure the demand for payment of the debt by the trustees and to resolve how it is to be shared between the parties.

[45] On Ms Green's evidence the approximate net value of the principle assets in dispute is $2,886,000.[20] On Mr Hing's evidence the current value is approximately $2,009,000.[21] Mr Hing says that he should be entitled to retain the increase in value of the business assets since separation or for other compensation for his post-separation work.

[46] There are significant issues yet to be resolved between these parties. It is certainly not possible for the Court to conclude now that Ms Green's claims under the PRA lack merit.

Prejudice to the Respondent

[47] Mr Hing says that he relied on the alleged informal agreement of the parties and devoted himself to ensuring the survival of the business assets in the expectation that he would retain the benefits of his labour.

[48] That is an explanation that is at odds with his position as a director of Tzubi Trustee, at odds with his position as a trustee of the Hing Family Trust and at odds with the memorandum of wishes for the Tzubi Trust. That memorandum states that it is intended that its assets and investments will be held and improved "*for the benefit of the final beneficiaries of the Trust being the beneficiaries under the Hing Family Trust*". A letter of advice written by the family solicitor at the date the trust was set up stated that the purpose of the Tzubi Trust was "*to accumulate dividends that may develop from the business operations … which can then filter down to the (Hing) Family Trust as the ultimate wealth gathering vehicle*".[22]

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[20] Value of funds held on deposit following sale of family home $1,019,000 – B779. Mr Hussey's assessment of current value of Tzubi Trust assets is $1,867,000 – Evidence of Mr Hussey B977.
[21] Mr Davis' assessment of current value of Tzubi Trust $990,000 – Evidence of Mr Davis B1035.
[22] There has been no "filtering down" to the Hing Family Trust since the trusts were established.

[49] Mr Hing says he has worked without remuneration or salary since separation. He claims that he is owed "*approximately $1.8 million, which amounts to an approximate $300,000 salary per annum over six years between the years 2013 to 2019*". He said, "*this is the advice of my accountant and is recorded in the company accounts*".[23]

[50] There is no record of any liability or contingent liability for salary or remuneration for Mr Hing anywhere in the accounts.[24] It was conceded that he has received some benefit from the companies held by the Tzubi Trust which may not be recorded in the accounts such as overseas travel linked to business travel. There is no other indication in the evidence filed to date as to how he has in fact been remunerated or how he has financially supported himself, if he has not been paid by the companies held by Tzubi Trustee.[25]

[51] The theory of Mr Hing's case is that Ms Green has essentially waited until the value of the assets of Tzubi Trust have increased through his hard work before bringing her claims. However, it should be noted that the forensic expert instructed by the second respondent. Mr Davis considers it appropriate to adopt a notional liquidation valuation approach to the Flexa Group companies and concludes that the shares had a nil valuation at the five valuation dates that he adopts – 29 March 2010, 1 April 2011, 8 December 2011, 24 August 2015 and 31 March 2020. His calculations do not include any allowance for the notional unpaid salary of $1.8 million claimed by Mr Hing, which would leave the companies in a significantly worse financial position if it were found to be justified.

[52] The only document that supports Mr Hing's claim that he is entitled to claim unpaid salary at $300,000 per annum is an "*agreement*" dated 20 March 2019 signed by Mr Hing seven times, in his personal capacity and, in his capacity as a director of the following companies: Tzubi Investment Trustee Company Limited, Tzubi Limited,

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[23] Bundle 87 Affidavit Hing, 13 February 2020, at [16].
[24] A point that was conceded by his counsel in his submissions.
[25] An analysis of the various shareholders current accounts in Tzubi Investments Limited and the Flexa Group companies does not show a pattern of support through borrowing from the companies nor through repayment of any debt owed by the companies. Ms Green is concerned as to how he has maintained what she describes as *"a comfortable lifestyle"* since separation.

of Flexa Clinic Limited, Flexa Physio Limited, Flexa Studio Auckland Limited and Flexa Physio at Apollo Limited.

[53] The only asset of the Tzubi Trust that appears to have significantly increased in value post-separation is the commercial property that was held through Tzubi Investment and sold on 17 January 2020. Ms Green says that the increase is a product of inflation, not of hard work.

[54] It may be that Mr Hing is entitled to compensation under s 18B of the PRA should Ms Green succeed in establishing either that the bundle or package of rights in the Tzubi Trust and/or the Hing Family Trust are relationship property. Mr Hing might need to establish that his contributions have either caused an increase in the value of the real property or of the trading assets or that it is otherwise just that he be compensated for his contributions. Section 18B requires that he establish that he has done something which would have been a contribution to the marriage, and that it is just that he be compensated.

[55] However, it is difficult to see why he had a legitimate expectation to retain all of the assets of the Tzubi Trust and all gains from the assets of the commercial entities held by the Tzubi Trust. Those assets were always held by trust entities, and he was but one of three identified potential discretionary beneficiaries of those assets.[26]

[56] Ultimately, I cannot conclude that his decision to continue to practice his profession through the Tzubi Trust held companies and to continue to act as sole director of those companies amounts to prejudice of the kind envisaged in *Beuker v Beuker*.[27]

Extension of Time – Conclusion

[57] The delay in this case is moderate and at least partially explained. There are meritorious claims that both parties will want to present to the Family Court. I cannot conclude that Mr Hing has suffered significant prejudice as a result of the delay.

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[26] Although through the Hing Family Trust, [the parties' daughter] is the ultimate final beneficiary.
[27] *Beuker v Beuker*, above n 5.

[58] Standing back and looking at the overall justice of the situation, I conclude that it is proper that an extension of time for bringing the application be granted.

[59] There are significant issues between the parties that remain unresolved. Mr Hing's solution to that need for resolution is to say that all Ms Green needs to do is to agree to the assets of the Hing Family Trust being distributed equally and that there is no need for the Court to intervene. That is not an answer, particularly not where it is clear that the parties as trustees hold such divergent views as to what would constitute a fair resolution.

[60] An extension of time is granted accordingly.

Should I Grant a Declaration that Ms Green May Pursue her s 182 claim?

[61] Claims under s 182 of the FPA must be brought "*on or within a reasonable time after, the making of an order under [dissolving the marriage]*".[28]

[62] The application for a declaration that Ms Green is entitled to pursue her s 182 applications appears to be an attempt to "*head off at the pass*" any allegation that her s 182 application was not brought "*within a reasonable time after the dissolution*" of her marriage to the first respondent.

[63] On 15 October 2020, Ms Green filed her amended application for orders pursuant to s 182 of the Family Proceedings Act, naming Tzubi Trustee as second respondent and herself, Mr Hing and JT Trustee Company Limited as third respondent. Tzubi Trustee had been named as the second respondent since the PRA proceedings were filed. It is not conventional to name parties other than the relevant spouses or de facto partners as parties when proceedings are commenced under the PRA.

[64] On 9 November 2020, Ms Green applied for orders joining herself, Mr Hing and JT Trustee Co Limited as third respondents in their capacity as trustees of the Hing Family Trust. She then sought the declaration that she was entitled to pursue her

[28] Family Proceedings Act 1980, s 182(1).

application under s 182 "… *including one against the Hing Family Trust once the trustees are joined*".

[65] The assets of the Hing Family Trust are principally the proceeds of sale of their family home. While Mr Hing says the issue could be resolved simply by agreement between the parties, there is no agreement yet. In relation to that trust and the Tzubi Trust judicial intervention may be required.

[66] The applications under s 182, therefore, may be an appropriate vehicle to resolve the substantive issues raised by Ms Green's proposed applications.

[67] However, there is no express jurisdiction vested in the Family Court under the Declaratory Judgments Act. The Family Court has no inherent jurisdiction, absent any interlocutory application to strike out on grounds of delay (which is not encouraged), to declare the application has been brought within a reasonable period at this interlocutory stage.

[68] It follows that the part of Ms Green's omnibus interlocutory application dated 9 November 2020 which seeks a declaration is dismissed.

Should Mr Hing's Applications to Strike Out the s 182 Claims be Granted?

[69] In his application to strike out Ms Green's amended application Mr Hing asserted that the addition of the new course of action under s 182 of the FPA to a claim under the PRA was done "*in a manner that falls outside the requirements of both s 182 of the FPA and the relevant rules of court*". One of points that was being made is that a discrete application under s 182 ought to have been filed with the claims pleaded in a separate notice of application.

[70] Had such a separate application or proceeding been filed it would have inevitably been consolidated with the applicant's application for division of relationship property. I have already noted the principles in r 3 of the Family Court Rules 2002 echoed in s 1N(d) of the PRA urging such inexpensive, speedy and simple resolution as is consistent with justice.

[71] Ms Green now applies for joinder of the trustees of the Hing Family Trust who are Ms Green, Mr Hing and JT Trustee Company Limited. In her application for joinder she pleads firstly, that the trustees of the Hing Family Trust will have an interest in property which will be affected by orders sought in the proceedings: secondly, that their presence before the Court is necessary to enable the Court to effectively adjudicate the issues: thirdly, that rights of relief are sought: and fourthly, that she has claims under ss 44, 44C of the PRA and s 182 of the FPA in regard to the Hing Family Trust.

[72] Rule 133 provides for the striking out or adding of parties to proceedings and allows the court to order a party be joined or removed either on application or on the court's own initiative. Joinder orders may be made where the person's presence may be required to completely adjudicate on and settle all questions in the proceedings.

[73] In considering the respondent's application to strike out Ms Green's claim for orders under s 182, I am exercising the discretion that the Court possesses under r 193(1) of the Family Court Rules 2002 which allows the court to act either on its own initiative or on application made. The court may make an order if a pleading discloses no reasonable basis for the pleading, is likely to cause prejudice or embarrassment or delay, or is otherwise an abuse of the court's process.

[74] I note that Mr Hing had asserted that if the applicant was permitted to proceed "*in a way that contravenes proper process, I am likely to suffer significant prejudice and a miscarriage of justice is likely to result*". He did not elaborate on how a miscarriage of justice might ensue because of what is essentially an alleged procedural error.

[75] The threshold for strike out applications is high.[29] The power to strike out a pleading "… *is underpinned by the need to avoid prejudice or unfair advantage to a party in the proceedings*".[30] Courts have traditionally and rightly been reluctant to

[29] *TD v T* [2019] NZHC 2490 at [17].
[30] *Re Coyne* (2005) 24 FRNZ 922 (FC) at [25] per Judge Murfitt. The judgment includes a good summary of the principles for dealing with an application to strike out on the basis that the pleadings disclose no reasonable basis for the application at [24].

strike out pleadings or claims where any defects can be cured by an amended pleading.[31]

[76] To either strike out the pleading or decline Ms Green's application to join the Hing Family Trust would be inconsistent with r 3 of the Rules and s 1N(d) of the PRA.

[77] It is appropriate that the trustees of the Hing Family Trust be added as parties for the purposes of the application that Ms Green intends to file under s 182 of the FPA. I will make timetabling directions at the conclusion of this decision for the filing of a particularised claim, including any amended claim under the PRA. Those directions will include a timetable for the trustees of the Hing Family Trust to file any notice of appearance or response in relation to the FPA application. I will also formally direct notice under s 37 so that they can elect whether or not they wish to appear and be heard in relation to the relief that is sought under the PRA.

[78] I will give a similar direction in relation to Tzubi Trust. However, I decline the application to make a formal order striking out the existing pleadings under the PRA against Tzubi Trustee given that Ms Green will now be required to file an application which particularises the remedies she is seeking and the grounds of relief.[32] I will also make a formal direction that the applications under s 182 be considered with those under the PRA.

Has There Been a Failure to Give Notice Under s 37 PRA? If So is that Fatal?

[79] In submissions in opposition Tzubi Trustee says that "*the applicant has not undertaken the necessary step of serving a s 37 notice on the Tzubi Trust giving the Tzubi Trust the option, and its election, to participate in the proceedings. No orders can be made unless that process if followed*".

[80] This is not a point that was raised in any of the notices of opposition or memoranda that were filed prior to hearing. It may be a surprising submission that the

[31] At [24](iv).
[32] Noting that there is no pleading as yet under s 44 or s 44F of the Act for example.

Court might be barred from making orders against a party because a particular form of notice has not been given when:

(a) They are named as a party;

(b) They have actively opposed the applications before the Court on a significant number of procedural and substantive grounds; and

(c) They have been heard in opposition to the applications and this hearing has proceeded with ample notice to Tzubi Trustee of the applications the applicant was bringing and the date on which they would be heard.

[81] Section 37 of the PRA is headed "Persons entitled to be heard", and s 37(1) provides that before any order is made under the PRA, such notice as the court directs shall be given to any person having an interest in the property which would be affected by the order, and any such person shall be entitled to appear and to be heard in the matter as a party to the application.

[82] The decision of Chilwell J in the High Court in *Martin v Martin* is relied upon.[33] Mr and Mrs Martin had two sons, one of whom, Garry, was registered as a proprietor of their farm property as a tenant in common with equal shares with his parents. Garry had been joined as a second defendant to an application by Mr Martin for orders determining their shares in the farm. Mr Martin disputed that his son had any interest in the property. The Judge was asked to determine whether Garry had been properly joined as a party and if he was properly joined. Garry was represented and was heard on the issue. His Honour found:

(a) Garry was "*plainly a person entitled to appear and be heard under s 37*".

(b) The giving of such notice is not a condition precedent to entitlement to appear and be heard.[34]

[33] *Martin v Martin* (1982) 1 NZFLR 307 (HC).
[34] At 310.

[83] However, Chilwell J made a declaration that Garry had been improperly joined as a party. He had not been given notice under s 37 of the application and hence had not been given the option of appearing or not appearing.

[84] In *Martin v Martin* there was no statutory claim directed at the assets of the third party, Garry. In contrast in this case Ms Green seeks orders against the property of Tzubi Trust and/or Tzubi Investments. She applies under s 43 of the PRA for an order restraining disposition, under s 44C for compensation for disposition of property, and has indicated that she intends to apply under s 44. She has also filed a claim under s 182 of the FPA. In *Martin* the son Garry's position (sustained by the Court) was that the Court had no statutory power to make orders affecting his title to property. He successfully contended that he should not be a party, and that, therefore, he did not need to be heard on the relationship property application.

[85] In this case Tzubi Trustee has made it clear that it does intend to appear and be heard. It opposes Ms Green's claims on both procedural and substantive grounds. There is no doubt it would still have elected to appear and be heard if a notice had been issued formally which stipulated that it was being given under s 37 of the PRA.

[86] Counsel for Tzubi Trustee referred to other cases where s 37 had been cited or followed. In the Court of Appeal decision of *Johansen v Johansen* the essence of the decision was that the Court lacked jurisdiction under s 37 to make an order directing service on a third party because s 37 does not allow a spouse or spouses to join a third party with the intention of establishing a claim or interest in that third party's property independently of the PRA.[35] Such a claim requires separate proceedings to be issued.

[87] In *Staheli v Staheli* Judge Brown, relying on *Martin v Martin* and *Johansen v Johansen*, found that he could not make an order joining a trust as a party.[36] The trustees instead had to be given notice under s 37 and an opportunity to elect whether to appear or not. The Judge was not prepared to "*force the trust to become party to the proceeding*".

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[35] *Johansen v Johansen* (1993) 10 FRNZ 578 (CA).
[36] *Staheli v Staheli* [2017] NZFC 5287.

[88] Counsel for Tzubi Trust referred the Court to the relevant passages from *Fisher on Matrimonial and Relationship Property* where the view is expressed that the Court retains a discretion as to whether or not notice ought to be given under s 37(1).[37] The authors noted the wording "*Before any order is made under this Act, such notice as the Court directs shall be given to any person having an interest in the property …*".[38] (emphasis added). The authors note that given the number of decisions where a Court has subsequently held that a particular third party should have been given notice; it must be that a judicial discretion exists.

[89] None of the cases cited by counsel for Tzubi Trustee related to applications under s 43 of the PRA. Section 43 introduces its own discretion as to the notice that is to be given to any affected party. Section 43(1) allows the court to restrain a disposition *"…on such notice as the court may direct…"*.

[90] It is often necessary for the Court to make orders under s 43 on a without notice basis.[39] In those circumstances the Court effectively (although not always expressly) exercises the statutory discretion given in s 43 and proceeds on the basis that it is appropriate that the order be made without any prior notice being given.

[91] The Court's power to make orders under s 43 should not be and is not restrained by a requirement that the effected party first be given both formal notice under s 37 and an opportunity to elect whether to be heard. It would be ineffective for the purposes of urgent relief if it were so restrained. It follows that s 37 is not a bar to Ms Green's application for relief under s 43. However, it is open to question whether Tzubi Trust has otherwise yet been properly joined as a party for the purposes of the other relief that Ms Green is claiming, for example, under ss 44 and 44C of the PRA. I will deal with that in the orders and directions below.

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[37] RL Fisher (ed) *Fisher on Matrimonial and Relationship Property (NZ)* (online ed. LexisNexis) at [19.11].
[38] PRA, s 37(1).
[39] *S v S [Relationship Property]* [2008] NZFLR 227 (HC) confirms the power given to the Family Court, District Court and High Court to act ex parte – see paragraph [26].

Is a Failure to Seek Directions Under s 33A of the Trustee Acts 1956 Fatal?

[92] Both the first and second respondents say that a joinder of the trustees of the Hing Family Trust should not be permitted because Ms Green failed to comply with s 33A of the Trustee Act 1956, which is now s 137(2) of the Trusts Act 2019. That section provides as follows:

> **137 Trustee may sue self in different capacity**
>
> (1) Despite any rule of law or practice to the contrary, a trustee in that capacity may sue, and be sued by, the trustee in any other capacity, including the trustee's personal capacity.
>
> (2) However, in every such case the trustee must obtain the directions of the court in which the proceeding is taken about the way in which the opposing interests are to be represented.

[93] Their submission was that before issuing proceedings under s 182 Ms Green ought to have applied to the High Court for directions as to how the Hing Family Trust or any other "opposing interests" were to be represented. They argued that was a condition precedent to those proceedings or at least to the addition of the Hing Family Trust as a named party in the intituling to the amended application for orders pursuant to s 182 that Ms Green filed on 15 October 2020.

[94] As far as I am aware, it has not been the practice in this Court for parties to apply for directions under s 33A of the Trustee Act before commencing proceedings under s 182. However, under s 137 of the Trusts Act directions can now be given by this Court, ie: "*the Court in which the proceeding is taken*".[40] The ability of this Court to give directions is consistent with s 141 of the Trusts Act, which allows the Family Court to "*make any order or give any direction available under this Act*" if the order or direction is necessary to protect or preserve any property or interests or to give proper effect to any determination in the proceedings.

[95] It is unlikely that there will be trustee unanimity as to how Ms Green's application ought to be responded to. However, Mr Hing in his personal capacity will have an opportunity to present his views in opposition. I do not consider it necessary

[40] Trusts Act 2019, s 137(2).

for any other directions to be made; the Hing Family Trust held the parties' core domestic asset, their home. The only other capital or income it is likely to receive will come from the Tzubi Trust.

[96] I do not consider it necessary to make any particular directions for representation in relation to the Tzubi Trust. The interests of that trustee company are being actively represented, although it may be appropriate for the trustee to now reflect upon the nature of its opposition and how its legal costs are being funded given Mr Hing's continuing active opposition. However, if the trustees of either trust, or either of the parties consider any further directions as to service or representation are desirable, they may apply accordingly, and I will allow for that below.

[97] Again, I would consider it contrary to r 4 of the Rules and s 1N(d) of the PRA to strike out Ms Green's claims because she failed to seek directions prior to issuing her proceedings. The parties and the Tzubi Trust in particular would be better focused on addressing the substantive merits of the claims and applications.

Are the Undertakings Sufficient Protection?

The Undertakings

[98] In submissions Mr Illingworth QC, acting for Mr Hing, was able to offer undertakings, and Mr Phillips, acting for Tzubi Trustee was able to offer assurances from Mr Hoole. I recorded the undertakings on 19 May 2021. They included:

(a) An undertaking by Mr Hing that he would not remove Mr Hoole as a director of Tzubi Investment Trustee Company Limited.

(b) An undertaking that the $820,000 currently held on term deposit would be preserved and not disbursed.

(c) An undertaking by Mr Hing as the director of Flexa Physio Limited, that the $140,000 held in an account for that company would not be disbursed without an order of the Court permitting access to the funds.

He sought leave to apply on 48 hours' notice in the event that access was required for the purposes of working capital.

[99] The assurance offered from Mr Hoole was that the $820,000 that was on term deposit was not required for working capital and that he was confident that the Flexa Group businesses could continue to trade using revenue, subject to the possibility they may need to access some of the $140,000 held by Flexa Physio Limited.

[100] On 20 May 2021, Mr Illingworth filed a memorandum which disclosed that part of the $140,000 had been used by Mr Hing's account manager to pay some expenses. The memorandum said it had happened without Mr Hing's prior knowledge, and he did not know that the account balance had fallen below $140,000 when the undertakings were given. Mr Hing had arranged to make up the shortfall at his own personal expense and the undertakings were therefore confirmed.

The Restraining Order Application

[101] The application Ms Green filed for restraining orders was broad. She sought to restrain the second respondent and the first respondent "… *including in his capacity as director of [Tzubi Investments and the Flexa Group] from any disposition of property, including any cash, shares, property or other asset*".

[102] In submissions her application was refined to focus on the funds that remained following the sale of the commercial properties owned by Tzubi Investments for a total price of $4,800,000. The balance remaining at the date of hearing was:

(a) $820,000 held in a term deposit by Tzubi Investments.

(b) $140,000 "held in an unknown account". In fact, the first and second respondents have disclosed that the $140,000 is the balance remaining of an advance to Flexa Physio Limited from Tzubi Investments.

[103] Those funds are the only significant fungible assets and the most valuable asset by a significant margin of the entities owned by Tzubi Trustees.

[104] Ms Green raised issues which she says should lead the Court to infer that a disposition is being contemplated or is likely to occur in the near future.

[105] She was not informed about the sale of the commercial properties by Tzubi Investments. The sale was initially concealed from her and from the Court as well. In the affidavit that he swore on 13 February 2020 Mr Hing described the trust structures that were in place and said "*the Tzubi Investment Trust in turn **owns** the majority shareholding in what the applicant has described as the physiotherapy and sports medicine business and **the property located at 160 Lake Road** from which the business operates*" (emphasis added).[41] That was wrong, and Mr Hing must have known it was wrong.

[106] The commercial properties had been sold by Tzubi Investments to a third party under an agreement dated 20 November 2019. The agreement included a number of terms and conditions designed to ensure that the Flexa Group companies continued to tenant the property. It also included a "*tenant equity maintenance*" clause requiring the companies to retain capital at a certain level as an assurance of ongoing rental payment. The sale of the properties had settled on 31 January 2020, and the net balance received after costs of sale and repayment of the BNZ and other creditors was $1,410,511.39, which was paid into the BNZ.

[107] Ms Green says that the sale was only uncovered following inquiries by her accountant.

[108] Mr Hing had an opportunity to explain his incorrect evidence in later affidavits. He claimed there was "*an unfortunate slip-up*".[42] He did not say how such a "*slip-up*" might have occurred.

[109] However, Mr Hing explained why a decision was made to sell the commercial properties. He said there were significant and long-term issues with debt servicing and a withdrawal of support from the bank which had been long fore shadowed. Mr Hing was advised by a business mentor he had worked with for many years that the

[41] B82 Affidavit of M Hing, 13 February 2020, at [5].
[42] B562 Affidavit of M Hing, 13 August 2020, at [9].

sale of the properties would eliminate debt and free up capital, including working capital for the Flexa Group. Mr Hing said he would also *"be able to be compensated for the fact that I had not been paid a salary since 2012*".[43]

[110] Ms Green was also concerned that an undertaking that had previously been provided by Tzubi Trustee and Mr Hing had been breached. On 2 July 2020, an undertaking was signed by Mr Hing in his personal capacity and in his capacity as a director of Tzubi Trustee and of Flexa Clinic Limited. It referred to three term deposits:

(a) $30,000 held by Tzubi Limited, maturing 19 August 2020.

(b) $820,000 held by Tzubi Limited, maturing 22 July 2021.

(c) $300,000 held by Flexa Clinic Limited, maturing 19 July 2020.

[111] The undertaking given was that no steps would be taken to break the term deposits unless they were called on by a creditor to pay, in which case 10 working days' notice would be given. By no later than 5 August 2020, Ms Green was to be advised of *"their intentions regarding the funds maturing on 19 August 2020"* and they were to seek agreement regarding the use for reinvestment of those funds. If agreement was not reached the funds were to remain on call for a further period of 21 days following maturity to enable Ms Green to apply for a restraining order.

[112] The undertakings in relation to the $300,000 deposit and $30,000 deposit were subsequently breached when Mr Hing and his lawyers failed to advise Ms Green of how the money was being dealt with. She later learned that $250,000 was invested into another term deposit by Flexa Clinic Limited with a maturity date of 17 March 2021, the remaining $50,000 was in a current account and the $30,000 had been "*applied to legal fees*" which Tzubi Trustee had incurred in relation to Ms Green's claims.

[43] B700-704 Affidavit of M Hing, 3 November 2020.

[113] Mr Hing later explained this as "*an oversight*" as the relevant date *"came up amidst the turmoil of the developing situation in the second lockdown"* and that Tzubi Trustee's counsel Mr Phillips *"forgot to diarize the date which was then overlooked".* He claimed no prejudice had been suffered.[44]

[114] By the date of this hearing the term deposit holding $250,000 had been broken with only $140,000 remaining along with the $820,000 which is on deposit until 22 July 2021.

[115] Ms Green was concerned that funds that originally had a value of $1,150,000 had been reduced to $960,000. $190,000 had been spent since November 2020. No detailed explanation was provided by Mr Hing except to say that the money was required for business expenses such as working capital, salaries, or to pay creditors. From the respondents' submissions it was clear that a substantial part of the funds had also been applied to legal fees and the costs of the forensic accountant instructed by the second respondent. However, no details or breakdown of those fees were provided either in evidence or submissions.

[116] In his submissions in opposition Mr Hing said that the funds held on deposit were owned by the Flexa Group. It is difficult to see how that was so given that they were the proceeds of sale of property owned by Tzubi Investments.

[117] In its submissions in opposition Tzubi Trustee said that "… *the subsequent need to advise Ms Green of the intentions regarding the funds on term deposit as set out in the undertakings was not diarised*". They went on to submit that "*any benefit to the Flexa Group is a benefit to Ms Green. It must be to Ms Green's (through the family trust) benefit that the Flexa Group continues to operate to avoid the catastrophic consequences of failure*". That submission did not address the $190,000 that had been disposed of since November 2020 without a detailed explanation. It did not explain why the second respondent had thought it appropriate to apply significant funds that had been subject to an undertaking to pay its legal fees incurred in opposing Ms Green's claims – an expenditure that does not appear to benefit Ms Green.

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[44] B836, Affidavit of M Hing, 26 November 2020 at [48].

[118] The respondents say that $500,000 of the $820,000 that was retained on deposit must be retained for the duration of the 10-year lease between Flexa Physio Limited and the purchaser of the properties previously owned by Tzubi Investments. That is a result of a collateral deed which requires that a minimum shareholder equity of $500,000 be maintained by Flexa Physio as tenant for the duration of the lease.

[119] Ms Green was concerned that Mr Hing had consistently asserted in his personal capacity his belief that he was entitled to retain the commercial entities held by Tzubi Trustee as a result of the alleged informal agreement. The execution by Mr Hing alone of the "agreement" allegedly acknowledging a $1.8 million debt to him exacerbated her concerns.

[120] There were further examples where it was submitted Mr Hing had made incorrect statements in his affidavits. At paragraph [16] of his affidavit sworn 13 February 2020 he referred to his claim that he had not been paid wages for six years and was owed $1.8 million for the period 2013 to 2019. He said, "*this is the advice of my accountant and is recorded in the company accounts*". The companies' financial accounts disclosed no such record: his counsel conceded this in submissions. Again, Mr Hing should have known that statement was untrue. There is no corroborative evidence that he had been advised by his accountant in relation to the alleged salary debt.

[121] Ms Green was also concerned about an email that Mr Hing had received from an accountant, Lyle Irwin, on 11 December 2019. The letter commences "*I have detailed below the proposal for accessing the funds ex Tzubi Limited once settled, given I have been made aware by Murray (Hing) that this company CANNOT now be wound up immediately after as this could jeopardise the ongoing matrimonial dispute entitlements*". That email went on to detail a series of proposed transactions which would include *"the remaining funds to be accessed for Murray later for a potential house purchase can then be dealt with separately when that happens*".

[122] The letter does not appear to acknowledge Mr Hing's obligations as director of Tzubi Trustee to the beneficiaries of that trust and indeed the Hing Family Trust.

Ms Green's concern was that the letter evidenced a plan to divest Tzubi Trustee and hence the Tzubi Trust, of its assets in favour of Mr Hing to defeat Ms Green's claims.

[123] Considering that background Ms Green's concern that Mr Hing or Tzubi Trustee might dispose of assets in order to defeat her claim or right was understandable. Despite the undertakings and assurances that I have recorded Ms Green nonetheless seeks a restraining order.

[124] However, Mr Hing says that the $820,000 held on deposit is significantly more than 50% of the value of the assets held by Tzubi Trustee and therefore it is not essential that the entire fund be retained.

The Valuation Opinions

[125] There is competing expert evidence on that issue. Ms Green produced an affidavit and report from an experienced forensic accountant, Mr Hussey. He placed a value on the Tzubi Investments shares as at March 2020 of $1,867,000 with Ms Green's 50% interest being $933,000.

[126] In an analysis of the Flexa Group and Tzubi Investments accounts Mr Hussey identified a large number of subvention of income tax loss payments made post-separation. Mr Hussey expressed the view that "*but for this subvention of tax losses post-separation such 2020 value of Tzubi Investments would have been $2.617 million with Ms Green's 50% interest being $1.308 million*".

[127] Mr Hussey's opinion was that the shares in all or any of the Flexa Group companies had no value as at March 2020.

[128] Mr Hussey did not explain how a Family Court might deal with the issue of the subvention payments. It is not apparent how that value might be "clawed back" if that is what is envisaged, nor why it might be appropriate to do that.

[129] Tzubi Trustee commissioned a report from another experienced forensic accountant, Mr Anthony Davis. Mr Davis produced valuations for the Flexa Group Companies, Tzubi Investments and Tzubi Trustee.

[130] For the Flexa Group Companies he adopted a notional liquidation approach to valuation. In his opinion they had no value at 31 March 2020, but they had a "*third party creditor shortfall*" of $195,300.

[131] In Mr Davis' opinion Tzubi Investments on a net asset approach had a value of $1,373,700 at 31 March 2020.

[132] The 99% interest held by Tzubi Trustee in both Flexa Group and Tzubi Investments combined was valued by him at 31 March 2020. In his opinion there were $383,500 worth of investments that could not be recovered at that date resulting in a net combined valuation of $990,200.[45]

[133] I am not in a position to determine if either of the valuers' opinions are correct in the context of this interlocutory hearing. The value that Mr Hussey attributes to Tzubi Investments might be optimistically high given the apparent absence of significant assets to support that valuation other than the proceeds of sale of the commercial properties. However, discovery is yet to be completed and neither experts' opinion has been tested in cross-examination.

[134] Mr Hoole's affidavit of 14 April 2021 provides the Court with some useful information. Of the $140,000 still held he says, "*provision needs to be made for the trust's future legal fees*". He says he understood that it was always intended that part of the proceeds of sale would be available as working capital for the Flexa Group to use for commitments to pay out, such as rent, wages and taxes. "*The business does not have any significant assets against which it can borrow, and it must therefore have recourse to the funds which were set aside for working capital. That does not include the $820,000 which is currently on term deposit*".

[135] The $960,000 which is subject to the undertakings is considerably more than Mr Davis says Ms Green might receive should there be a 50% division of Tzubi Trustee's assets. It is, however, less than Mr Hussey says she might receive. In the absence of evidence that there are any other assets to satisfy Ms Green's claims all that

[45] Net value of Tzubi Investments $1,373,700 less unrecoverable assets of $383,500. The irrecoverable investment of $350,824 was a write down in the value of an advance made to Flexi Physio.

is required is an assurance those funds will be available until the substantive issues are resolved.

[136] Ms Green does not trust Mr Hing to comply with the undertakings pointing to the history outlined above. However, the continued appointment of Mr Hoole as a director of Tzubi Trustee provides an additional level of assurance. Mr Hoole's assurance to the court that the $820,000 will not be needed for working capital combined with the requirement for court approval before any of the $140,000 is utilised entails an assumption of personal responsibility by him as a director of Tzubi Trustee. In light of those undertakings and assurances I have decided, on balance of probabilities, that it is not necessary to make a restraining order. Ms Green might have a claim in excess of the funds retained, but there are no other assets of the Tzubi Trust identified which can be restrained.

Should the Application for Restraining Order be granted?

[137] It follows that I do not need to consider whether the grounds for granting a restraining order under s 43 PRA are made out. An order is unnecessary given the undertakings.

Should an Order be Made Removing and Replacing a Trustee?

[138] The Trusts Act 2019 in s 141 introduced a significant new jurisdiction to the Family Court, which came into effect on 30 January 2021 and which relevantly provides as follows:

> **141 Jurisdiction of Family Court**
>
> (1) This section applies where the Family Court has jurisdiction under section 11 of the Family Court Act 1980 to hear and determine a proceeding.
>
> (2) The Family Court may during the proceeding make any order or give any direction available under this Act if the Family Court considers the order or direction is necessary—
>
> (a) to protect or preserve any property or interest until the proceeding before the Family Court can be properly resolved; or

(b) to give proper effect to any determination of the proceeding.

…

(5) To avoid doubt, an exercise by the Family Court of jurisdiction under this section is not subject to financial limits in relation to the value of any property or interest. …

[139] On 7 December 2020, Ms Green replied for an order removing Tzubi Trustee as trustee of the Tzubi Trust and appointing Public Trust, or in the alternative, appointing herself as trustee of the Tzubi Trust.

[140] In support of that application Ms Green cited:

(a) The failure of Mr Hing and the trustee to notify her about the sale of the commercial properties.

(b) The disposal of some $190,000 of the sale proceeds since November 2020.

(c) The breach of the undertakings that were given in relation to the sale proceeds.

(d) Mr Hing's attempts *"to retrospectively establish the companies owned by Tzubi Trustee owe him an unpaid salary totalling $1.8 million"*.

(e) That *"Mr Hing treats the assets of Tzubi Trustee as if they are his own"*.

[141] Ms Green does have grounds to be concerned about Mr Hing's actions given that he has, at least until now, effectively held sole control of Tzubi Trustee and the entities it owns in his position as sole director.

[142] There are aspects of the conduct of the trustee which cause Ms Green concern, including the continued payment of the costs of this litigation out of trust assets without the benefit of court approval via a *Beddoe* order.[46]

[46] *Re Beddoe* [1893] 1 Ch 547

[143] In response Mr Hing and the Tzubi Trustee principally raise procedural issues. Firstly, Mr Hing says the application is a nullity because it was filed before the Family Court had power under s 141, at a time when the power to remove trustees was exclusively held by the High Court under both the Trustee Act 1956 and the High Court's inherent jurisdiction to supervise the conduct of trusts. However, by the date of hearing the Court had the power to "*make any order or give any direction available under (the Trusts Act)*". I do not consider that argument to be a barrier to the relief sought.

[144] The second respondent argued that s 141 did not in fact give the Family Court the power to appoint or remove trustees. They submitted it is s 114 of the Trusts Act which contains the specific power to appoint or replace trustees. They say that the review of the Law of Trusts by the Law Commission recommended that the District Courts have express jurisdiction concurrent with the High Court to appoint and remove trustees, but that this recommendation was not adopted.[47]

[145] A specific discreet provision giving the Family Court power to appoint and remove trustees does not feature in the Trusts Act, but the wording of s 141 could hardly be clearer. The Family Court now has the power to make <u>any</u> order or give <u>any</u> direction available under the Trusts Act provided the Court considers the order or direction is necessary to either protect or preserve any property or interest pending resolution, or to give proper effect to any determination of the proceedings. That includes, where "*necessary*", orders replacing trustees. If it were thought necessary to make such an order the provisions of S114 of the Trusts Act would then need to be considered and there is a significant volume of relevant case-law on the issue of removal of trustees.[48]

[146] The second respondent noted that Ms Green had asked that the Public Trust be appointed without complying with s 114(3) of the Trusts Act which requires the Court to give the Public Trust an opportunity to be heard before it is appointed as a replacement trustee.

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[47] Law Commission *Review of the Law of Trusts: A Trusts Act for New Zealand* (MZLC R130, 2013).
[48] Including the line of cases in New Zealand which apply the principles derived from *Letterstedt v Broers* (1884) 9 App Cas 371 (PC).

[147] During submissions Ms Green suggested that instead of the Public Trust being appointed an independent individual trustee, specifically Mr Jeff Meltzer, a retired accountant might be appointed.[49]

[148] The difficulties with that proposal were:

(a) There was no indication from Mr Meltzer that he was willing to undertake the job.

(b) There was no indication from Mr Meltzer as to what his costs might be, and hence no ability for the parties or the Court to assess the practicability of his being appointed.

(c) The terms of the trust deed for Tzubi Trustee require that "*if the trustee appointed is not a corporate trustee then there shall be not less than two trustees appointed*".[50]

[149] Ms Green's counsel suggested in submissions that the Court might make directions as to the appointment of alternate trustees allowing the parties time to come back with suggestions as to suitable appointments and evidence of their consent to the appointment.

[150] That might be practicable if appointment of new trustees were truly urgent, however. I first must be satisfied that the order or direction is necessary to protect or preserve property pending resolution.

[151] The Family Court does not have a general power or jurisdiction to "police" conduct of trustees whether under s 141 or otherwise. Some of the concerns that Ms Green raises as to the historical conduct of Mr Hing as the director of Tzubi Trustee do not directly impact on the future protection or preservation of property or interests.

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[49] Ms Green abandoned her proposal that she be appointed.
[50] Clause 9A of the trust deed.

[152] Section 141 says that resort should be made to the orders or directions available under the Trusts Act only where such resort is "*necessary*". If there is a practicable alternative which will protect or preserve the relevant property, the order or direction would not be "*necessary*" and hence would not be available to the Family Court.

[153] Mr Hing and Tzubi Trustee submit the appointment of a new trustee might also have some unintended and unfortunate consequences. Mr Hing and Tzubi Trustee are guarantors under the lease of the commercial premises with the new owner. The respondent suggests the removal of company as a trustee might be a breach of a covenant in the lease and might lead to forfeiture, re-entry or further action by the landlords of Flexa Group.

[154] However, I do not need to decide whether that submission is right. I have found that the undertakings are sufficient to prevent a disposition of property in order to defeat Ms Green's claim. They are also sufficient to "*protect and preserve any property or interest until the proceeding before the Family Court can be properly resolved*". It is not *"necessary"* for me to make an order removing the current trustee. That application is accordingly declined.

Should All of Ms Green's Discovery Orders be Granted?

[155] Ms Green's application for discovery was directed to Mr Hing and Tzubi Trustee. She sought an order for the filing of an affidavit of documents and sought disclosure of the following classes of documents:

(a) Copies of all bank statements for the above companies since the date of separation including any loans or term deposits.

(b) Copies of all documents in regard to the sale of properties held by Tzubi Investment.

(c) Copies of all documents held by Jim Thompson – Barrister and Solicitor, in regard to the Hing Trust and the Tzubi Trust.

(d) Full sets of accounts for the Hing Trust and the Tzubi Trust since their date of settlement.

(e) Any deeds of amendment for the Hing Trust and the Tzubi Trust.

(f) Copies of all trustee resolutions for the Hing Trust and the Tzubi Trust.

(g) Copies of all trustee minutes for the Hing Trust and the Tzubi Trust.

(h) Copies of bank statements for Murray Hing including any overseas accounts since the date of separation including any loans or term deposits.

[156] Some of the documents requested may already have been supplied. It seems that some of them do not exist.[51]

[157] However, in the context of these proceedings it is reasonable for Ms Green to require an affidavit of documents to be filed by Mr Hing and Tzubi Trustee. The lists of documents should include the relevant documents that have already been the subject of informal disclosure between the parties for the avoidance of any doubt as to what has and has not been disclosed.

[158] The respondents' initial opposition to Ms Green's application for discovery was moderated in oral submissions. In written submissions Mr Hing had submitted that the discovery order was "*extravagantly excessive in its breadth and extends to potentially large classes of documents that have no apparent relevance to the matters at issue in these proceedings, including documents potentially held by third parties who are not currently subject to orders of the Court in this litigation (including the trustees of the Hing Family Trust)*".

[159] In oral submissions concern was expressed about orders being made to disclose documents that might no longer be available; for example, bank statements going back

[51] It was disclosed in submissions that financial accounts have never been prepared for the Hing Family Trust or the Tzubi Trust, although there are full sets of accounts available for the entities owned by Tzubi Trust.

a decade or more may not have been retained and may not be available from the bank. That is no barrier to the order for discovery being made. Such an order and the list of documents consequent upon such an order would simply require the party giving discovery to depose as to the documents that are in their possession, power or control. To the extent that there are any documents that are not in their possession, power or control or that are no longer in their possession, power or control (ie: bank statements that may have been lost or destroyed years ago and not retained by the bank) the affidavit of documents contains a section which addresses those issues.

[160] The second respondent indicated there was no opposition to disclosure of the documents listed in (b), (c), (d), (e), (f) and (g) above. They submitted however, that if source documents were required other than financial accounts, the experts should confer and agree on what further, if anything, may be needed.

[161] In *Clayton v Clayton* the Court of Appeal recognised that full and frank disclosure of relevant information by the parties was necessary for the Court to determine the outcome of relationship property issues under the PRA.[52] As the Court of Appeal said in *M v B* "*total disclosure and cooperation*" is required between parties in proceedings under the PRA.[53]

[162] Kös J in *Dickson v Kingsley* highlighted the need for a robust approach which is consistent with the purpose of the Act.[54] Discovery should take account of the aim of the Act that there should be inexpensive access to justice. Discovery should not be onerous. It should be reasonably necessary at the time it is sought and tailored to enable the Court to deal with the relationship property matter efficiently and justly.

[163] Tzubi Trustee's principle objection seems to be to disclosure of all bank statements which was said to be *"unduly onerous, disproportionate and unnecessary"*.

[164] It is likely that in a well-ordered company all the bank statements would have been retained in a particular electronic or physical file and discovery would not be onerous. Alternatively, available statements can be obtained from the relevant banks.

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[52] *Clayton v Clayton*, above n 12.
[53] *M v B* [2006] 3 NZLR 660 (CA) at [49].
[54] *Dickson v Kingsley* [2015] NZHC 2044, [2015] NZFLR 1012.

There may be a small charge for some historical documents. It may not be possible to obtain documents going back as far as is requested.

[165] Ordinarily, I would be reluctant to make an order for disclosure of bank statements dating back for the decade or so since the parties separated. That level of information is not usually relevant to the division of relationship property as it exists at the date of hearing.

[166] However, Mr Hing has had control of the commercial assets held by the Tzubi Trustee since separation. He claims that he has received no remuneration from the company but has not explained how his lifestyle was funded. Although he said on oath that he was entitled to salary at the rate of $300,000 per annum and that this was "*recorded in the company accounts*", it is not recorded there. If Ms Green's claim that the value of the assets held in Tzubi Trustee is effectively relationship property succeeds, it is likely that Mr Hing would seek compensation under s 18B of the Act.

[167] In those circumstances the disclosure of his personal bank statements and the disclosure of the bank statements for the company are relevant and necessary. Ms Green and the expert that she has retained are entitled to be able to ensure that the accounts prepared present an accurate picture of the companies' income and expenses. Both they and the Court are entitled to be confident that Mr Hing's claims that he was unremunerated and unsupported by the commercial entities owned by Tzubi Trustee are true given the absence of other evident means of support.

[168] Therefore, I make an order that Mr Hing and the second respondent file a list of documents within 28 days detailing the relevant documents that are in their possession, power and control as listed in paragraph [159](a) to (h) above, including those that have already been disclosed to Ms Green.

Directions and Orders

[169] The directions and orders which follow are intended to ensure that this case is effectively and efficiently progressed.

A. Mr Hing's claim under s 182 against the trustees of the Yep Family Trust is to be consolidated with these proceedings. Those applications should be heard together.

B. Leave is granted to Ms Green to join the trustees of the Hing Family Trust as a party to her claim under s 182. The trustees are also, by this direction, given notice under s 37 of the PRA that they are entitled to be heard in relation to Ms Green's claims under the PRA. They are to respond by 23 July 2021.

C. Tzubi Investments Trustee Company Limited is to remain a party to these proceedings in relation to Ms Green's claims against that trust under s 182 of the FPA. I have already determined that they have effectively been given notice under s 37 of Ms Green's claims under the PRA. However, should they decide that they do not wish to continue to oppose, they may notify the Court accordingly by 23 July 2021.

D. Ms Green's claims against the Hing Family Trust and Tzubi Investments Company Limited under s 182 are consolidated with the proceedings under the PRA.

E. Ms Green is to advise whether or not there are other parties who need to be given notice under s 37 should she be of the view that there are other parties which have an interest in property which might be affected by orders made under the PRA.[55] She is to advise the Court by way of memorandum by 16 July 2021 of any party to whom a s 37 notice ought to be given. Any memorandum can be referred to me for directions.

F. If the trustees of either trust or Mr Hing consider that directions as to service or representation ought to be given to anyone else, particularly anyone who may have an interest in or claim to property which may be affected by the Court's orders, they are to file a memorandum with the details by 16 July 2021. Any memoranda can be referred to me in chambers.

[55] Tzubi Investments Limited and/or Flexa Physio Limited.

G. By 30 July 2021, Ms Green is to file an amended particularised application for relief under the PRA and the FPA, incorporating any additional claims which have not yet been pleaded.[56]

H. Any notices of opposition are to be particularised and are to be filed by 20 August 2021.

I. Ms Green's application for a declaration that she can proceed with her s 182 claim against the Hing Family Trust is dismissed.

J. Mr Hing's application to strike out Ms Green's applications brought under s 182 which is dated 15 October 2020 is dismissed.

K. Ms Green's application for an interim restraining order under s 43 is dismissed. The undertakings given by the respondents remain in effect until further order of this court.

L. Ms Green's application for an order removing trustees is dismissed.

M. An order for discovery is made in terms of paragraph 155 above. Lists of documents are to be filed by 6 August 2021.

N. Inspection is to be completed by 20 August 2021.

O. Counsel are then to confer and agree on a timetable for the filing of any additional evidence. They are to file a joint memorandum as to directions sought to complete the evidence and ready the matter for hearing by 27 August 2021. Any points of difference can be noted in that memorandum.

P. Any necessary additional interlocutory applications are also to be filed by 27 August 2021. Any notices of opposition are to be filed by 7 September 2021.

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[56] The claims that she has foreshadowed under s 44 of the PRA.

Q. A one-hour Directions conference before me will be held on 8 September 2021 at 10 am. The purpose of the conference is to progress the matter to hearing and address any outstanding interlocutory issues.

Costs

[170] If any party seeks costs, they are to file a memorandum outlining the basis for their claim and the quantum sought by 23 July 2021. Any response is to be filed by 6 August 2021. Memoranda and responses are to be limited to six pages plus any relevant schedules annexing tables of scale costs or the like.

[171] I encourage the parties to constructively engage in negotiation or ADR. The quantum of property available for division here is not significant given the level of disagreement between the parties and the complexity of the legal issues. It must be a matter of concern to everyone involved that the proceeds of sale of the family home have remained undivided for so long because Mr Hing and Ms Green have been unable to resolve their differences. This has been a complex and hard-fought interlocutory application. The issues involved in the applications for substantive relief are legion and the cost involved in seeing this litigation through to its conclusion may be out of proportion to any gain that either party might make.

Signed at Auckland this 5th day of July 2021 at am / pm

K Muir
Family Court Judge