IN THE FAMILY COURT
AT MANUKAU

I TE KŌTI WHĀNAU
KI MANUKAU

FAM-2019-092-000495
FAM-2019-092-000498
[2022] NZFC 11802

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
AND IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	DIANNE LYNAIRE THORBURN Applicant
AND	KEVIN JOHN MOWLES Respondent

Hearing:	14,17,18,21,22 February 2022
Appearances:	L La Mantia for the Applicant R Gay for the Respondent
Judgment:	18 November 2022

RESERVED DECISION OF JUDGE GJ WAGNER

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[1] Dianne Thorburn and Kevin Mowles seek the Court's determination on various issues relating to the division of their relationship property and financial support following their separation.

[2] The matter was heard over five days with evidence from both parties and a number of witnesses in support of Ms Thorburn.

The Issues

[3] The issues for determination are:

1. Commencement and end date of the parties' relationship.

2. Was there an oral agreement between the parties which should be given effect to in accordance with s 21H Property (Relationships) Act 1976 (the PRA)?

   If not;

3. Should there be unequal sharing of relationship property in favour of Ms Thorburn (s 13 PRA)?; and/or

4. Ms Thorburn's claim to an interest in Mr Mowles' shares and superannuation (ss 8, 9A and 17 PRA); and/or

5. Ms Thorburn's claim to an interest in Mr Mowles' share in the property at 24 Defender Crescent, Beachlands (s 9(4)).

6. Value and division of family chattels.

7. Ms Thorburn's compensation claim for dissipation of relationship property in relation to the Maxum boat (s 18C).

8. Division of sale proceeds of Galailai boat.

9. Extent of rental income received by Ms Thorburn/sharing of same.

10. Post-separation compensation claims (s 18B) for:

    i. Performance of services (Ms Thorburn).

    ii. Payment of occupation rental by Ms Thorburn (Mr Mowles).

11. Adjustment for Ms Thorburn's post separation over spend from joint accounts.

12. Ms Thorburn's claim for past spousal maintenance.

[4] The only issues the parties had been able to agree on were:

a) An interim distribution from the sale proceeds of the former family home;

b) The date of separation balance of Ms Thorburn's KiwiSaver ($32,458.49), to which Mr Mowles is entitled to a half share; and

c) The shares in Hi Tek Marine NZ Limited (**Hi Tek**) are relationship property; they have negligible value; the shares are to be retained by Mr Mowles; there is to be no adjustment to Ms Thorburn.

Background

Previous relationships

[5] Ms Thorburn was formerly married to Neil Cameron, with whom she had three children. Their marriage ended in 1998. She afterwards acquired the property at 28A The Links, Mt Maunganui (**The Links**).[1]

[6] Mr Mowles was previously married to Deborah Mowles. They also had three children together. They separated in 2003. On 18 March 2004 the Mowles executed a s 21A agreement, pursuant to which Mr Mowles retained the following property:

(a) Their family home at 188 Maungakawa Road, Cambridge (**Maungakawa**).

(b) His 1,650 class B shares in Brevini New Zealand Ltd (**the Brevini shares**).

(c) His UK Brammer Services Retirement Benefit Scheme Pension (**the Brammer pension**).

[1] Essentially using her share of the relationship property upon separation, though some time later. It was purchased in January 2003 for $170,000.

(d) Various family chattels and other miscellaneous property.

[7] In consideration for retaining that property, Mr Mowles agreed to pay Ms Mowles the sum of $50,000.

Ms Thorburn and Mr Mowles

[8] Ms Thorburn and Mr Mowles met in May 2003. At that time, Ms Thorburn was living at The Links with the youngest of her three children.[2] Mr Mowles was living at Maungakawa with two of his three minor children.[3]

[9] At some point between then and April 2004, the two began an intimate relationship.

[10] They dispute the commencement date of their de facto relationship. Ms Thorburn claims it commenced in April 2004, when they started looking for a joint property. She selects 21 April 2004 specifically, that being the date they entered the lending structure to purchase their first joint property (see below at [12]). Mr Mowles claims it commenced in July 2004 when they moved into another joint property with their respective children.

[11] They married on 3 March 2007.

Property acquisitions

[12] The parties began looking for a joint property in early 2004. On 21 April 2004, they entered into a lending structure to purchase the property at 111 Thompson Street, Cambridge (**Thompson Street**). They purchased the property that same month. Ownership was in their joint names. So too was the mortgage, the purchase having been 100 per cent financed through ASB and both The Links and Maungakawa used as security.

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[2] The older two were already independent.
[3] The third was living with his former wife.

[13] They dispute whether they intended Thompson Street to be their first family home (Ms Thorburn's position) or an investment/rental property (Mr Mowles' position).

[14] In any event, in July 2004 they purchased the property at 24 Bracken Street, Cambridge (**Bracken Street**) and, with Ms Thorburn's daughter and Mr Mowles' two children, moved in. Around this time, Mr Mowles sold Maungakawa; the proceeds went towards the purchase of Bracken Street.

[15] They purchased for investment purposes the property at 33 Tennyson Avenue, Cambridge (**Tennyson Ave**) in February 2005. They subsequently subdivided the property. They sold the new section at 33A Tennyson Avenue, then 33 Tennyson Avenue in November 2005. The proceeds went towards reducing joint debt.

[16] In February 2006, the parties sold Bracken Street and purchased their second family home at 26 Norfolk Drive, Cambridge (**Norfolk Drive**). They also sold Thompson Street in early 2007, applying the proceeds to reduce the mortgage over Norfolk Drive.

[17] In April 2014, the parties purchased what transpired to be their final family home at 41 The Circle, Manly (**The Circle**) for $785,000, which they owned jointly.

The Links sold to Molay

[18] On 26 February 2009, the parties set up Molay Holdings Ltd (**Molay**), a loss attributing qualifying company (or LAQC), with the professional assistance of Ms Thorburn's brother, Ross Thorburn. Both Ms Thorburn and Mr Mowles were directors. Mr Mowles held 99 per cent of the shares and Ms Thorburn the balance.

[19] The agreed purpose for incorporating Molay and structuring the shareholdings as they did was to reduce their overall income tax liability. Ms Thorburn says the specific primary purpose in reducing Mr Mowles' taxable income was to minimise his

child support liability (all three of his children by that point living with his former wife).

[20] The Links was transferred to Molay on 3 April 2009 for $309,000.

The Links sold to Renee

[21] In March 2015, Molay sold The Links to Ms Thorburn's daughter, Renee and Renee's fiancé for the sum of $335,874.11.[4]

[22] The proceeds were used to repay bank debt of $306,634 in the company's name.[5] The balance of approximately $29,200 was applied to reduce a joint overdraft.

End of relationship

[23] On 13 February 2016, Mr Mowles advised Ms Thorburn he wanted to separate. He moved out of their family home on 28 February 2016.

The proceedings so far

[24] The proceedings have included interlocutory applications for discovery and interim distribution of relationship property. By consent order dated 27 September 2019, an interim distribution was made from the proceeds of sale of The Circle to each party in the sum of $190,000.

Property involved

[25] The major assets existing at the date of separation were The Circle and Mr Mowles' Brevini shares (which he claims as separate property). After significant renovation and rectification works undertaken post separation, The Circle was sold in early 2018 for $1,310,000. The net sale proceeds totalling $786,728.81[6] have been held on trust by Ayres Legal since settlement on 27 April 2018.

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[4] According to Ms Thorburn calculated based on a market value of $350,000, less notional real estate agents commission and a contribution to Renee's wedding.
[5] #91-003 & #91-004 loans of $56,634 and $250,000 respectively.
[6] Less the $380,00 interim distribution from September 2019.

[26] There are also family chattels, including two boats; Ms Thorburn's Kiwisaver; bank accounts; Hi Tek shares; and Mr Mowles' Brammer pension (again which he claims as his separate property).

Issue 1 – When did the parties' relationship start and end?

Issue 1a Commencement date

The Law

[27] Section 2D(1) of the PRA defines "de facto relationship" as follows:

> (1) For the purposes of this Act, a de facto relationship is a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman)—
>
> (a) who are both aged 18 years or older; and
>
> (b) who live together as a couple; and
>
> (c) who are not married to, or in a civil union with, one another.

[28] Section 2D(2) sets out the matters the Court may have regard to in determining when a de facto relationship exists. Such weight may be attached to any matter as deemed appropriate.[7] It is an evaluative task, and is not limited by the matters set out in s 2D(2), i.e. it is a non-exhaustive list.[8]

[29] The factors in s 2D(2) are:

> (a) Relationship duration:
>
> (b) nature and extent of common residence:
>
> (c) if a sexual relationship exists:
>
> (d) degree of financial dependence or interdependence, and any arrangements for financial support, between the parties:

[7] Property (Relationships) Act 1976, s 2D(3)(b).

[8] *L v P [Division of property]* [2008] NZFLR 401 (HC) at [43]; *B v F* [2010] NZFLR 67 at [50]; *Scragg v Scott* [2006] NZFLR 1076 (HC).

(e) ownership, use, and acquisition of property:

(f) degree of mutual commitment to a shared life:

(g) care and support of children:

(h) performance of household duties:

(i) reputation and public aspects of the relationship.

[30] Although it is not necessary for the Court to make a finding on any of the factors listed in s 2D(2),[9] they are a useful guide in determining the start date of a de facto relationship. I address them below.

[31] *Relationship duration*: The parties knew each other for 11 or 14 months, if their relationship commenced in April or July 2004 respectively. Theirs was a relatively lengthy relationship regardless when it commenced. Little turns on this factor.

[32] *Sexual Relationship*: Ms La Mantia's closing submissions assert the parties were in an intimate relationship prior to April 2004[10], though there is no specific evidence to support this. Again however little turns on this.

[33] *Performance of household duties and care of children*: There is little evidence on division of household responsibilities around either 2004 date. Similarly, there is little discussion regarding the care of each other's children, other than Ms Thorburn's recollection at the hearing that early on in the relationship (so a different timeframe) she had to "collect Becky from school, take her to I think it was dance classes and things like that".[11]

[34] *Public aspects of the relationship*: There is no direct evidence regarding the point at which the parties began presenting themselves to the outside world as a couple.

[35] Mr Caldwell recalled meeting Ms Thorburn at Mr Mowles' apartment in February/March 2004, but didn't think they were living together at that time. In

[9] Property (Relationships) Act 1976, s 2D(3)(a).
[10] Closing submissions of Dianne Lynaire Thoburn (7 March 2022) at [7(d)].
[11] NOE pg 8 lines 26-27.

response to the Court's question on his understanding as to when they did start living together, he replied "Thompson Street". He then qualified this by acknowledging he was going back 15-17 years, but said "I would have thought that Dianne would have moved in directly to that one bedroom unit[12] before they moved to Thompson Street together…". [13] This evidence isn't reliable however[14] as the couple never lived together at Thompson Street. Furthermore, Mr Mowles had moved from the small apartment he was living in when the parties met into Maungakawa for the short time between acquiring it from his first wife and moving into Bracken Street with Ms Thorburn.

[36] *Nature and extent of common residence*: Ms Thorburn first asserted the de facto relationship commenced in May 2004.[15] She subsequently said it commenced when they bought their first property together, in April 2004, by which time they had already decided to live together. [16]

[37] Mr Mowles did his own date changing. He first claimed in his Notice of Defence that the de facto relationship started in May 2004, later changing this to July 2004.

[38] Ms Thorburn originally stated at the hearing that they first shared a common residence at Maungakawa from May to July 2004, and she considered this her "home".[17] She said between these months, whilst still based at the Mount, she spent most weekends at Maungakawa plus some week days (given her flexible work hours). Although her daughter, Therese sometimes also went, Ms Thorburn said at 14 years of age Therese was very independent and stayed back a lot with a close friend. Ms Thorburn says she renovated Maungakawa for the purpose of sale alongside Mr Mowles, and she had "free run" as "lady of the house".[18]

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[12] Not entirely clear, but understood to be the small apartment Mr Mowles was living in with his two sons when the parties met.
[13] NOE pg 184 lines 12-14.
[14] Not intended as a criticism of Mr Caldwell given the length of time that had elapsed.
[15] Narrative affidavit of applicant (16 May 2019) at [3](b).
[16] Second narrative affidavit of applicant (23 August 2019) at [7].
[17] NOE pp 8, 9, 12 and 37.
[18] NOE pg 9 lines 4-5.

[39] Somewhat contradictory however, Ms Thorburn later said she considered Bracken Street as the couple's first family home together as Maungakawa was Mr Mowles' ex-wife's property.[19] Undeniably Ms Thorburn was still based at The Links, as was her daughter, until they both moved to Bracken Street in July 2004.

[40] *Degree of mutual commitment to a shared life* / *Nature and degree of financial dependence or interdependence* / *Ownership, use, and acquisition of property*: This appears to be the crux of Ms Thorburn's argument for an earlier commencement date. She states she believed there was a mutual commitment to a shared life together when the couple started discussing a joint property purchase, cemented when they subsequently intertwined their financial affairs for their purchase of Thompson Street.

[41] Mr Mowles confirmed they opened a joint bank account after signing the agreement to purchase Thompson Street.[20] At the hearing he agreed they were significantly financially interdependent by April 2004.[21] I reject his assertion, made for the first time at the hearing, that the reason for the interlinked financial arrangements was because Ms Thorburn was at risk of losing her home (The Links).[22] That is not supported by the evidence, including no evidence to that effect in the voluminous affidavits filed.

[42] Ms Thorburn claims the original intention was for Thompson Street to be the family home.[23] However she contradicts this by elsewhere saying Thompson Street was intended to be an investment[24] and Bracken Street was their first family home together.[25] This aligns with Mr Mowles' evidence that Thompson Street was always intended to be an investment property, with Bracken Street being the first family home.

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[19] NOE pg 11 line 30.
[20] First narrative affidavit of respondent (21/6/19) at [17].
[21] NOE pg 382 lines 11-13.
[22] NOE pg 382 lines 15-18 pp 382-383.
[23] NOE pg 37 line 15.
[24] See narrative affidavit of applicant (16 May 2019) at [57] and NOE pg 71.
[25] NOE pg 11 lines 30-31.

Discussion

[43] The primary factor in favour of an earlier date is the couple's commitment to investing in a property together, and the resultant intertwining of their respective separate property as security (be that for Ms Thorburn's benefit, as asserted by Mr Mowles, or for Mr Mowles' benefit as asserted by Ms Thorburn).

[44] However there are a number of outweighing factors in favour of the July date. First is Ms Thorburn's admission that she considered Bracken Street to be the first family home. Secondly, whilst Ms Thorburn spent most weekends and some week days in Cambridge, she was primarily based at The Links until the move to Bracken Street. Although the High Court in *Scragg v Scott* held that "the absence of sharing a common residence is not determinative",[26] the surrounding context is a good indicator that the couple was not fully committed to living a shared life until Ms Thorburn moved her primary residence, and her daughter, to Cambridge (Bracken Street). Ms Thorburn did not redirect her postal mail until July 2004. She did not get a job in Cambridge until she moved to Bracken Street. Therese remained at Mt Maunganui College until the July move to a new home, following which she started at Cambridge High.

[45] Furthermore, on balance I consider the joint acquisition of Thompson Street was intended as an investment rather than the couples' home.

[46] I find therefore on the balance of probabilities that Ms Thorburn and Mr Mowles' qualifying de facto relationship commenced when they moved into Bracken Street in July 2004.

Issue 1b Separation date

[47] Though not specifically argued, it is apparent from the evidence that the parties differ as to when they separated. Was it 13 February 2016 when Mr Mowles

[26] *Scragg v Scott* (2006) 25 FRNZ 942, [2006] NZFLR 1076 (HC) at [40]; *Excell v DSW* (1990) 7 FRNZ 239, [1991] NZFLR 241 (HC).

announced that for him the marriage was over, or was it when he moved out on 28 February 2016?

[48] The law is long settled, as demonstrated in *X v X [Economic disparity]* that a combination of three factors - mental attitude averse to cohabitation, a communication of that attitude or intention and physical separation - is required to effect separation.[27] In that case the Court found that the marriage ended not when the husband announced the marriage was over in March 2003, but the following month when they physically separated.[28]

[49] Thus I find that the date of Ms Thorburn and Mr Mowles' separation is 28 February 2016.

Issue 2: Was there an oral agreement?

The Law

[50] Part 6 of the PRA, comprising ss 21 and 21A–21T, concerns a couple's ability to contract out of the provisions of that Act. To that end, s 21 enables spouses or partners to make any agreement they think fit with respect to the status, ownership, and division of their property.

[51] Section 21F(1) provides that a s 21 agreement is void unless the following requirements in s 21F(2)-(5) are complied with:

> (2) The agreement must be in writing and signed by both parties.
>
> (3) Each party to the agreement must have independent legal advice before signing the agreement.
>
> (4) The signature of each party to the agreement must be witnessed by a lawyer.
>
> (5) The lawyer who witnesses the signature of a party must certify that, before that party signed the agreement, the lawyer explained to that party the effect and implications of the agreement.

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[27] *X v X [Economic disparity]* (2006) 24 FRNZ 934, [2006] NZFLR 361 (FC) at [68]-[71].
[28] At [71].

[52] However, even if an agreement is void for non-compliance with s 21F(2)-(5), s 21H provides that the Court may declare the agreement has effect, wholly or in part or for any particular purpose, if it is satisfied non-compliance has not materially prejudiced the interests of any party to the agreement.

[53] In interpreting the near-identical predecessor to s 21H, Tipping J held the process to follow in exercising discretion under that provision as involving the following three steps:[29]

> First, the Court must decide whether there is an otherwise enforceable agreement under the section. Secondly, the Court must determine whether the party seeking to enforce the agreement can show that non-compliance with the formalities has not materially prejudiced the interests of the other party. Thirdly, the party seeking to enforce the agreement must persuade the Court that the residual discretion which the Court has should be exercised in that party's favour.

[54] Courts have since recognised that same sequence of considerations applies to s 21H.[30]

[55] The first of these considerations will often not be in issue. In the present case, it is. Ms Thorburn alleges an oral agreement that Mr Mowles disputes. In deciding whether to exercise the discretion under s 21H, I must therefore address each of the three issues identified by Tipping J in *Evans*.

First step: Was there an agreement?

[56] Whether there is an agreement (one that is enforceable but for the non-compliance with s 21F) involves an assessment of the facts in terms of the usual principles of contractual formation.[31] To satisfy the Court there is an enforceable agreement, Ms Thorburn must, therefore, prove on the balance of probabilities the parties reached an agreement whose terms were certain; and that they intended by that agreement to create legal relations.

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[29] *Evans v Evans* (1992) 9 FRNZ 614 (HC) at 617–618.

[30] See for example *West v West (No 2)* [2004] NZFLR 164 (HC) at [41]; *C v W* HC New Plymouth CIV-2020-443-192, 28 July 2010 at [38]–[39]; and *Fraser v Fraser* [2011] NZFLR 658 (FC) at [31]–[33].

[31] *C v W*, above n 30, at [39]; and *Jane v Mikulicic* [2019] NZFC 4888 at [36].

[57] Valuable consideration is, in normal circumstances, also a pre-requisite to any enforceable contract. However, for the purposes of s 21 agreements it is, courtesy of s 21K, deemed.

Agreement: offer, acceptance and certainty

[58] Ms Thorburn must prove the parties reached an agreement in the sense there was between them some consensus. Agreement is usually found in the process of offer and acceptance, whereby one party makes an offer to another, who in turn accepts that offer. That is not always the case. It is sometimes difficult to point to an exact "offer" and a precise "acceptance" of that offer, even though it is otherwise clear on the facts there is consensus between the parties. In those instances, a broader approach to determining agreement may be warranted.

[59] I consider this is such a case. The difficulty in pointing to a precise offer and acceptance largely derives from the oral nature of the alleged agreement, making it difficult for anyone to point exactly to when an offer was made and when that offer was accepted. For example, in her evidence Ms Thorburn provides a rough idea of when the alleged agreement was reached; but she does not identify the exact words used comprising an "offer" and "acceptance".

[60] That same difficulty means the scope of evidence relevant to whether an oral agreement was reached is wider than that relevant to purely written contracts. In determining whether agreement has been reached, the courts typically focus not on the subjective intentions or understandings of the parties, but their objective intentions - that is, how their intention is conveyed by what they have said, written or done.[32] Thus, evidence as to what the parties understood they had agreed on is irrelevant and impermissible.

[61] When it comes to oral agreements (whether purely or partly oral) however, the best evidence of what the parties *actually* said often comes in the form of what they *understood* was said. That is because it is generally too difficult to recall all details of and circumstances surrounding relevant conversations.

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[32] See for example *Stevenson Brown Ltd v Montecillo Trust* [2017] NZCA 57 at [5] and [21].

[62] So, to determine how the parties' intentions are conveyed by what they said or did, it is practical (and usually necessary) to permit evidence as to the parties' understandings.[33] That is important given much of the evidence of Ms Thorburn and Mr Mowles is of their understandings at the relevant time.

[63] Inherent in the requirement for objective consensus between the parties is the need for "certainty". Any agreement which is to be enforced must be in terms which define with a sufficient degree of certainty the obligations which the parties are to undertake.[34] The evidence I outline below as relevant to whether the parties "agree" is also relevant to whether the terms on which they have agreed are sufficiently certain. For that reason, I deal with the "agreement" and "certainty" requirements as one.

Overview: The parties' positions

[64] Ms Thorburn asserts the parties entered an oral agreement in early 2004 to the effect that, in the event they separated, The Links would always be hers and the Brevini shares would always be Mr Mowles'. She essentially asserts that by 'The Links would always be hers', the parties meant either the property itself, equity in the property or any proceeds of sale of the property, whatever the case might be. On that basis, she claims she is entitled to the $335,000 from the 2015 sale of The Links to Renee as her separate property.

[65] Mr Mowles asserts there was no agreement to that effect. He claims all the parties agreed was that if they were to separate in those "early days", he would:

(a) retain the Brevini shares; and

(b) compensate Ms Thorburn for the difference in equity between the Links property (which he valued at approximately $140,000)[35] and the Maungakawa property ($60,000), being $80,000.

[33] *ANZ Bank New Zealand Ltd v Bushline Trustees Ltd* [2020] NZSC 71, [2020] 1 NZLR 145 at [65].
[34] *Wellington City Council v Body Corporate 51702 (Wellington)* [2002] 3 NZLR 486 (CA) at 495.
[35] Being the purchase price of $170,000 less a flexible credit facility of $30,000.

[66] He asserts further that, based on a (mis)understanding of the PRA, he believed that by 2007 all their property had become intermingled; that any earlier agreement therefore ceased to apply; and that from then they would share 50/50 in all property.

Evidence for Ms Thorburn

[67] Ms Thorburn highlights the context of the alleged agreement as crucial to understanding how it came to be. She explains it arose in the context of Mr Mowles' need for finance in early 2004. At that time:

(a) First, as the purchase of Thompson Street was to be 100 per cent financed, the couple needed to use their respective homes (The Links and Maungakawa) as security in addition to Thompson Street itself.

(b) Secondly, Mr Mowles' need to raise funds to pay his former wife the agreed settlement sum of $50,000.

[68] Ms Thorburn says Mr Mowles needed The Links - which had greater equity than Maungakawa - as security to raise the extra funds to pay Ms Mowles. Ms Thorburn says she was hesitant at first, borne of her concern about the lending structure for Thompson Street, and "specifically wanted an ownership share in Maungakawa to protect the equity [in The Links) which was about 98%".[36] The submission is made that Ms Thorburn needed Mr Mowles' assurances in the form of the oral agreement to move forward with the proposed transactions. Indeed Ms Thorburn says she agreed to assist Mr Mowles on his reassurance that she could keep The Links as her separate property (and he would keep the Brevini shares as his separate property).[37] She says they understood that was "fair" because his using The Links as such meant he did not have to liquidate his Brevini shares to pay the $50,000 settlement sum. She explains the failure to get the agreement in writing was because she loved and trusted him.[38]

[36] Evidence of Philip Caldwell NOE pg 181 lines 3–5.
[37] Narrative affidavit of applicant (16 May 2019) at [48] – [49].
[38] Narrative affidavit of applicant (16 May 2019) at [50].

[69] The evidence of Philip Caldwell, the parties' mortgage broker at the time, corroborates Ms Thorburn's explanation of the background context. Mr Caldwell deposed in support of Ms Thorburn that for the couple to buy Thompson Street together, The Links was critical to meet the bank's loan to valuation ratio (LVR) policy. He says although Mr Mowles' net asset position was not strong, his income level was essential to service the proposed joint debt. Ms Thorburn, on the other hand, had a stronger net asset position. As a result, he says the parties were interdependent on each other from the outset to meet any bank's lending criteria.

[70] Ms Thorburn says she had at all times since those early discussions understood Maungakawa, as well as all debt incurred in relation to Maungakawa, was to be in their joint names. Mr Caldwell also says that all lending the couple obtained in April 2004 in relation to Maungakawa and Thompson Street was in their joint names; and neither had separate loans or mortgages in their sole names.[39] Ms Thorburn says she believed Maungakawa and related debt was indeed in their joint names from 2004, and that understanding endured until she read Mr Mowles' first narrative affidavit. It transpired that documents produced show there was an amendment to the loan documentation in relation to Maungakawa, with Ms Thorburn's name being deleted. The end result was Maungakawa was actually transferred from Kevin and Deborah Mowles to Mr Mowles alone, and the mortgage registered against Maungakawa was in Mr Mowles' sole name.

[71] I explain the significance of both sides' understandings in the discussion section below.

[72] Ms Thorburn's position is that the oral agreement involved only The Links and the Brevini shares (as opposed to, for example, Maungakawa or the Brammer pension). She explained her understanding that Maungakawa wasn't included because it had negligible equity, and Mr Mowles' Brammer pension simply wasn't on the radar/was never discussed.

[39] Affidavit of Philip John Caldwell (22 January 2020) at [5] & [6].

[73] Her position is also that the oral agreement endured and was confirmed on multiple occasions throughout the relationship. She provides as specific examples that the agreement was discussed:

(a) in conversation with the couple's best friends, Ms Robyn Vlasich and Mr Francis Askwith;

(b) with her brother, Mr Ross Thorburn, when he assisted with their incorporation of Molay; and

(c) when, in the presence of Ms Vlasich and Mr Askwith, Mr Mowles declared their relationship over.

[74] The existence of an agreement is corroborated by Ms Vlasich and Mr Askwith. They each deposed in their respective affidavit evidence that the topic was brought up and discussed multiple times over the years in the presence of both Ms Thorburn and Mr Mowles in the course of normal, social conversation. Mr Mowles never refuted to them the existence of an agreement to the effect that Ms Thorburn would retain The Links if they ever split (and Mr Mowles would in turn retain his Brevini shares).[40] Ms Vlasich and Mr Askwith were both present on 13 February 2016 when Mr Mowles declared the relationship over. They witnessed Ms Thorburn ask Mr Mowles if he was going to honour their agreement around The Links, confirming that he replied "Of course". They both deposed that when catching up with Mr Mowles alone a few weeks later, Ms Vlasich asked Mr Mowles directly if he intended honouring the oral agreement. They both confirm he replied in the affirmative.[41]

[75] Their evidence at the hearing was consistent with this. Consistent with Ms Thorburn's evidence too, both Ms Vlasic and Mr Askwith understood the agreement to concern The Links and Brevini shares only, and not other assets either party might have owned (in particular Maungakawa and Mr Mowles' Brammer pension).

[40] NOE pp 246 lines 32-33, 252 lines 13-17 and 266.
[41] NOE pp 256 line 14 and 273 line 21.

[76] Ross Thorburn deposed that during their discussions around setting up Molay in 2009, and prompted by his concern that the effect of transferring The Links into the company was it would become "co-mingled", he suggested to the parties they each get independent legal advice. In response he said both parties advised him they had already discussed the issue and they had a verbal agreement whereby the value or proceeds of The Links would always be allocated to Ms Thorburn in the event of a separation.[42]

[77] Again, Mr Thorburn's evidence at the hearing was consistent. Under cross-examination he said Mr Mowles' property was never discussed, only The Links because that was the property being transferred to Molay. When pressed about what the real intention might have been, Mr Thorburn said the couple didn't go into detail beyond simply advising him that "the value or proceeds [of The Links] would always be Dianne's…".[43] Mr Thorburn confirmed in answer to a question from the Court that he had not had any discussion about an alleged oral agreement with either party at any other time.

Evidence for Mr Mowles

[78] In his first narrative affidavit[44], Mr Mowles denied any oral agreement at all. He specifically stated:

> I disagree – no discussion to this effect was ever agreed upon.[45]
>
> …
>
> There was never any oral agreement about separate property …[46]
>
> …
>
> There was never any oral agreement between us about separate property …[47]

[79] At the hearing, Mr Mowles then gave evidence there was an oral agreement, just not that alleged by Ms Thorburn. Instead, he stated during cross-examination

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[42] Affidavit of Ross Maxwell Thorburn (5 September 2019) at [4] & [5].
[43] NOE pg 228 lines 4-5.
[44] First narrative affidavit of respondent (21 June 2019).
[45] At [82].
[46] At [83].
[47] At [84].

that they originally agreed she would be compensated the difference in equity between the property she brought to the relationship (The Links) and the value he brought in from Maungakawa (the value of which is in dispute/not known). For example, he said at the hearing:[48]

> That was, absolutely, there was discussions in the early part of our relationship where Dianne was concerned about what she viewed as the disparity between what I was bringing in, what she was bringing in, and it was literally an equitable, sorry an equity conversation, as in funds, nothing to do with property, so that if in the event of a separation in the early stage that she would be compensated for what she termed was the 60 or 80K difference between our two equities.

[80] He then confirmed an early discussion of that nature:[49]

> There was a discussion, like I said earlier, and there was a talk about being recompensated for the difference in equity brought into the relationship.

[81] There is no evidence of any such discussions across Mr Mowles' extensive affidavit evidence.

[82] There are other discrepancies between his affidavit evidence and the evidence Mr Mowles gave at the hearing. One concerns discussions about the Brevini shares being separate property. In his first narrative affidavit, he deposed he did not recall discussing the Brevini shares with Ms Thorburn.[50] At the hearing however, in response to being asked whether they talked about the Brevini shares, Mr Mowles stated:[51]

> The shares were discussed as a separate thing. They're always my separate property, yes.

[83] Another concerns his assertion at the hearing he had assumed, based on a misunderstanding of the law, that he and Ms Thorburn would split everything 50/50 after a certain amount of time together, including the Brevini shares.[52] Again, there was no mention of this belief across his extensive written evidence.

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[48] NOE pg 403 lines 24-30.
[49] NOE pg 413 lines 16-18.
[50] At [82].
[51] NOE pg 404 lines 23-24.
[52] NOE pg 409, 415, 417 and 475.

Discussion

[84] I consider the evidence favours Ms Thorburn's alleged agreement.

[85] Ms Thorburn was consistent throughout her evidence. She continuously maintained the couple agreed The Links would always be her property and the Brevini shares Mr Mowles'. She also gave consistent evidence as to the underlying reason for the agreement in terms of the debt finance structuring the parties required, and specifically that Mr Mowles required, so that in settling with Ms Mowles he could preserve his Brevini shares. In that regard the evidence of Mr Caldwell, their mortgage broker at the time, supports Ms Thorburn's version of events.

[86] Although Mr Mowles says the evidence shows The Links was not used as security to help him obtain the loan required to pay his former wife out and retain Maungakawa, I accept Ms Thorburn's evidence, supported by Mr Caldwell, that that was the original intention of the refinancing; and that it was always Ms Thorburn's understanding (and again Mr Caldwell's) she was joint owner and a joint mortgagee for the mortgage over Maungakawa. The evidence given at the hearing did not ultimately clarify how it was that Mr Mowles was able to proceed, presumably at the last minute, on his own vis-à-vis retaining Maungakawa and paying out his former wife. Again, I prefer Ms Thorburn's evidence that this eleventh hour change was never communicated to her, and throughout the relationship she had understood she had been critical to that transaction.

[87] Ms Thorburn's position is also corroborated by the evidence of Ms Vlasich, Mr Askwith and Mr Thorburn. Although it is arguable their loyalty is to Ms Thorburn, I found each of them reliable and credible witnesses. They were consistent across their respective evidence and between each other. They did not seek to give evidence on matters they had no knowledge of. None of them sought to embellish their evidence by filling in apparent gaps. They gave appropriate concessions. Overall, each was unmoved despite robust challenge from Mr Gay on behalf of Mr Mowles.

[88] It is questionable whether Ms Thorburn would have proceeded with transferring The Links to Molay had Mr Mowles not confirmed the agreement they had when Mr Thorburn raised his concern around 'co-mingling'. Furthermore, the undisputed fact that Ms Thorburn gave each of her children $1,000 after the sale of The Links[53] indicates the terms were likely clear and that both parties were aware she could do what she wanted with the sale proceeds even after the property was sold to Molay.

[89] For the reasons explained above, I found Mr Mowles' evidence on this score less credible. There were a number of discrepancies between his written and oral evidence. I also consider his version of events less likely for any reasonable person in Ms Thorburn's position. If the Brevini shares were considered separate property, it is unlikely Ms Thorburn would have agreed he could preserve his shares but she could not retain The Links.

[90] I do not think anything turns on whether Ms Thorburn brought into the relationship debt in the sum of $3,000 or $30,000, though I note I prefer her evidence in this regard, supported by Mr Caldwell, to that of Mr Mowles. Regardless, in either event Ms Thorburn's equity position at the beginning of the relationship was considerably stronger than Mr Mowles'. I do not consider the dispute about her debt undermines the evidence about the underlying debt finance structuring that formed the background to the oral agreement. As elsewhere, I reject Mr Mowles' contention at the hearing that part of the rationale was that Ms Thorburn was at that time at risk of losing The Links.

[91] It is therefore my finding, on the balance of probabilities, that an objective bystander would have considered the parties had an agreement to the effect asserted by Ms Thorburn.

[92] I also consider that agreement was sufficiently certain. Both in cross-examination and in his submissions, Mr Gay challenged Ms Thorburn's inconsistencies in describing the alleged agreement. He said she sometimes

[53] NOE pp 251 (from) line 29 to 252 (to) line 2.

described it purely in terms of The Links as a property; sometimes in terms of her equity in The Links; and she alleged no mechanism by which the proceeds of sale of any property introduced by either party would entitle that party to be compensated upon separation. While I accept Ms Thorburn does describe the agreement in terms of a property, and an equity-based designation at various points in her evidence, I do not think that undermines the consensus between the parties. Instead, based on the evidence in particular of Ms Thorburn, Ms Vlasich and Mr Askwith, it seems clear the agreement was that Ms Thorburn would retain The Links *or* its value (for example, if it were sold, as it indeed was), whatever the case might be. In the event, The Links was sold, and I consider there was still consensus between the parties that Ms Thorburn would be entitled to the proceeds of that sale.

Intention to create legal relations

[93] Not every agreement on which parties agree forms a legally binding contract. The parties must intend as such. Determining whether the parties so intended involves an objective assessment.

[94] While the courts were once reluctant to attribute an intention to create legal relations to agreements between spouses and domestic partners,[54] that is no longer the case. The courts have recently been more willing to find such an intention where the alleged agreement concerns substantial assets.[55] The involvement of substantial assets suggests the parties intended to create legal relations.

[95] Given the subject-matter involved in the agreement asserted by Ms Thorburn, that being The Links and Brevini shares, I consider there is no doubt the parties intended to create legal relations.

Second step: Material prejudice to Mr Mowles?

[96] There are a number of matters the Court should consider in determining whether non-compliance has materially prejudiced the respondent.

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[54] See the previous leading case, *Balfour v Balfour* [1919] 2 KB 571, [1918-1919] All ER Rep 860.
[55] See for example *Fleming v Beevers* [1994] 1 NZLR 385 (CA).

[97] The first is to assess the degree of non/compliance with the s 21F formalities, including whether independent legal advice was obtained. In the present case there is a clear failure with all formalities, as the agreement was not put in writing and neither party obtained independent legal advice. In *West v West (No 2)*, the High Court noted that the more substantial the failure to comply with the formalities required by s 21F, the harder to demonstrate a lack of material prejudice.[56]

[98] Although a lawyer was involved at the time of the 2004 debt/ownership restructure,[57] that lawyer acted for both parties and Ms Thorburn's evidence is that she was not given or even recommended to obtain independent legal advice (on the implications for her of introducing The Links as security). Neither party obtained independent legal advice prior to The Links being transferred to Molay, as supported by Mr Thorburn's evidence that the couple assured him they did not need to because of their verbal agreement. It is relevant that both parties were aware from previous experience of the process of obtaining legal advice, at least in the context of a separation.

[99] Independent legal advice may have convinced Ms Thorburn to either put the agreement in writing or not proceed with the proposed financial transactions in 2004 or 2009. It is possible that independent legal advice may have dissuaded Mr Mowles from entering into the agreement (on the assumption the agreement would become redundant at the point at which assets would be split 50/50 under the PRA).[58] On the other hand however it is possible he would have still entered a written agreement given he wanted to protect his shares and needed The Links for the finance structure that enabled him to pay his former wife out.

[100] A third factor, the quality of any legal advice obtained, is not relevant.

[101] Next, the Court should determine the extent to which the agreement reflects potential entitlements under the PRA. The likelihood of prejudice is greater the more the informal agreement differs from the outcome the PRA would have provided.[59]

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[56] *West v West (No 2)* [2004] NZFLR 164 (HC) at [44].
[57] Bruce Sargent.
[58] NOE at page 417.
[59] *Mills v Graham* FC Hamilton FAM-2004-019-1914, 3 March 2005 at [21].

[102] One the one hand, it could be said that The Links could have been lost to Ms Thorburn as it was intermingled with relationship property. However had it been formally 'protected', that it is Ms Thorburn's separate property accords with the PRA rules being property she owned pre-relationship (as with the Brammer pension for Mr Mowles for example).

[103] I find on balance that Mr Mowles is not materially prejudiced by enforcing the oral agreement. Had it been formally documented it would have accorded with the law in any event. It was clearly Mr Mowles' intention right up until some point after separation. Furthermore, upholding the agreement accords with the PRA purposes and principles, in particular ss 1M(c) and 1N(c).

Third step - Residual discretion

[104] Even in circumstances where there is an absence of material prejudice, the Court has the residual discretion to not enforce the agreement.[60] When exercising this discretion consideration should be given to s 21J, specifically the s 21J(4) criteria including:[61]

(a) the provisions of the agreement:
(b) the length of time since the agreement was made:
(c) whether the agreement was unfair or unreasonable in the light of all the circumstances at the time it was made:
(d) whether the agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made (whether or not those changes were foreseen by the parties):
(e) the fact that the parties wished to achieve certainty as to the status, ownership, and division of property by entering into the agreement:
(f) any other matters that the court considers relevant.

[105] I consider it appropriate to exercise my discretion to uphold the oral agreement. It was reached very early on (even before their qualifying de facto relationship started). It endured throughout the 12 years of their relationship, as

[60] See *Wright v Wright* HC Auckland HC72/97, 24 October 1997; *Fraser v Fraser* [2011] NZFLR 658 (FC); Augustine Choi *Fisher on Matrimonial and Relationship Property* (online loose-leaf ed, LexisNexis) at [5.72].
[61] See also *C v W* HC New Plymouth CIV-2010-443-192, 28 July 2010 at [59] for other factors.

confirmed a number of times during. It was reconfirmed by Mr Mowles on and shortly after separation. It gave both parties certainty and assurance around the preservation of targeted property (The Links for Ms Thorburn and Brevini shares for Mr Mowles).

[106] It was a fair and reasonable agreement in the particular circumstances at the time it was made, confirming as it did what the law provided for at the time. I do not consider it became unfair or unreasonable at any point during the course of the relationship. In fact the agreement benefitted Mr Mowles, in terms of having The Links available to get the couple's successive property developments off the ground in the first instance. Finally, again upholding the agreement accords with the purposes and principles of the PRA.

Conclusion

[107] The parties' oral agreement is upheld. I declare Mr Mowles' Brevini shares to be his separate property. I order a payment to Ms Thorburn from the net sale proceeds of The Circle in the sum of $335,000, which sum is to be her separate property.

Issues 3 – 5 - Alternative Claims

[108] Having found in favour of Ms Thorburn on her claim under s 21H PRA, I do not need to consider her alternative claims pursuant to ss 8, 9A, 9(4), 13 and 17 PRA.

Issue 6 - Family Chattels

[109] Mr Mowles seeks an adjustment of $15,015 for family chattels retained by Ms Thorburn. Ms Thorburn says there should be no adjustment.

[110] Mr Mowles chose to take a few personal belongings when he vacated The Circle, including clothes, personal effects, tools and his gun(s). He took more tools in June, around the time the Maxum boat was sold. Much later, in December 2017, arrangements were made for him to collect whatever else he wanted. Mr Mowles

deposed that he specifically organised to uplift "miscellaneous tools and personal equipment".[62]

[111] Mr Mowles sent a removal truck with two men. He chose not to attend. Ms Thorburn says, despite the items to be collected being agreed in advance and made ready by her in the garage, Mr Mowles had instructed the movers to take a much smaller quantity. Mr Mowles was contacted by the removal men, after Ms Thorburn protested, and he added the garage vacuum system and gazebo (per the original list).

[112] In apparent contradiction to the above evidence, Mr Mowles claimed later that Ms Thorburn controlled what his removal people took and the contents uplifted were minimal and mostly worthless.

[113] Mr Mowles says Ms Thorburn was left with a house full of furniture, the value of which he estimated at $31,630. A valuation was not obtained. Ms Thorburn disputes the furniture left with her was valuable. At best, she says, it was 10-12 years old and tatty, being a mix of things the parties each had before meeting plus what they had purchased for Norfolk Drive in 2006. Some of the furniture she claimed as heirlooms, having been inherited from her grandmother.

[114] Moreover, Ms Thorburn was aggrieved at being left to deal with the chattels. She repeatedly asked Mr Mowles in earlier times to collect what he wanted,[63] his response being he had no room. Ms Thorburn dropped items off for him to his parents' home. She had to shift and/or store items during the renovation work. In readiness for the sale of The Circle she sold items on Trade Me, donated some to charity and disposed of others before settlement.[64] Ms Thorburn had temporarily stored what wasn't needed for staging purposes for the sale. She said when that furniture was retrieved some of it was mouldy so she threw it out. Ms Thorburn described all of this as a liability she neither asked for nor wanted.

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[62] Narrative affidavit of the respondent (21 June 2019) at [45] pg 286.
[63] Mr Mowles acknowledged being asked. See narrative affidavit of respondent (21 June 2019) at [93] pg 298.
[64] She said she didn't need much furniture as she was going flatting after The Circle.

[115] Contrary to his affidavit evidence,[65] at the hearing Mr Mowles acknowledged he could have accessed the chattels at The Circle had he wanted to.[66] He also accepted, in answer to a question from the Court, that Ms Thorburn was effectively given no option around being left to deal with the chattels.[67]

[116] The proceeds of 27 items sold on Trade Me was $1,486.89. There was effort on Ms Thorburn's part in arranging the sale process, for minimal gain. Whilst this amount is relationship property and would ordinarily be shared, it is effectively offset by the net sale proceeds of the Galailai boat (dealt with below), and I rule there is to be no adjustment to Mr Mowles.

[117] I further rule there is to be no adjustment for the other chattels left behind with Ms Thorburn. Although Mr Mowles described those chattels as mostly 'new or near new'[68], it is apparent from the detailed chattels list he himself compiled together with Ms Thorburn's response, in fact many were quite aged (some from 2007/08 and others purchased in the early 2000s) and not 'designer' as claimed.

[118] There is insufficient evidence to clearly identify precisely what Mr Mowles took and their value.[69] What is clear is that Mr Mowles had every opportunity to take more chattels than he chose to.

[119] Ms Thorburn claims what Mr Mowles retained was probably more valuable than what she did. Again however it is difficult to clearly identify what Ms Thorburn retained, and its independent value, versus what she disposed of.[70] I do however accept her evidence that most of the chattels were either sold, donated or thrown out, at considerable effort on her part.

[120] There is to be no adjustment in respect of family chattels.

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[65] To the effect that Ms Thorburn controlled what he got.
[66] NOE pg 478 lines 25-28.
[67] NOE pg 478 lines 29-32.
[68] Further affidavit of respondent (21 June 2019) at [9].
[69] The parties are at odds as to what Mr Mowles retained.
[70] She says she only retained a bed, chair, coffee table, microwave, TV and her nana's dresser - applicant's affidavit in reply to affidavit of respondent sworn 21 June 2019 (dated 23 August 2019) at [99].

Issue 7 - Maxum Boat

[121] The 2008 Maxum boat (the Maxum) was purchased for $55,000 in 2012. It was used regularly and well maintained by Mr Mowles. He made a number of modifications/additions to it prior to separation.

[122] The Maxum was sold in June 2016 to a Mr Ben Simpson for $50,000.[71] An initial verbal agreement to sell at $55,000 was reduced at Mr Simpson's insistence after a pre-purchase inspection. Mr Simpson was unhappy with the dirty state of the boat.

[123] A written agreement was signed on 17 June 2016 by both parties and Mr Simpson confirming the $50,000 sale price. Ms Thorburn asserts she was bullied into signing that. She says she wasn't aware Mr Mowles had listed the boat on Trade Me and knew nothing about the proposed sale to Mr Simpson until Mr Simpson phoned her to arrange an inspection. Mr Mowles disputes this, saying Ms Thorburn was aware of the listing and was "completely" involved in its eventual sale.

[124] Ms Thorburn claims the boat was undersold by approximately $30,000 and at the hearing was seeking compensation for one half of the value of the under sale. Her belief the Maxum was worth more was based on the following:

(a) The marine broker who sold the boat to Mr Mowles told her (in Ms Vlasich's presence and as confirmed by Ms Vlasich) it was worth $75,000-$80,000;

(b) Mr Askwith, also a boat owner, says it would have been worth more;

(c) Only months after purchasing it, Mr Simpson listed the boat on Trade Me for $85,000.

[125] There is no evidence what Mr Simpson subsequently sold the Maxum for, or if indeed he did sell it. Mr Mowles said at the hearing Mr Simpson kept in touch with him for a time as he had a number of post-sale queries. He was aware Mr Simpson had made further improvements to the Maxum. He was aware Mr Simpson had listed

[71] These sale proceeds were paid into the joint Orbit account and in that sense effectively shared.

it for sale at $85,000, which he understood from him to be a "feeler" starting price. He understands the asking price was reduced to $80,000. No-one, including Mr Mowles, knew if the Maxum was subsequently sold or, if so, what for.

[126] Furthermore, no evidence was placed before the Court as to the market value of the boat in June 2016. I am not prepared to accept hearsay evidence of the marine broker, Mr Askwith's unqualified opinion, or an unconfirmed listing price a few months later.

[127] I do however consider it appropriate to value the boat at the initial sale price of $55,000. I find Mr Mowles was in control of the sale process. I accept Ms Thorburn's evidence that she didn't know about it until the eleventh hour and felt pressured to sign off what was essentially a 'done deal'.

[128] Only Mr Mowles used the boat after separation. After the last occasion in March 2016 (Easter) he gave it his usual careful wash. However he didn't sight the boat subsequently and couldn't comment on its state at the time of listing it. If it was dirty, he surmised it would have been from sitting under the tree at The Circle (its usual resting place) with possible mould growth.

[129] It is clear from the evidence that had the boat been cleaned it would have achieved $55,000.[72] Mr Mowles made no attempt to check or clean the boat prior to sale, despite agreeing under cross-examination it would have been prudent to ensure it was up to a good presentation standard before listing it.[73] His reasoning for not doing so, that "*Dianne had installed extra locks…..so I could not remove it and clean it and ready it for sale*"[74] doesn't wash with the Court. He could have made arrangements to return to clean the boat, especially after being advised of its state. He didn't even try to. I find he was responsible for its condition.

[130] I therefore value the Maxum boat at $55,000. Ms Thorburn is entitled to a credit for $2,500.

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[72] Mr Mowles agreed at the hearing the sale price was reduced simply because the boat was dirty - see NOE pg 394 lines 13-14.
[73] NOE pg 389 lines 1-3.
[74] Narrative affidavit of respondent (21 June 2019) at [99].

Issue 8 - Galailai Boat Sale Proceeds

[131] This smaller boat was purchased in October 2015 for $2,824.63. It was sold by Mr Mowles shortly after separation. The gross sale proceeds were $5,655.50. The net proceeds after deduction of related expenses were $1,473.48.[75]

[132] There is no dispute Ms Thorburn initially agreed for Mr Mowles to retain the sale proceeds, which are acknowledged to be relationship property, without adjustment.[76] She subsequently retracted that in light of how other matters panned out, and now claims a half share of the sale proceeds.

[133] As with the chattel items sold on Trade Me by Ms Thorburn, there was effort on Mr Mowles' part in arranging the sale of the Galailai boat. The amounts received are comparable. These factors, coupled with the original agreement that he would retain any profit, leads me to find it is appropriate for Mr Mowles to retain the Galailai boat sale proceeds as his separate property, with no adjustment to Ms Thorburn.

Issue 9 - Income received from The Circle

[134] Ms Thorburn initially disclosed income received from her friend, Sharlee Kreft of $3,000 for two separate periods Ms Kreft stayed at The Circle.[77] Ms Thorburn says this amount covered Ms Kreft's living expenses (food, power etc) plus a nominal amount for lodging.

[135] Another friend, Robbie Robson[78] also stayed at The Circle. It is Ms Thorburn's and Mr Robson's evidence that he did not pay board in lieu of helping Ms Thorburn around that time with the renovations.

[136] After disclosure of bank statements, Ms Thorburn subsequently acknowledged also earning total gross income of $2,550 from six weeks of Airbnb renting in early 2017. This does not include Ms Thorburn's time in readying the room(s), cleaning

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[75] The breakdown is found in the affidavit of respondent (29 January 2021) at [32].
[76] Mr Mowles claims this was in return for his $12,500 salary payment going into the Orbit account shortly before separation – refer affidavit of respondent (29 January 2021) at [101](d).
[77] $1800 over 12 weeks in 2016 and $1200 over 8 weeks in 2017, at $150/week.
[78] Also briefly a romantic interest.

afterwards etc, and Ms Thorburn says it turned out to be more work than it was worth (especially alongside readying The Circle for sale).

[137] I accept that evidence and find that the total income from Airbnb listings was $2,550. I also accept the evidence before the Court that total gross rental income received by Ms Thorburn from third parties (Ms Kreft) was $3,000.

[138] Ordinarily Mr Mowles would be entitled to a credit for one half of this income. However it has been included by Ms Thorburn in her income figures for her spousal maintenance claim, and to make an adjustment here and in turn deduct it from her income would simply increase Ms Thorburn's claim for financial support. I therefore rule that the income Ms Thorburn received from The Circle is to be retained by her with no adjustment to Mr Mowles.

Issue 10 – Compensation for Post Separation Contributions

The Law in general

[139] Pursuant to s 18B of the PRA, the Court may make an order for one party to compensate the other if after separation the other partner has made a qualifying contribution to the relationship. "Contribution" is defined in s 18.

[140] The purpose of s 18B is to ensure that "neither party should be advantaged or disadvantaged as a result of post-separation actions by the other".[79] It is a discretionary power that must be exercised in light of the purposes and principles of the PRA.[80]

[141] In order to exercise its discretion under s 18B(2), the Court must determine whether:

a) a spouse or partner has done anything during the relevant period that would have been a "contribution" under s 18 to the relationship had the relationship not ended; and

[79] *Fischbach v Bonnar* [2002] NZFLR 705 (FC) at [48].
[80] Property (Relationships) Act 1976, ss 1M and 1N.

b) it would be "just" in the circumstances to either order a spouse to pay the other spouse or partner a sum of money or order the transfer of any property from one spouse or partner to the other.

[142] In some circumstances contributions from one party may be off-set by the other, e.g. compensation owed by one party in the form of occupation rent may be offset by compensation owed to the other for their contributions to improving the net value of the property. In determining whether this is the case, the court may take a broad-brush rather than "precise accounting" approach.[81]

Issue 10a - Performance of Services

[143] Section 18(1)(f)(i) of the PRA specifically defines as a contribution for the purposes of s 18B "the performance of work or services in respect of the relationship property or any part of that property".

[144] Ms Thorburn seeks compensation for her post-separation contributions with respect to The Circle in two respects. Firstly, completion of ongoing renovations started during the marriage, including the deck rebuild, painting/tiling downstairs, lining/painting the garage/replacing garage doors, removal of concrete pad, rendering/painting exterior and landscaping. Second and subsequently, significant rectification/reconstruction work required after Council became aware that renovations undertaken in 2015 by Mr Mowles, with Mr Askwith's assistance, to the kitchen/dining/living areas were non-compliant and potentially unsafe.[82]

[145] There is no issue that the above works were necessary to obtain a code of compliance certificate (CCC) and/or ready The Circle for sale, or that their completion increased its market value.

[146] Ms Thorburn claims she spent 1017 hours on various tasks associated with the above, plus readying the property for marketing, and claims $30/hour for services rendered. Her total claim is $30,510.[83]

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[81] *Ronayne v Coombes* [2016] NZCA 393, [2016] NZFLR 672 at [32].
[82] The rectification work in particular was required to obtain CCC.
[83] Calculated on the basis of an average of 9 hours/week for 113 weeks.

[147] Specifically, Ms Thorburn says she undertook, arranged and/or oversaw the following:[84]

i. Obtained quotes from different builders in respect to the deck
ii. Met with the architect & project manager to design the deck
iii. Supervised new deck build
iv. Liaised with numerous tradespeople/suppliers
v. Sourced and obtained products, including (to name just some) tiles, blinds and deck materials, involving considerable travel
vi. Assisted with installation of downstairs windows and installed window coverings
vii. Installed laundry cabinets
viii. Organised the tiling
ix. Painted the downstairs flat, laundry, hallway & garage
x. Completed plumbing work in the downstairs kitchen
xi. Assisted with the repair of the lounge ceiling plaster
xii. Supervised installation & painting of windows/new doors upstairs
xiii. Painted window frames and architraves upstairs
xiv. Landscaping work, including repair/painting all fences and garden shed
xv. Broke up concrete at the back of the house
xvi. Supervised exterior rendering & painting
xvii. Organised/facilitated installation of new garage doors
xviii. Sought advice regarding obtaining the CCC
xix. Sought advice regarding obtaining Safe and Sanitary
xx. Arranged rubbish removal from the property, including removal of unwanted family chattels.

[148] In his affidavit evidence Mr Mowles claimed most of the work was carried out by contractors and he took issue, item by item, with Ms Thorburn's list.[85] He claimed he arranged some tasks from off-site, such as finding the renderer and organising the CCC. He argues in a number of contexts that it wasn't practical for him to assist onsite given the acrimonious post-separation relationship.

[149] However there was little dispute by the end of the hearing that Ms Thorburn did undertake the tasks claimed, as supported by the following:

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[84] Narrative affidavit of applicant (16 May 2019) at [105].
[85] Narrative affidavit of respondent (21 June 2019) at [103].

- A lot of the work was confirmed by Mr Robson, who deposed he witnessed it being undertaken;[86]

- The history of Ms Thorburn being personally involved with home renovations, as attested by her first husband Mr Cameron;[87]

- Importantly, Mr Mowles accepted at the hearing that Ms Thorburn likely undertook a lot of the work claimed.[88]

[150] I find that Ms Thorburn did undertake the tasks outlined in her evidence.

[151] Is it just, however, to make an award? Ms Thorburn's contributions cannot be viewed in isolation. I must look at the surrounding circumstances, including consideration of Mr Mowles' contributions.

[152] Ms Thorburn acknowledges that particularly from mid-2017 Mr Mowles liaised with the Council, engineer and architectural draughtsman around the CCC process, though she would add this was after many attempts to get him to engage. She also complains Mr Mowles didn't always keep her in the loop as to what he was doing. For example, in mid-2017 he commissioned design plans for the kitchen/dining/living area without consultation which were ultimately 'unhelpful' and had to be altered.

[153] Mr Mowles did contribute in the following ways:

- Removing the deck (albeit this was just prior to separation);

- Dealing with paperwork, such as submitting the building consent application to Council;

- Liaising and meeting with relevant parties such as engineers, the draughtsman and Council personnel.[89] [90]

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[86] NOE at page 219 & confirmed in the affidavit of Ian David Robson in support of applicant (22 August 2019).
[87] Affidavit of Neil Colin Cameron (23 September 2019) at [8]-[14].
[88] NOE pp 348, 352, 353, 356, 371, 372, and 374.
[89] NOE pp 97, 99, 345, and 369.
[90] The schedule of works undertaken by Mr Mowles is found in respondent's second affidavit of financial means and their sources (8 October 2020).

[154] It is incontrovertible these contributions were limited compared to Ms Thorburn's. I do not accept the difficult post-separation environment justifies Mr Mowles not making himself more available to assist with what were significant tasks for a long 2-year period. As one solution, Ms Thorburn had offered to be absent if Mr Mowles was to attend the property.

[155] On balance, I find it is just to compensate Ms Thorburn for her post separation contributions towards The Circle. Though Mr Mowles argues there was no prior agreement to Ms Thorburn being paid, he was prepared to pay a professional project manager. Throughout the 2 year period Ms Thorburn was working to ready The Circle for sale, Mr Mowles had the freedom to get ahead in life by acquiring a section and building a new home with his now wife. Ms Thorburn did not have that opportunity. Her independent life was effectively put on hold over this period. Additionally, she attended to the tasks around her full-time job and, according to her evidence, to the detriment of that employment. Ms Thorburn's efforts increased the value of The Circle. Both parties benefited from that capital gain, though Mr Mowles with minimal input. Ms Thorburn should be compensated for her efforts in achieving that. That accords with the purpose of s 18B and PRA principles.

[156] In terms of quantifying the compensation, it is appropriate to apply a deduction to acknowledge Mr Mowles' contributions. Given those have not been quantified in a monetary sense, and there is no independent evidence supporting Ms Thorburn's calculations, or that $30/hour is an appropriate "going rate", it must of necessity be a broad-brush exercise. I am prepared to award Ms Thorburn two thirds of her total claim, namely $20,000 (rounded).

Issue 10b – Occupation Rental

[157] Mr Mowles claims occupation rent in the sum of $17,250 for Ms Thorburn's exclusive post separation use/occupation of The Circle.

[158] It is long confirmed that one partner making their share of capital in the home available to the other partner may qualify as a s 18 contribution. An award of occupation rent is "designed to compensate the party who has been deprived of the

use of his or her capital for the period during which the other party continued to occupy the home".[91] The power to award occupation rent is discretionary. The mere fact one party has made such a contribution is not sufficient for an award to be made. As observed by Lang J in *C v C,* awards for occupation rent should only be made after a full assessment of all the post-separation circumstances.[92] That will require the Court to take into account a variety of factors, many of which will be case specific. Again, the ultimate question is whether it is just in all the circumstances for such an award to be made.

[159] Several factors exist in the present case which Courts have previously taken into account in considering whether to award occupation rent, which I address below.

[160] *Standard of dwelling*. Assessing the quality of the dwelling and whether it was tenantable is an important factor.[93]

[161] Ms Thorburn contends The Circle was legally and/or practically untenantable for most of the relevant period given:-

- the upstairs deck was ripped out and the ranch slider doors opened to nothing;
- upstairs was structurally unsound;
- lack of CCC[94];
- the remedial works necessary to rectify the structural issues meant the house was a construction zone for much of the time;
- downstairs couldn't be rented as it was also being renovated and took some time to be separately partitioned.

[162] Mr Mowles contends it was not necessarily dangerous to live in the property during the renovations/remediation work. Nonetheless he did concede at the hearing it would have been difficult to rent the property without a CCC.[95]

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[91] *C v C* HC Auckland CIV-2007-419-1313, 26 June 2008 at [34].
[92] At [28].
[93] *Caie v Caie* FC Auckland FAM-2009-057-186, 10 October 2011; *Saunders v Sloan* [2020] NZFC 3453.
[94] Until the remediation work was completed late in the piece.
[95] NOE pg 338 lines 29-30.

[163] That is the Court's view too, noting a property leased without a CCC is technically in breach of the Residential Tenancies Act 1986.[96] The Circle was not completely unhabitable, evidenced by Ms Kreft, Mr Robson and Airbnb guests staying there. However I find it would have been difficult to rent out, particularly for any length of time, given it was under renovation for most of the relevant period and was without a CCC.

[164] This is a significant factor against awarding occupation rent.

[165] *Benefits derived through rental income*. Ms Thorburn did derive rental income, though relatively minimal and in terms of the Airbnb required considerable effort.

[166] *Contributions to the mortgage and other expenses*. This issue is addressed below, including an accounting exercise to equalise/offset these contributions.

[167] *Delay in selling the house*. Mr Mowles argues Ms Thorburn unreasonably delayed sale of The Circle. However I do not find on the evidence that the two year timeframe was excessive or unreasonable, particularly as there was a combination of valid reasons.[97] Moreover Mr Mowles could probably have hastened the process had he assisted more than he did. I do not therefore take this factor into account.

[168] *Time to notify Ms Thorburn of claim*. Mr Mowles did not notify his intention to claim occupation rent until 21 February 2017, a year after he moved out. This delay tends to count against an award, though it is not a significant factor in the overall scheme.

[169] *Benefits of occupation/finding accommodation*. Ms Thorburn contends Mr Mowles could have remained living in the downstairs flat. I accept however Mr Mowles' position that it was unrealistic for both parties to remain at the property. Realistically one of them had to find alternative accommodation, most logically in the circumstances Mr Mowles.

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[96] By failing to comply with the Building Act 2004.

[97] Including, in addition to the scope of the work required to obtain CCC, delays occasioned by the builder breaking his wrist, a shortage of contractors during the building boom, awaiting Council consent/CCC and Ms Thorburn working full-time.

[170] Ms Thorburn also claims mitigation in the fact that there was consent for her to have sole occupancy post-separation. Mr Mowles agrees he initially consented, though on the basis there was equal contribution to outgoings and things didn't drag on as long as they did. I have already found the timeframe was not unreasonable, or of Ms Thorburn's doing.

[171] It could be argued Ms Thorburn financially benefited from the post-separation arrangement. However, as will be evident from other sections of this judgment, in the circumstances of these parties I do not on balance see it that way.

[172] Not only was there negligible benefit to Ms Thorburn having occupation after separation, overall I consider she was more prejudiced by her essentially enforced occupation than was Mr Mowles. Mr Mowles benefited from having Ms Thorburn at the home to make decisions and oversee the rectification/renovation works. She effectively shielded Mr Mowles from the stress of day-to-day management of the site and living in a construction zone. Whilst Mr Mowles claims he could have been the one to live there to do all this,[98] I consider this unrealistic, even self-serving, especially as it was never offered.

[173] This burden, and Ms Thorburn's output in terms of her various contributions, including the consequential capital gain enjoyed by both parties, outweigh in my view any benefit to Ms Thorburn of living at The Circle. Accordingly, this factor does not weigh in favour of occupation rental.

[174] *Contributions to improving the value of the home*. I have dealt with this factor above, finding (without any real dispute) that Ms Thorburn was largely responsible for attending to and/or managing the rectification and renovations works necessary to get The Circle marketable.

[175] I have found that Mr Mowles' contribution was minimal in comparison, and largely reject his assertion that he could not return to the family home to assist because

[98] Narrative affidavit of respondent (21 June 2019) at [107].

of the acrimonious post-separation relationship. These circumstances count against an award of occupation rent.

Conclusion

[176] Taking all of the above into account, I rule it would not be just to award occupation rental.[99] It is unlikely that the parties could have rented the entire home, or any part of it, for any length of time before it was sold (which notably occurred soon after the works were complete). During the renovations it was necessary for one party to remain onsite to oversee the project. Ms Thorburn effectively had no say that it was her. I find there was no undue delay on Ms Thorburn's part in completing the works as soon as practicable to get the property on the market. She did so around, and to the detriment of, her full-time job and with limited assistance from Mr Mowles (none on-site, bar an early meeting with the proposed project manager). I accept Ms Thorburn's evidence that living in the home under these circumstances was stressful and more of a burden than of any benefit to her.

Issue 11- Adjustments for post-separation spending from joint accounts

[177] At separation the parties retained joint accounts, primarily for ongoing payment of utilities and maintenance/renovation of The Circle. Both parties also used the accounts for personal expenditure (Ms Thorburn for a longer period than Mr Mowles). The accounts in question are:

(a) ASB Orbit Home Loan - # 12-3122-0237851-00 ("the Orbit account")

(b) ASB Visa Platinum – # 1200002500397 ("the Visa account").

[178] The debit balances in the accounts as at 13 and 28 February 2016 were:

- Visa ($2,736.88) 13.02.16; ($4,899.57) 28.02.16
- Orbit ($44,175.18) 13.02.16; ($38,654.15) 28.02.16.

[99] Over and above Ms Thorburn's greater post separation contributions to the Orbit account – dealt with below.

[179] The monthly Visa debit balance was paid in full, on time, from the Orbit account. The Visa and Orbit accounts were closed on 29 December 2016 and 27 April 2018 respectively.[100]

[180] Ms Thorburn seeks a declaration that there should be no adjustment for post-separation expenditure from either facility. Mr Mowles initially sought an adjustment in his favour of $25,313.17 for what he argued was Ms Thorburn's greater net spend from these accounts .[101]

[181] Each party provided very extensive evidence attributing post-separation expenditure from/deposits into both accounts to either her/himself, the other party or as a joint expense.[102] Unsurprisingly there were significant differences between them. However those differences greatly narrowed during the course of the hearing.

[182] I deal with each of the accounts in turn. The parties' post-separation analysis commences from 13 February 2016. Although I have determined the date of separation is 28 February 2016, I do not disturb the analysis from the earlier date as it makes no material difference to the outcome.

Joint Credit Card

[183] The following is a table of disputed transactions:

Date	**Description**	**Value**	**She says**	**He says**
26.2.16; 26.3.16; 26.4.16	Spotify	$12.99	His	Joint
29.2.16	Smith & Smith	$40	Joint (House)	Hers

[100] The Orbit balance was settled with the sale proceeds of The Circle.
[101] Respondent's second affidavit of financial means and their sources (8 October 2020) at [31(h)].
[102] Mr Mowles' initial position was set out in the spreadsheet attached to narrative affidavit of the respondent (21 June 2019), with a modified spreadsheet annexed to respondent's second affidavit of financial means and their sources (8 October 2020). Ms Thorburn's response/initial position was set out in notated bank statements attached to applicant's affidavit in reply to affidavit of respondent sworn 21 June 2019 (23 August 2019).

18.3.16	NZ Transport	$4	His	Hers
22.3.16	Noel Leeming	$359.99	Joint (House)	Hers
8.6.16	Locksmart	$729.80	Joint (House)	Hers
16.7.16	Northland Waste	$69	Joint (House)	Hers
24.7.16	Briscoes	$90.99	Joint (House)	Hers

[184] *Spotify*. The evidence indicates, supported by the fact Ms Thorburn started her own Spotify account later on, that this account was primarily for the benefit/use of Mr Mowles. I therefore attribute the Spotify expense to him.

[185] *Smith & Smith/NZ Transport.* I do not have sufficient evidence around what the Smith & Smith expense was for and therefore attribute it to Ms Thorburn, who incurred the cost. Although Ms Thorburn initially classified it as a house related expense, it notably did not form part of her later schedule of disputed items.[103] Likewise for the nominal NZ Transport expense.

[186] *Locksmart*. This relates to the installation by Ms Thorburn of a lock between the main house and downstairs unit, changing the front/back door locks and installation of deadlocks.

[187] Ms Thorburn says she felt compelled to change the front/back door locks after Mr Mowles was able to enter the house after separation using a random key (i.e. not specifically for the installed lock). She felt this posed a security risk requiring immediate rectification. Whilst acknowledging he was able to access the house through the front door with a random key, Mr Mowles argues it was unnecessary to

[103] Applicant's affidavit in response to respondent's affidavit of financial means and the sources dated 8 October 2020 (29 January 2021) at [27] & Exhibit "D".

change the locks a second time[104] and that it was only done to prevent him from entering the property.[105]

[188] Although part of the reason may have stemmed from a distrust of Mr Mowles, I find the fact that he was able to enter the house with a key not designed for the in-situ lock justified a lock change from a security perspective.

[189] Furthermore, in terms of installation of a lock downstairs, though Mr Mowles contends it was only installed to rent out downstairs, I consider there was a broader intent to create a separate downstairs unit thereby improving the value of the home. This lock enabled the property to be marketed as a house with a self-contained, rentable unit.

[190] As such I consider this properly a joint expense.

Northland Waste/Noel Leeming/Briscoes

[191] For reasons set out below,[106] I consider the Northland Waste, Noel Leeming and Briscoes expenses were for the property/home and should be shared accordingly.

[192] Taking into account the above findings, post-separation expenditure on the joint credit card is summarised as follows:

- Ms Thorburn $5,207.54
- Mr Mowles $2,976.61
- Joint $2,716.74

  _____
- Total $10,900.89.
- Ms Thorburn's greater spend $2,230.93.

[104] A new front door handle/lock set had been purchased before separation but not installed until soon after separation.
[105] However the evidence established Mr Mowles was offered a key (at his initial request), which he didn't take up. NOE pp 380 lines 19-27 and 381 line 9.
[106] At [197].

Orbit Account

[193] It is in respect of the Orbit account where there was significant movement and narrowing of differences during the hearing, with Mr Mowles in particular changing his position on a large number of transactions especially pertaining to improvement of The Circle. This includes such things as Mitre 10, Smart Interiors, Resene Paints, Lighting Plus, various landscaping, plant and nursery expenses.[107] I am therefore able to re-categorise expenses of this nature as joint, and indeed consider it appropriate to do so.

[194] It was further agreed that the three cash withdrawals of $2000 on 24/1/17, 2/2/17 and 4/3/17 and a $220 withdrawal on 28/11/17 were likely cash payments to the painters/renderer. The payment to Queens Liquor of $16.97 on 11 September 2017 was for a working bee shout. The cleaning expenses on 24 and 26 April 2018 of $300 and $80 respectively were for open homes.

[195] A significant category remaining in dispute are utility expenses including Watercare, Northland Waste, Envirowaste and Genesis Energy.

[196] It is not disputed that there was initial agreement from Mr Mowles to those costs being shared. His position changed in February 2017 when he became frustrated by how long it was taking for The Circle to be sold. However he acknowledged at the hearing in response to a question from the Court that the delays could not be attributed to Ms Thorburn personally, rather the various things needed to get the home market ready some of which was drawn out for reasons beyond either parties' control.[108]

[197] I have already found that Ms Thorburn was not personally responsible for the 2½ year 'delay' between separation and sale of The Circle, and that she worked diligently and proactively in attending to all tasks required for that to happen as soon as practicably possible. Although she personally benefited from the utilities, most if not all were also required for the renovation/improvement works. In light of that, and

[107] Not an exhaustive list.
[108] Those various steps are summarised in Ms La Mantia's closing submissions at [87].

the agreement in principle at the outset that it would be appropriate for the costs to be shared, I find that all such costs should be jointly shared.

[198] That then leaves a relatively small number of transactions in dispute as set out in the following table. I address my finding and reasons in the last column:

Date	**Description**	**Value**	**She says**	**He says**	**Correct Classification**
20.2.16	Sky	$153	Joint	Hers	Manly Bills (Joint) as pre-Mr Mowles moving out
01.03.16	Fix washing machine	$260	Joint	Hers	Manly Bills (Joint). The aged washing machine required fixing soon after separation, with Ms Thorburn deposing Mr Mowles used it at least once after separation.
03.03.16	Thermal Resort Waiwera	$107.50	Joint	Hers	Ms Thorburn. Despite evidence of Mr Mowles' sympathy for Ms Thorburn treating herself on what would have been their wedding anniversary, Ms Thorburn should bear the cost being the beneficiary of the treatment.

[199] This effectively means that all items in the 'Manly Bills' column are to be shared, with the exception of Sky payments post-February 2016, which Ms Thorburn accepts are her responsibility (albeit with a question mark over the March cost, but which I attribute to Ms Thorburn).

[200] The following expenses require simple correction as to the columns they have been placed in, in error, in Mr Mowles' initial spreadsheet:

Date	Description	Value	Initial Classification	Correct Classification
22.2.16	Watercare	$105.83	Ms Thorburn (a double up with Manly Bills)	Manly Bills
08.03.16	Bendon	$72.43	Mr Mowles	Ms Thorburn
20.03.16	Watercare	$46.95	Ms Thorburn	Manly Bills
23.03.16	HMS Host & Relay Auckland	$7.50 *(NB not $27.50 as recorded*) $21.73	Ms Thorburn	Mr Mowles
08.04.16	AMP Credit	$37.72	Manly	Ms Thorburn credit
15.04.16	Tile Warehouse	$57.09	Ms Thorburn	Manly
10.05.16	Mortgage interest & principle	$629.29 $159.91	Manly	Main loan interest/mortgage principle
07.10.16	AMP Credit	$35.85	Manly	Ms Thorburn credit
01.12.16	Iconic Fund	$207	Ms Thorburn	Ms Thorburn credit
09.09.16	Reimbursement transfer	$260	Manly	Debit Mr Mowles
20.11.16	Rates	$641.91	Main loan interest	Manly

[201] When all of the above is taken into account, and a recalculation undertaken of attribution of expenditure, there is obviously a significant narrowing of Ms Thorburn's

greater spend. According to my recalculation, the net spend by Ms Thorburn in excess of Mr Mowles reduces to just $1,767.05.[109]

[202] I consider in the context of Ms Thorburn's past spousal maintenance claim (dealt with below), it is appropriate to treat this amount as a contribution towards spousal maintenance properly payable to Ms Thorburn. I therefore rule there is to be no adjustment from Ms Thorburn to Mr Mowles in respect of post-separation expenditure from the Visa and Orbit accounts.

[203] As part of the above reconciliation, Ms Thorburn contributed $9,534.99 more than Mr Mowles to the Orbit account. She appropriately proposes this amount is effectively seen as an offset against Mr Mowles' claim for occupation rental.

Issue 12 – Past Spousal Maintenance

[204] Ms Thorburn seeks lump sum past spousal maintenance of $30,500, calculated at $250/week over the 122-week period 28 February 2016 to 30 June 2018. The claimed period covers both during the marriage (separation to 17 April 2018 - 112 weeks) and after dissolution (18 April-30 June 2018 - 10 weeks).

[205] Mr Mowles in response seeks a declaration that Ms Thorburn was able to meet her own reasonable needs from the income stream available to her over that period.

The Law

[206] Spousal maintenance prior to and post dissolution of marriage is dealt with under ss 63 and 64 respectively of the Family Proceedings Act 1980 (FPA). The Court can make an order directing a respondent to pay such lump sum towards the past maintenance of the applicant as it thinks fit.[110] The general presumption is that neither party to a marriage or civil union is liable to maintain the other during the marriage or after dissolution unless a party cannot practically meet their reasonable needs because of any of the circumstances set out in ss 63(2) or 64(2). The other partner is liable to

[109] Visa account $2,230.93 / Orbit account -$463.88 [$2,772.31 (Ms Thorburn) - $3,236.19 (Mr Mowles)].
[110] Family Proceedings Act 1980, s 69(1)(c).

the extent of any shortfall between the applicant's reasonable needs and the extent to which s/he can reasonably meet those.[111] Neither party has the onus of proof. Rather it is a question of whether there is sufficient evidence to satisfy the Court of the matters outlined in ss 63 and 64 respectively.[112]

[207] Following dissolution, each spouse must assume responsibility within a period of time that is reasonable in all the circumstances of the particular case for meeting his or her own needs.[113]

[208] In determining whether to make an award in accordance with ss 63 / 64, the Court must answer three questions:[114]

- First, what are the applicant's reasonable needs and the amount of money required to satisfy them?
- Second, identify the extent to which the applicant cannot meet those needs.
- Third, does that inability arise because of a qualifying circumstance? If not, the applicant cannot obtain maintenance from the other spouse.

[209] In terms of causation, Ms Thorburn relies on the grounds in s 63(2)(a)(ii) & (c) and the equivalent provision in s 64(2)(a)(ii) & (c), namely the likely earning capacity of each spouse and the standard of living whilst they were together.

[210] The FPA does not define "reasonable needs". The Court has held that the "reasonable needs" of a party are to be assessed on a case-by-case basis, as "what constitutes the reasonable needs of one person may not be sufficient to meet the reasonable needs of another".[115] However it is clear that the Court should not read down the phrase to the strict necessities of life or needs at a subsistence level.[116]

[211] Reasonable needs are obviously assessed by reference to the shared standard of living prior to separation. Having regard to the standard of living previously

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[111] *Bruce v Bruce* (1984) 3 NZFLR 129 (FC). Cited by *Douglas v Douglas* [2013] NZHC 3022 and *Hodgkinson v Judd* [2014] NZHC 3315.
[112] *McQueen v Penn* [2016] NZCA 571, [2017] NZFLR 31 at [20].
[113] Section 64A.
[114] *Wederell v Wederell* (1994) 12 FRNZ 582, [1994] NZFLR 928 (HC); *RK v DK* [2011] NZFLR 468 (HC); *Hodgkinson v Judd* [2014] NZHC 3315.
[115] *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 294.
[116] *M v B* [2006] 3 NZLR 660 (CA) at [197] and [256]; *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 294.

enjoyed does not mean that the post separation standard is necessarily always maintained at the pre-separation standard.[117] However, a high standard of living pre-separation does create an expectation of greater reasonable needs as noted in *RK v DK*:[118]

> The standard of living may be such that, when the relationship ends, the spouse or partner may, through development of the expectations associated with that standard of living engendered during the marriage or relationship, have far greater reasonable needs than they can possibly meet from their own resources. The reasonable needs may be elevated to an extent they could not meet them, because of the higher standard of living.

What are Ms Thorburn's reasonable needs and the amount of money required to satisfy them?

[212] Ms Thorburn's gross income and actual expenditure post-separation is summarised as follows:

Period	**Gross income**	**Actual expenditure**	**Net result**
13/02/16 to 12/02/17	$64,869.16	$72,302.89	($7433.73)
13/02/17 to 12/02/18	$79,505.35	$72,111.62	$7393.73
13/02/18 to 30/06/18	$31,183.59	$37,351.69	($6168.10)
Overall shortfall			($6208.10)

[213] Ms Thorburn's claimed reasonable needs are as follows:[119]

[117] *P v P* [2003] NZFLR 925 (FC).
[118] *RK v DK* [2011] NZFLR 468 (HC) at [42].
[119] Exhibit "C" of applicant's affidavit as to spousal maintenance claim and correction of evidence (7 October 2020).

Expenses	**Amount per week**
Life Insurance	35
Home insurance and superannuation	80
Mortgage/rates/rent	260
Water rates	24.23
Food and household supplies (including bakeries, café meals, takeaways, and groceries)	200
Electricity and gas	50
Telephone and internet	50
Clothing/ shoes	100
Christmas presents	20
Birthday presents	10
Entertainment	200
Public transport and taxi fares	15
Magazines/books/kobo	5
Cleaner	25
Sky/Netflix/ Spotify	37.38
Dental	10
GP/Specialist	5
Pharmacy	5
Hair	40
Nails	20
Waxing and treatments	40
Makeup, skin, perfume and hair product	41.54
Gym fees and trainer	65
Holidays	100
Legal costs	71.54
Contacts	13.85

[214] The claimed reasonable needs for the relevant period total $1,523.54 per week. Deducting power and water costs to avoid double counting reduces the claim to $1,449.30/week.

[215] Mr Mowles argues Ms Thorburn's post-separation expenditure was excessive in comparison to pre-separation expenditure and is beyond what could be considered "reasonable".

[216] Again, considerable resource was put to both parties' evidence on this issue, including scrutiny of pre- and post-separation expenditure. There was extensive cross-examination of both parties. During cross-examination of Mr Mowles especially much of the previously disputed expenditure was in fact acknowledged to be reasonable. There was no real issue by the conclusion that the amounts claimed for life insurance, superannuation, food/household supplies, clothing/shoes, Christmas/birthday presents, public transport/taxi/ fares, magazines/books/kobo, cleaner, Sky/Netflix/Spotify, GP/dental/specialists/pharmacy/contacts were all reasonable.

[217] On a close analysis of the evidence, I am satisfied that the table of claimed reasonable expenditure was in most respects commensurate with the standard of living this couple enjoyed prior to the end of their marriage. I am satisfied they had a comfortable standard of living, with no real brake on discretionary spending on such things as meals out, clothes, hair/beauty treatments and the like. They were able to put significant resources towards renovating their home(s) and maintaining their boat, which they used often, plus they travelled overseas almost annually.

[218] Having said that, again, the pre-separation level does not have to be precisely maintained after separation. The test still remains what is reasonable in all of the circumstances.

[219] I consider a small number of Ms Thorburn's claimed expenditure not to be reasonable, even in the context of the standard of living enjoyed prior to separation. The claim for entertainment at $200 per week when considered alongside the food/household supplies claim (including takeaways/cafes/bakeries) is in my view properly reduced to $150. For any personal telephone costs, a plan costing $25 per week is considered more realistic and reasonable. The weekly claim of $141.54 for combined hair/nails/waxing/make up/skin/perfume/hair products is properly reduced to $100. Gym fees + personal trainer of $65 per week is reduced to exclude the trainer.

Regular use of a personal trainer is not considered reasonable when it was only sporadic during the relationship. It is appropriate to limit this item to the gym membership cost.

[220] Legal costs are also excluded. In *C v G* [Maintenance of former partner: period of liability] the Court of Appeal held it was wrong in principle to include legal costs in a maintenance assessment unless such costs are likely to be an ongoing expense.[120] The Court of Appeal considered that the proper course was to deal with litigation costs as a separate issue, where appropriate to be addressed through a discrete costs application. This reasoning was followed by Kós J in *Hodson v Hodson*.[121]

[221] A summary of adjustments to properly reflect a reasonable standard of living (as measured against the pre-separation level) in Ms Thorburn's post-separation reality is as follows:

Item	**Claimed**	**Adjusted to**	**Deduction**
Telephone & Internet	$50	$25	$25
Entertainment	$200	$150	$50
Hair/nail//waxing & treatments/make up, skin, perfume, hair product	$141.54	$100	$41
Gym fees & trainer	$65	$20	$45
Legal fees	$71.54	Nil	$71.54

[222] Taking account of these adjustments, I assess Ms Thorburn's reasonable needs at $1,291 per week.

[120] *C v G* [Maintenance of former partner: period of liability] [2010] NZFLR 497.
[121] *Hodon v Hodson* [2012] NZFLR 252 (HC).

Ability to meet own reasonable needs

[223] Ms Thorburn's net income through full-time work and rental income was $1,201/week over the relevant period. For reasons previously given, it is not reasonable to expect Ms Thorburn to have pursued more rental income than she did. It follows Ms Thorburn was unable to meet her reasonable needs by $90/week.

Is there a qualifying circumstance?

[224] I am satisfied Ms Thorburn's inability to meet her needs arose because of qualifying circumstances, specifically:

- Her likely earning capacity compared to that of Mr Mowles.

  Mr Mowles earnt more than Ms Thorburn, and his greater income during the marriage supplemented their comfortable lifestyle/spending.

- The standard of living pre-separation.

  The standard of living enjoyed by the parties was higher while they were still living together.

Mr Mowles' ability to pay

[225] There was no serious suggestion Mr Mowles was unable to pay any shortfall, rather the main scrutiny was on Ms Thorburn's claimed needs. In any event, I am satisfied based on Mr Mowles' budget evidence and what he was able to achieve financially over this immediate post separation period that he did indeed have the ability to meet Ms Thorburn's shortfall.

What is just?

[226] The total shortfall over the 122 weeks based on reasonable needs is $10,980. However, in all of the circumstances, I consider it appropriate to limit the payment to Ms Thorburn to the shortfall between her income versus actual expenditure over this

period.[122] I therefore quantify Ms Thorburn's claim for past spousal maintenance at $6,208.10.

[227] Looking at it from a different angle, on scrutiny of Ms Thorburn's actual costs after separation I consider that, particularly in the time available to her, there was still generous spending on discretionary items such as hair/beauty treatments, social activities and overseas holidays (albeit for the latter using other means, such as air points). The unfortunate reality for Ms Thorburn is she did not have a lot of spare time around her full-time employment and work on The Circle, and she has been financially compensated for the latter efforts.

[228] Additionally, and some support for the argument Ms Thorburn had a greater ability than claimed to meet the costs she incurred in the time available to her, is that she was able to save money.

[229] There was some inconsistency around Ms Thorburn's evidence in this respect. Early in her evidence[123] she deposed her father loaned her $5000 to cover the shortfall in her income "in the 52 weeks prior to the end date of my claim".[124] In apparent contradiction, particularly as to the timeframe, at the hearing Ms Thorburn said her father had given her $5000 in cash shortly after Mr Mowles left the home.

[230] In or about February 2017 Ms Thorburn transferred $9700 to her father. Of this amount, at the hearing she said $5000 was repayment for what she had borrowed earlier and the balance $4,700 was other savings she had been able to accumulate. She said she gave it to her father for safe keeping to ensure that she didn't spend it.

[231] Her father repaid her $5000 in two tranches on 19 March 2018 ($2000) and 23 May 2018 ($3000). Given he was only holding $4700 for her, Ms Thorburn responded affirmatively when asked by the Court if her father effectively overpaid her by $300.

[232] Whatever the true position, it is clear that by early February 2017 Ms Thorburn had been able to accumulate savings of close to $10,000 and was in a position to repay

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[122] This is in addition to no adjustment for expenditure from joint accounts (value $1,767.05).
[123] Narrative affidavit of applicant (16 May 2019) at [134].
[124] Suggesting the 52 weeks from July 2017 to July 2018.

her father what she said he had lent her and to also have her father hold onto balance savings (not repaid until early/mid 2018).

[233] In all of these circumstances, I do not find that the claim of $250 per week is reasonable. Whilst acknowledging Ms Thorburn's lifestyle post-separation and until The Circle was sold was very much constrained by the hours that she was required to put into readying The Circle for sale, she was still able to live a reasonable lifestyle including discretionary/luxury items such as personal spending and holidays. I consider that a payment sufficient to cover the shortfall in her actual expenditure over this period would satisfy her reasonable needs as measured against the standard of living she enjoyed prior to separation.

[234] Accordingly, there is to be a payment from Mr Mowles to Ms Thorburn for past spousal maintenance in the (rounded) sum of $6210.

Conclusion/Summary

[235] The following orders/declarations are made:

1) The parties' relationship commenced in July 2004 and ended on 28 February 2016.

2) Ms Thorburn is to receive a payment from the net sale proceeds of The Circle of $335,000, representing the value of her separate property, The Links, before the balance proceeds are divided equally between the parties (subject to other agreed/ordered adjustments).

3) Mr Mowles retains the following, having been his separate property throughout:

    a) the Brevini shares;

    b) the Brammer pension;

    c) his Sovereign Life Assurance policy.

4) Each party is to retain as their respective separate property the $190,000 interim distributions from the sale proceeds of The Circle.

5) Each party is to retain as their respective separate property the family chattels in their possession, with no adjustment.

6) Ms Thorburn is to retain as her separate property the sale proceeds of family chattels in the sum of $1,486.89, with no adjustment to Mr Mowles.

7) Mr Mowles is to pay Ms Thorburn the sum of $2,500 for his dissipation of the value of the Maxum boat.

8) Mr Mowles is to retain as his separate property the net proceeds of sale of the Galailai boat of $1,473.48, with no adjustment to Ms Thorburn.

9) Ms Thorburn is to retain her Kiwi Saver policy as her separate property, with a credit to Mr Mowles in the sum of $16,229.24.

10) Mr Mowles is to retain as his separate property the Hi Tek shares, with no adjustment to Ms Thorburn.

11) Ms Thorburn is to retain as her separate property rental income received from The Circle post-separation in the sum of $5,550, with no adjustment to Mr Mowles.

12) Mr Mowles is to pay the sum of $20,000 to Ms Thorburn in satisfaction of her s 18B claim for performance of services in respect of The Circle.

13) There is to be no further adjustment between the parties in respect of the joint Orbit and Visa credit card accounts.

14) Mr Mowles is to pay the sum of $6,210 to Ms Thorburn in satisfaction of her claim for past spousal maintenance.

[236] Costs are reserved in respect of this decision, and any earlier interlocutory matters where the issue of costs was reserved.

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Judge G Wagner
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 17/11/2022