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

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IN THE FAMILY COURT
AT NORTH SHORE

I TE KŌTI WHĀNAU
KI ŌKAHUKURA

FAM-2023-044-000173
[2023] NZFC 12359

IN THE MATTER OF	THE DOMESTIC ACTIONS ACT 1975
BETWEEN	[STEVE LAMBERT] Applicant
AND	[KATIE RIVER] Respondent

Hearing:	22 August 2023
Appearances:	J Beverwijk on behalf of D Chambers KC for the Applicant No appearance by or for the Respondent
Judgment:	19 October 2023

RESERVED DECISION OF JUDGE A M MANUEL

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[1] The parties lived in a de facto relationship from about June 2020 to November 2022.

[2] In [2022] Mr [Lambert] asked Ms [River] to marry him and gave her a three stone diamond ring in a platinum setting. She accepted and they celebrated their engagement in [country deleted].

[3] Ms [River] left Mr [Lambert] about four months later and obtained a temporary protection order against him on the grounds of physical and psychological abuse. Mr [Lambert] defended the protection proceedings, which were ultimately settled on the basis of undertakings.

[4] Mr [Lambert] is now seeking the return of the engagement ring or, in the alternative, payment of the sum of $45,000, which he says is the "estimated retail replacement value." He also seeks costs and disbursements in the total sum of $8,463.24.

[5] Mr [Lambert]'s application is made under the Domestic Actions Act 1975 (the DAA). The DAA is a piece of legislation which is seldom used. It implemented the Report of the Torts and General Law Reform Committee on Miscellaneous Actions to the Minister of Justice in February 1968. The Committee recommended abolition of the action for breach of promise of marriage, taking the view that it was better for an engagement to be broken off than for a marriage to take place which one of the parties no longer wanted. But they considered that provision should be made for the settlement of disputes arising out of property transactions entered into in anticipation of a marriage which did not take place.

[6] Following the Committee's recommendations, s 8(1) of the DAA enables applications to be made for orders:

> Where the termination of an agreement to marry gives rise to any question between the parties to the agreement … concerning the title to or possession or disposition of any property …

[7] Section 8(3) of the DAA provides that:

> … the court shall make such orders as it thinks necessary to restore each party to the agreement … as closely as practicable to the position that party would have occupied if the agreement had never been made.

[8] Section 8(4) of the DAA expressly provides that the Court:

> … shall not take into account or attempt to ascertain or apportion responsibility for the termination of the agreement.

[9] The Property (Relationships) Act 1976 (the PRA) sets out rules for the division of property when a relationship ends on separation or death. The DAA was enacted

before the PRA was amended to include de facto relationships (and civil unions) as well as married relationships. Many couples who agree to marry live in de facto relationships and rely on the provisions of the PRA, rather than the DAA, to resolve their property disputes. This explains for the most part why the DAA is used so infrequently.

[10] Mr [Lambert] made his application in March 2023. He made affidavits in support dated 23 March 2023 and 14 August 2023. Ms [River] filed a notice of response and affidavit in support dated 8 June 2023. Otherwise, she took no steps. A formal proof hearing took place on 22 August 2023.

[11] The parties met and began their de facto relationship during the Covid-19 period. Ms [River] was employed by [details deleted] and was still being paid at the time. She was in her late 20s and had about $20,000 in savings. Mr [Lambert] was about 40 and the principal dealer for a [company]. He was the managing director of the company [name deleted]. In comparison to Ms [River], he had substantial wealth. Ms [River] moved to live with him in a home held by the trustees of Mr [Lambert]'s family trust. They wanted to have children together and tried to conceive throughout the relationship, attending a first appointment at a fertility clinic in July 2020, very soon after their relationship began. She says that at his suggestion she left her job and was employed as a "full time executive assistant" to him, and he then claimed the Government Covid-19 subsidy. Ms [River]'s duties did not match the job description in her employment contract. Rather, she carried out household duties and sold second hand product while the Government Covid subsidy was used to pay household and living expenses. She says this "employment" arrangement came to an end when the Government subsidy ended. Ms [River] wanted to return to the paid workforce, but her background was in hospitality and she found few jobs in the offing. She says she continued to carry out household duties, which freed Mr [Lambert] up to work in his own business. Just prior to Auckland moving to an alert level 4 lockdown in August 2021 she moved with Mr [Lambert] to [location 1] to avoid the rigours of the lockdown. The move made it more difficult for her to return to the paid workforce and left her isolated from friends and family. She also says she assisted with the sale of Mr [Lambert]'s (or his trusts') properties at [location 1] and [location 2] and furniture and furnishings which helped to achieve sales on favourable terms. The

properties at [location 1] and [location 2] were replaced by the purchase of the couple's "forever home" at [location 3].

[12] Mr [Lambert] denies the extent of the contributions which Ms [River] claims to have made to the property and the relationship and denies that her performance of household duties freed him up to work in his own business. It is clear from his evidence that he views himself as the main contributor to the relationship, certainly in a financial sense. He maintains that the return of the ring is necessary to restore him to the position he would have been in if they had never agreed to marry.

[13] After the demise of the relationship Mr [Lambert] remained living in the [location 3] property, and continued to run his business as dealer principal for a [company]. Ms [River] moved to her parents' home. She was not in paid employment. Her savings were gone. Mr [Lambert] paid her the sum of $10,000, which she says was spent on legal fees for the family violence proceedings and negotiations prior to the issue of the ring proceedings.

[14] In correspondence which was produced to the Court Mr [Lambert]'s lawyers maintained to Ms [River]'s then lawyers that because the de facto relationship was one of short duration[1] and s 14A of the PRA did not apply,[2] he was at liberty to make an application under the DAA for the return of the ring. Ms [River]'s lawyers countered that s 14A of the PRA did in fact apply and under s 10 of the PRA the ring was Ms [River]'s separate property because it was a gift from one party to the other.

[15] Ms [River] and her lawyers were evidently taken by surprise when the claim for the ring was made because they had understood that the undertakings in the family violence proceedings had ended all disputes between the parties. Mr [Lambert]'s lawyers maintained otherwise. Over time Ms [River] ran out of funds to pay her lawyers and she was either self-representing or played no part in these proceedings.

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[1] Defined at s 2E of the PRA as a relationship of less than 3 years.

[2] Section 14A provides (broadly) that if a de facto relationship is a relationship of short duration an order cannot be made under the PRA for the division of relationship property unless the Court is satisfied that there is a child of the de facto relationship, or that the applicant has made a substantial contribution to the de facto relationship, and that failure to make the order would result in serious injustice. However under s 14A(4) nothing in s 14A prevents a Court making a declaration or an order under section 25(3) of the PRA even though the de facto partners have lived in a de facto relationship for less than 3 years.

[16] Mr [Lambert]'s lawyer relied on the leading cases, *Oliver v Bradley* and *Zhao v Huang*.[3]

[17] *Oliver v Bradley* was decided by the Court of Appeal in 1987. The parties lived together in a de facto relationship from about May 1980 to February 1984.[4] They became engaged in 1980 and Mr Oliver gave Ms Bradley an engagement ring. He paid $500 for it. In about 1980 they bought a house for $27,500 and they lived there together from May or June 1980 until they separated. The home was registered in Ms Bradley's sole name despite the fact that Mr Oliver made greater financial contributions to both the home and the relationship. In the High Court Mr Oliver was awarded $19,500, or half the equity in the home at the time. He appealed, claiming this was insufficient to recognise his contributions and that the value of the home had increased due to inflation. By the time of the hearing in the Court of Appeal the home had been sold. On appeal Mr Oliver's award was increased to 7/10ths of the proceeds of sale of the home. Ms Bradley had sold the ring, but no order was made in respect of the proceeds of sale of the ring.

[18] The three Court of Appeal Judges who heard Mr Oliver's appeal each expressed views about the way in which the DAA should operate. The majority view (as set out in the judgments of Cooke P and Henry J) was to the effect that contributions to a de facto relationship should be taken into account holistically in applications under the DAA.

[19] Cooke P held that:[5]

> Where the parties have lived in a de facto relationship before the agreement to marry is terminated, to restore them as closely as practicable to their respective positions as if the agreement had never been made is far from a straightforward exercise
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> …
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> I think that the principle of restoration can be applied in a broad way in accordance with the spirit of the Act. Property in the names of one or both the parties may represent the fruits of combined contributions in assets or services. Both parties may have enjoyed the use of the property and other benefits from their association in the meantime and this cannot be undone. But restoration can be effected as closely as practicable by dividing the property built up by

[3] *Oliver v Bradley* [1987] 1 NZLR 586 (CA); and *Zhao v Huang* CIV-2012-404-006370 [2014] NZHC 132.
[4] The duration of the de facto relationship is not specifically set out in the judgment.
[5] At 590.

> their common efforts in broad proportion to their respective contributions of all kinds. Contributions may include housekeeping or looking after children, if the other party has been enabled to earn or acquire assets. In principle I would not exclude anything that has formed part of the consortium provided by one or other partner. To achieve approximate restoration on a just basis it may be necessary to take all such benefits into account. The statutory jurisdiction is intended to be much wider than that exercised by the Court in an action for money had and received.

[20] In a similar vein Henry J held that:[6]

> Section 8(3) requires the Court to restore each party to the agreement as closely as practicable to the position that the party would have occupied if the agreement to marry had never been made. Practical difficulties in implementing that direction will frequently arise, perhaps inevitably so, where, as here, the parties have lived in a de facto relationship for a period of years and there has been intermingling of finances and a sharing of the household. This is recognised by the legislature and the reference in subs (3) to "as closely as practicable." The aim of the Court must be to achieve a just result within that framework.
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> …
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> The restoration must be in respect of both parties
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> …
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> Any approach in a situation such as the present must be pragmatic.

[21] Casey J, in his minority decision, expressed doubts about the application of the DAA to de facto relationships, finding that:[7]

> My reservation about applying the latter to these circumstances arises from the opening words of subs (1): "Where the determination of an agreement to marry gives rise to any questions between the parties" etc. These parties not only agreed to get married, but they also agreed to live in a "de facto" domestic and sexual relationship, and it was their decision to embark on that which can be seen as leading to the acquisition of the house property and to its maintenance as their family home. Similarly, it was a termination of that relationship which led to the dispute about dividing their property. The concurrent agreement to marry appears to be no more than a facet of that more fundamental association. It seems quite artificial to regard this decision about the property as being merely the result of their broken engagement. This is borne out by the difficulties experienced in trying to restore the parties to the position they would have been in if the agreement to marry had never been made, as enjoined by s 8(3). Rather than introduce into the arena of domestic property disputes a new category of "engaged de factos", I would prefer to see s 8 confined to what I think is its real purpose – namely, the settlement of disputes about property acquired to mark the engagement (such as the ring in this case), or in contemplation of the marriage envisaged by it, rather than a furtherance of some other personal relationship. I do not think the legislation was ever intended to apply to the de facto situation in this case…

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[6] At 593.
[7] At 591.

[22] To put *Oliver v Bradley* in context, it was decided prior to the amendment which included de facto relationships under the PRA umbrella.

[23] However, the Court of Appeal in *Oliver v Bradley* drew a clear distinction between couples who agreed to marry and lived in a de facto relationship and couples who agreed to marry but did not live in a de facto relationship.

[24] This distinction can be seen in the High Court decision *Zhao v Huang*.[8] The parties agreed to marry in March 2012 and were in a brief relationship which lasted a matter of weeks. They never lived in a de facto relationship. Mr Zhou applied successfully under the DAA (inter alia) for orders including the sum of A$21,340 in respect of a Mercedes Benz which he had purchased and had remained with Ms Huang after their agreement to marry ended, the sum of NZ$30,000 in respect of a diamond solitaire ring, which he had bought and given to her and NZ$100,000 in respect of a bank cheque for NZ$100,000, which he had paid to her.

[25] There are two main difficulties with Mr [Lambert]'s application under the DAA. One is specific and the other general.

[26] The first difficulty relates to the value of the ring. There is no evidence about what Mr [Lambert] paid for it or how much it is now worth. The only evidence provided is a document which may well be sufficient for insurance purposes but is insufficient for the purposes of the Court.

[27] The second difficulty lies in the risk of isolating a single item of property under the DAA where a couple have lived in a de facto relationship. In this case the parties lived together for about 2½ years and it is apparent from the evidence available that during the course of their de facto relationship the parties both made various contributions – both financial and non-financial – notwithstanding that some of these are in dispute.

[28] If a single item such as the ring is dealt with in a vacuum and the contributions made by the parties to property and to the relationship more generally are put to one side, an injustice may occur. The evidence before the Court is insufficient to deal with

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[8] *Zhao v Huang*, above n 3.

this proceeding holistically. The approach which the Court is asked to take by Mr [Lambert] was not endorsed by the majority of the Court of Appeal in *Oliver v Bradley*, which approved an overall assessment of the parties' contributions in cases where there was not only an agreement to marry but a concurrent de facto relationship.

[29] If an order was made in the form that Mr [Lambert] is seeking, there is a risk that:

(a) if Ms [River] no longer has the ring or declines to return it, she may be obliged to pay him a sum in excess of its actual value; and

(b) while Mr [Lambert] may be restored to the position he would have been in if the parties had never agreed to marry with regards specifically to the ring, the parties would not necessarily be restored overall to the positions they would have been in had they never agreed to marry in respect of property.

[30] For these reasons Mr [Lambert]'s application for orders under the DAA (and for costs) is declined.

Dated at Auckland this 19th day of October 2023

AM Manuel
Family Court Judge