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

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IN THE FAMILY COURT
AT AUCKLAND

I TE KŌTI WHĀNAU
KI TĀMAKI MAKAURAU

FAM-2016-004-001161
[2019] NZFC 6881

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[CARRIE HOWELL] Applicant
AND	[RAY HOWELL] Respondent

Hearing:	26, 27, 28 August Submissions 3 September 2019
Appearances:	S Jefferson QC and Ms Hawker for the Applicant B Carter for the Respondent
Judgment:	29 November 2019

RESERVED JUDGMENT OF JUDGE S J FLEMING

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[1] Mr and Ms [Howell] were married to each other and separated on 22 August 2015. During their seven-year relationship they had three children, [Julia] (aged ten), [Edward] (aged eight) and [Peter] (aged six). The parties have been unable to agree upon the division of relationship property. Their relationship property consists of the following:

- The family home at [address deleted – "the family home"] (with an agreed value of $2,177,000). The property is subject to a mortgage of $989,204.44 (as at 21 April 2019 – it was $1,083,818 at separation).
- A wine collection (valued at £37,200 or NZ$70,069).
- Mr [Howell]'s UK pension ($101,985 plus interest at 2.5% – $109,354 as at 19 June 2018).
- 2000 shares in [company A].
- 2667 shares in [company B].
- 30,000 in [company C].
- 160,000 shares in [company D].
- Mr [Howell]'s shareholders loan account in [company D] ($66,000 face value).
- An art collection (value $265,100).
- Household chattels.

[2] The value of relationship property – where values have been fixed and agreed – is therefore about $1,632,000.

[3] A number of agreements have been reached. The values referred to in the preceding paragraphs are all agreed with the exception of the value of the shareholder's loan account. It is agreed the shares in all the companies will be divided

between the parties and transferred in whatever is the ultimate percentage division of relationship property. I further note Ms [Howell] agreed she is to reimburse Mr [Howell] for half a mediator's fee (total $8280).

[4] The division of chattels and artwork (and/or adjustment) has apparently been agreed, although on the basis of the submissions filed leave is reserved for either party to seek further directions or orders in relation to chattels and the artwork.

[5] There is agreement the relationship property pool should be divided equally subject to the other claims which are made by the parties. There was no submission Ms [Howell]'s preference for her s.15 claim to be quantified by a 70/30 division affected that agreement for an overall equal division. The following issues remain to be determined:

- Mr [Howell]'s application for compensation for the inclusion of the sale proceeds of the home he owned prior to the relationship (s.16 of the Act).

- The vesting and value of the shareholders loan account owed to Mr [Howell] by [company D].

- Mr [Howell]'s claim for compensation for capital withdrawn by Ms [Howell] post separation ($58,532.50).

- Ms [Howell]'s application for compensation for economic disparity (s.15 of the Act).

- Ms [Howell]'s application for compensation for post-separation contributions (s.18B).

- Mr [Howell]'s application for compensation (s.20E of the Act).

- Ms [Howell]'s application to vary the spousal maintenance order made on 21 June 2016 to include an allowance for legal and accounting fees (s.99 Family Proceedings Act 1980).

Background

[6] Mr and Ms [Howell] met in 2008. They were working for an [international firm], [name deleted – "the firm"], in [country A]. Mr [Howell] was at the time a partner in the firm and Ms [Howell] a senior associate. Mr [Howell] is English. Ms [Howell] is a New Zealander who obtained her [qualifications] in New Zealand but has never practised in New Zealand. She worked as a [profession deleted] in Australia and [country A].

[7] The [Howell]s married on [date deleted] 2009. At the time of the marriage, Mr [Howell] owned a home in the United Kingdom which he subsequently sold, and Ms [Howell] owned a home in [Australia]. She still owns that house.

[8] On [date deleted] 2009 the parties' eldest child [Julia] was born. She was diagnosed at birth with a rare [condition deleted]. [Julia] requires additional assistance as a result of her special needs but attends mainstream schooling with a teacher aide.

[9] Following [Julia]'s birth Ms [Howell] ceased working outside the home and has had limited paid employment ever since. The family continued to live in the Middle East. Mr [Howell] continued to be a partner in [the firm] until August 2011 and then became a partner with another firm in [country B]. Mr [Howell] was a high-income earner and the family enjoyed an extremely privileged lifestyle available only to the wealthy. They travelled extensively flying business and first class to various destinations referred to in detail by Ms [Howell] in her application for a spousal maintenance order but including Koh Samui, the South of France, Dubai, Oman, Africa, Hong Kong, Spain and Australia. They sailed around the Amalfi Coast on a private chartered yacht; went on safari in Africa; attended rugby matches in Scotland and South Africa, the Cannes Film Festival and overseas music concerts. They would stay at five-star hotels and luxury lodges, dining out at exclusive restaurants. They purchased expensive jewellery which Mr [Howell] gifted to Ms [Howell]. The family enjoyed extensive domestic assistance in the home. Again, there is detailed reference to that assistance in Ms [Howell]'s affidavit in support of her maintenance order but it included housemaids who also undertook some cooking, shopping, babysitting, dog walking and laundry duties as well as a gardener.

[10] At the end of 2013 the decision was made to leave the Middle East and relocate to live in New Zealand. There is some debate about whether it was Ms [Howell] or Mr [Howell] who was the more determined to move to New Zealand, but that is irrelevant as are the reasons for the move because there is no dispute there was agreement to the move. Ms [Howell] agreed in cross examination that at the time the decision was made for the family to move to New Zealand both she and Mr [Howell] were realistic and accepted their lifestyle would never be as it had been in the Middle East, and the decision to live here was a lifestyle choice.

[11] When the family arrived in New Zealand in April 2014 Mr [Howell] found it difficult to secure employment and between April 2014 and September 2015 (a period of 17 months) the family lived off their capital.

[12] Initially, upon arrival in New Zealand, the family moved in with Ms [Howell]'s parents and were generously provided with the use of a motor vehicle by Ms [Howell]'s parents. A few months later (July 2014) the [Howell]s purchased their [family home]. It cost $1.4 million and was funded by using the proceeds of sale of Mr [Howell]'s home in [England] that he owned prior to the marriage, and mortgage finance. The amount contributed by Mr [Howell], out of what had been his separate property, totalled around $600,000. Some of those funds were also used to pay for renovations undertaken prior to the parties moving into the home in September 2014.

[13] Finally, Mr [Howell] managed to secure employment as a CEO of a firm based in [Southeast Asia]. It was at this time the parties agreed to separate and Mr [Howell] left New Zealand for [Southeast Asia] on 22 August 2015 which is the agreed separation date.

[14] At the time of separation the children were young – five, four and 21 months, and the burden and responsibility for caring for the children fell on Ms [Howell]. Mr [Howell] would visit every four to six weeks.

[15] Mr [Howell]'s income in [Southeast Asia] was around NZ$922,000 ([foreign currency deleted]895,000). In addition, Mr [Howell] received other benefits such as health and life insurance and bonuses.

[16] Mr [Howell] remained working in [Southeast Asia] but was made redundant when there was a takeover in June 2018. He was paid until the end of the year, that is, until 9 December 2018 describing that six-month period as “gardening leave”.

[17] Since December 2018 Mr [Howell] has been providing consultancy services to [company name deleted – “the Group”]. His role is described as [deleted] but he is not employed by the Group; rather he is a consultant. He earned around NZ$160,000 in the seven-month period between December 2018 and July 2019. He said he had not been paid the £18,000 per month, which he had previously received, since April and had not rendered any invoices since then. Mr [Howell] explained at the hearing that was because the Group had no money and he knew he would not be paid. He accepted in cross examination he had performed consultancy work after April. He said the Group is engaged in energy and infrastructure projects, but it would not be until the first project is secured that investors would invest and provide cash flow. In the event that did not occur Mr [Howell] expected the Group would be liquidated. Mr [Howell] said if all went well it was intended for him to be employed under contract but that seemed unlikely (not impossible), given the present financial position of the Group. As a result of an uncertain future with this Group, Mr [Howell] said he was pursuing other work opportunities.

[18] Mr [Howell]’s uncertain position was not dissimilar to that of Ms [Howell]. She is now employed as [a Manager]. Her employment is part-time (around 20-25 hours per week) and is flexible. She receives gross $1000 a week. She hopes her employer will flourish financially from a venture involving investment funds focusing on [details deleted] in New Zealand. Her experience in the Middle East well qualifies her for her position. I understood from Ms [Howell]’s evidence that she expected with time her income would increase but emphasised, of course, her obligations to her children.

[19] The similarity between the [Howell]s that I referred to is that they are both engaged with relatively new organisations with, they expect and hope, good prospects of success in the future.

[20] Ms [Howell] remains living in the family home with the three children who are now aged 10, 8 and 6. Her parents live in the home with her and provide practical and emotional support to Ms [Howell] and that includes assistance with the children.

[21] A maintenance order which was made on 21 June 2016 came to an end on 21 April 2019. The original maintenance payable in the Family Court was $2500 per week but was increased on appeal to $3000 per week. Mr [Howell] in addition, pays the children's private school fees and other costs associated with the children.

[22] Mr [Howell] acquired some time ago a property in [location 1]. There is little equity in that property. When in New Zealand he lives mainly with his partner in [suburb 1]. Mr [Howell] still travels overseas for work purposes and has enjoyed three holidays overseas – [travel details deleted] – in the past year.

[23] There was reference during the hearing to a dispute around the contact arrangements for the children and to the possibility of Mr [Howell] filing proceedings under the Care of Children Act seeking a definition of the time the children will be in his care. I understand from Mr [Howell]'s evidence he is seeking to have the children stay with him a weekend every month and longer periods over the school holidays. Mr and Ms [Howell] have been to mediation but have been unable to reach any agreement. There is an issue it seems as to the frequency and duration of contact.

[24] Mr [Howell] acknowledged his job situation is "currently uncertain" so he was not proposing to pursue proceedings further until his position was clarified.

[25] Ms [Howell] wishes to remain living in the family home and to acquire Mr [Howell]'s share in it. On the basis of the evidence I have heard the vast majority of the childcare responsibilities (other than financial) will fall upon Ms [Howell] if Mr [Howell] is unable to achieve his wish of finding work, which enables him to spend the majority of time in New Zealand rather than continuing to work overseas. She retains an interest in an Australian superannuation scheme and also the [Australian] property she owned prior to the relationship commencing.

[26] As I have noted Mr [Howell] had a property also at the time the parties met. That property was sold and the proceeds invested into the acquisition and renovations of the family home as well as being used for general family expenses including expenditure on Ms [Howell]'s home in [Australia]. He retains that portion of his superannuation that related to the period prior to the [Howell]s meeting as his separate property. There is little if any equity in the home he has acquired in [location 1]. My impression was Mr [Howell] hoped to continue to earn a very good income but he was expressing a wish to remain based in New Zealand for various reasons including being able to spend time with his children and also his partner. He certainly appeared to wish to be based in New Zealand and accepted it was unlikely he would be able to return to higher paying positions because of his desire to remain here.

Section 16

> **16 Adjustment when each spouse or partner owned home at date relationship began**
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> (1) This section applies if,—
>
> (a) at the date the marriage, civil union, or de facto relationship began, each spouse or partner owned a home; and
>
> (b) each of those homes was capable of becoming a family home; but
>
> (c) at the time when the relationship property is to be divided, the home (or the proceeds of the sale of the home) of only one spouse or partner is included in the relationship property.
>
> (2) This section also applies if,—
>
> (a) before the marriage, civil union, or de facto relationship began, each spouse or partner owned a home; and
>
> (b) each of those homes was capable of becoming a family home; and
>
> (c) one of the spouses or partners (party A) sold his or her home in contemplation of the marriage, civil union, or de facto relationship; and
>
> (d) at the time when the relationship property is to be divided,—
>
> (i) the home (or the proceeds of the sale of the home) of the other spouse or partner (party B) is included in the relationship property; but

> (ii) the proceeds of the sale of party A's home are not included in the relationship property.
>
> (3) If this section applies, the court may adjust the shares of the spouses or partners in any of the relationship property (including the family home and the family chattels) according to what it considers just to compensate for the inclusion of the home of only one spouse or partner in the relationship property.
>
> (4) This section overrides sections 11 to 14A.

[27] At the commencement of the relationship Ms [Howell] owned a residential property in [Australia] and Mr [Howell], one in [the United Kingdom].

[28] Both of these properties were foreign immovables and the Act provides it applies to immovable property situated in New Zealand (s.7). Mr [Howell] seeks an adjustment pursuant to s.16 on the basis the two residential properties were capable of becoming a family home and at the time the relationship property is to be divided, the proceeds of sale of only his home are included in the relationship property (s.16(1)(c)).

[29] Mr Jefferson submits s.16 cannot apply because the term "family home" is a statutory definition and s.7 prevents the Act applying to foreign immovables. Accordingly, Mr Jefferson submits neither of the properties owned by the parties were capable of classification as a family home as defined in s.2.

[30] Mr Jefferson relied on the Court of Appeal decision in *Samarawickrema v Samarawickrema*[1] which held the property did not fall within the classification of matrimonial and separate property (ss.8 and 9) or within the provisions relating to the matrimonial home (ss.11 and 12) because to so classify a foreign immovable would mean the Act was applied which s.7 does not permit.

[31] However, Mr Jefferson also acknowledged s.16 was applied to foreign immovable property by Hardie-Boyes J in *Enright v Fox*,[2] the Judge commenting:

> "As long as it (the property) is not classified under the Act, or any order made affecting it, directly or indirectly, its existence and any dealings with it, can I think be taken into account for the purposes of s.16, and indeed of s.14."

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[1] *Samarawickrema v Samarawickrema* [1995] 1 NZLR 14 (CA)
[2] *Enright v Fox* (1989) 5 NZFLR 455 (HC)

> Somers J appears to have proceeded on this basis in *Livingston v Livingston* (1980) 4 MPC 129, 136."

[32] Mr Jefferson submits the decision in *Enright v Fox* "cannot be correct" because to trigger s.16 there must have been two homes capable of being the family home which requires a Court to classify the remaining property (Ms [Howell]'s [Australian] property) as the family home which is not permissible (*Samarawickrema*).

[33] The decision in *Enright v Fox* is of course binding upon me. In any event I do not accept the decision in *Samarawickrema* is authority for the proposition s.16 cannot apply. The Court was not there considering s.16 and furthermore, acknowledged the decision in *Enright v Fox* was an exception to the general rule, noting (at p 20):

> "The Court may in some circumstances be able to have regard to the existence of the foreign immovable to the limited extent indicated in Enright v Fox, but in doing so it must be careful to ensure that it has not applied to the foreign property, the philosophy of the New Zealand Statute."

[34] A similar argument to that put forward by Mr Jefferson was unequivocally rejected by Gilbert J in *BJP v PB*[3] where reliance was placed on *Samarawickrema* in submitting a foreign immovable can never be taken into account when considering the division of relationship property. Gilbert J said:

> "[30] I do not accept Ms Hollings submission that a foreign immovable can never be taken into account when considering the division of relationship property. Once the sharing proportions have been determined the foreign immovable may not be taken into account as if it were relationship property in determining the division of such property unless s.16 applies …"

[35] Further, Gilbert J noted the comments of McKay J in *Samarawickrema* at 20:

> "As long as it (the foreign immovable) was not classified under the Act, or any order made directly or indirectly affecting its existence and any dealings with it, it could be taken into account for the purposes of s.16, and indeed of s.14."

[36] Accordingly, I am satisfied the provisions of s.16 can apply.

[37] At the date of commencement of the marriage each spouse owned a home and each was capable of becoming a family home but when relationship property is to be

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[3] *BJP v PB* (*Relationship Property* (2012) NZFLR 780 at 31)

divided the proceeds of sale of the home of only one partner is included in the relationship property. The proceeds of sale of Mr [Howell]'s home have been used to in part to acquire the family home which is relationship property.

[38] At the time of separation, Ms [Howell] still owned the [Australian] property. It is subject to a mortgage (A$666,000). She estimated it then had a value of A$1.2 million (see her affidavit of assets and liabilities). At the hearing Ms [Howell] accepted the equity in the [Australian] property was in the region of A$1 million on the basis she had obtained a real estate estimate of value of between A$1,550,000 and A$1,650,000 although she commented she would expect to pay capital gains tax if it was sold.

[39] Mr [Howell] produced a desktop valuation which indicates the [Australian] property has a value of $2,250,000 as at September 2018 and a valuation of the land only, as at 2017, of A$1,320,000.

[40] In view of Ms [Howell]'s evidence at the hearing, that she has equity of A$1 million, I adopt that figure for the purposes of deciding whether to award compensation pursuant to s.16. The figure is a conservative one because most of the evidence points to a greater value than that suggested by the real estate agents. However, there was evidence of some expectation around capital gains tax being imposed which was not quantified.

[41] Mr [Howell] on the other hand, had sold the United Kingdom property in 2014 and received £334,585. There is no dispute most of those proceeds of sale (£300,000 or NZ$600,000 being the amount referred to in submissions) were used to purchase and renovate the family home in New Zealand as well as meet some of the mortgage payments on it.

[42] Mr Jefferson submits if there is jurisdiction which I have found there is, then it would be manifestly unjust to make any adjustment in favour of Mr [Howell] because:

- It affects the relationship property available for division and significantly affects the quantum of Ms [Howell]'s economic disparity claim.

  It does affect the relationship property pool but only really affects Ms [Howell]'s s.15 claim if compensation is assessed by percentage division.

- The [Australian] property is an asset which will be available to Ms [Howell] in retirement and the period of time outside the workforce has affected and will continue to affect her ability to save for retirement.

  The effect of time outside the workforce on Ms [Howell]'s position is addressed in the s.15 claim for economic disparity.

- The contribution of the sale proceeds of Mr [Howell]'s home in the United Kingdom is not entirely "lost" because there has been an increase in the value of the family home and he is entitled to share in that increase.

  Ms [Howell] equally benefits from the increased value.

- Mr [Howell] has been able to acquire a new property since separation although the evidence is he borrowed the deposit.

  Mr Jefferson was critical of the fact there was no independent evidence of the extent of any loan raised to purchase the [location 1] property, but the best and only evidence is that of Mr [Howell] which is that the property is "heavily indebted" and he had to borrow to fund the deposit, meaning he has little or no equity in it.

- Mr [Howell] made some investments which have turned out to be losses and Ms [Howell] complains she was not consulted about those investments.

  I note the most significant investment – $260,000 in [company D] – came about as a result of Ms [Howell]'s family introducing the shareholders in the company to Mr [Howell]. The families were longstanding friends. I also note Ms [Howell] seeks the vesting of the shares owned by Mr [Howell] in three of

the companies (the fourth investment in [company E] appears to be acknowledged as irrecoverable, that company having been placed in administration) on the basis she believes there may be a value ultimately. I do not accept these investments should impact on the issue of whether to award s.16 compensation.

[43] Overall, I am satisfied it would be unjust not to make any adjustment as a result of the inclusion of NZ$600,000 (that figure in NZ$ was not disputed) from the sale proceeds of Mr [Howell]'s home in the United Kingdom. I am satisfied in order for there to be a just division of the relationship property (s.1N) there needs to be an adjustment because:

- Ms [Howell] retains at least A$1 million in equity in the [Australian] property which was owned prior to the relationship commencing, whereas Mr [Howell] has lost the benefit of the home he owned prior to the relationship and the proceeds fall for division between the parties.

- In excess of $90,000 of relationship property was spent on the [Australian] property during the course of the relationship, which is solely to Ms [Howell]'s benefit.

- There is a relatively modest pool of relationship property given the income earned during the relationship but largely that is because the parties led a luxurious and extravagant lifestyle. Both enjoyed the benefits of that lifestyle which has impacted on the size of the relationship property pool.

- This was not a long relationship (seven years) and the input of $600,000 was relatively close to the separation. If it was a longer duration relationship or if the funds had been paid in earlier, the effects of such a significant capital input would be somewhat dissipated.

- The parties' joint decision to leave the Middle East and resettle in New Zealand came at the cost of a very much reduced income and period of almost two years

when there was no income coming into the household which again affected the value of the property.

- The fact a s.16 adjustment is made will affect the relationship property pool and the amount available for any other claims, in particular Ms [Howell]'s economic disparity claim, if allowed, does not persuade me it would be unjust to exercise my discretion and make an adjustment pursuant to s.16.

[44] Mr [Howell] claimed a lump sum compensation of $600,000. That methodology was not challenged and having regard to the overall effect on the shares of the spouses in relationship property I am satisfied the appropriate and just adjustment is $600,000 to be paid out of relationship property to Mr [Howell].

The Vesting of the Shareholders Loan Account Owed to Mr [Howell] by [company D]

[45] Mr [Howell] was introduced to the shareholders of [company D] by Ms [Howell]'s family. It is agreed the shares in [company D] are to be vested in the parties in whatever is the ultimate percentage division of relationship property.

[46] There is a shareholder's loan in Mr [Howell]'s name. The amount owing by the company is $66,000. It is accepted the debt owing is relationship property. Ms [Howell] seeks to have that asset vested in Mr [Howell] and an adjustment made in her favour with that debt being valued at $66,000.

[47] The shareholder advance is unsecured and at call. According to the evidence, if Mr [Howell] demanded repayment of the shareholder advance the company would go into liquidation and all shareholders advances would rank as unsecured creditors. It would mean the shareholders advance was worth between $20,000 and $40,000 with repayment being dependent on the introduction of further monies from the [name deleted] family.[4] It seems an offer was made to pay out a portion of the shareholder's account some time ago but was not accepted by Mr [Howell] because of this litigation.

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[4] Evidence of the accountant Mr Wood, p 145, bundle

[48] Mr [Howell]'s preferred position was to call up the loan and divide whatever amount was paid (if anything) equally with Ms [Howell].

[49] I am satisfied just as the shares in the company are agreed to be vested in the parties, the same should be the result with respect to the shareholder advance made to the company. The shareholder's loan advance is accordingly vested in the parties in whatever is the ultimate percentage division of all relationship property and the parties can decide how to best realise the value of that debt.

$58,532.50 Withdrawn at Separation

[50] There is no dispute Ms [Howell] withdrew $58,532.50 from the joint account at separation and those funds were relationship property. Mr [Howell] withdrew the balance – $600.

[51] On the face of it, Mr [Howell] is entitled to receive reimbursement for one-half of the amount withdrawn by Ms [Howell].

[52] Ms [Howell] however resists any adjustment for the imbalance in withdrawals despite having agreed she would account to Mr [Howell] for one-half of the amount she withdrew during the spousal maintenance hearing on 27 April 2016.

[53] Ms [Howell] points to the fact she had no income at the time of separation, was caring for the parties' three young children and no maintenance arrangements had been put in place by Mr [Howell] at the time he left New Zealand to take up employment in [Southeast Asia].

[54] Counsel take different positions on whether the Judge in the course of determining the application for a final maintenance order regarded the withdrawal of those funds as a form of past maintenance.

[55] Clearly the maintenance orders that were made are relevant. The first order made was an interim maintenance order. It was made on a without notice basis on 28 September 2015 and provided for maintenance to be paid at the rate of $2500 per week. The Judge, when making that order, referred to Ms [Howell] having access to

some "limited joint capital" and suggested there appeared to be "no reason why that should not be available to meet what are clearly joint commitments such as the mortgage and other outgoings on the home". The comments however appear to be made in the context of the Judge's difficulty in fixing the appropriate amount of maintenance on a without notice basis. The meaning of his comment is equivocal in any event.

[56] The parties separated on 22 August 2015 so the interim maintenance order was made around six weeks after separation.

[57] The final maintenance order was made on 21 June 2016. The Judge said at the commencement of his decision that Mr [Howell] received his first pay at the end of September 2015 and had complied with his obligations under the interim order since it was made. The application was recorded as being one "to determine the future maintenance obligations of the respondent". He did note however that Ms [Howell] was also seeking a past spousal maintenance award of $153,044. The Judge decided there would be no award for past maintenance and referred in the course of the decision to Ms [Howell] withdrawing $58,000 from the joint account and after meeting living expenses she still had $20,000 left of those funds, in addition to accumulating a further $20,000 savings from maintenance payments made by the respondent.

[58] This is not a decision on past maintenance which was determined by the Judge who heard the application and refused to order it. I accept however Ms [Howell] was entitled to use joint funds to meet jointly incurred expenses in the context of this claim for an adjustment up until when the interim maintenance order was made. Accordingly, Mr [Howell]'s claim for compensation for the withdrawal is reduced by allowing a credit to Ms [Howell] of $15,000, which is calculated on the basis of the six-week period when no maintenance was paid at the rate of $2500 per week.

[59] Ms [Howell] must account for the difference between $58,000 and $15,000 being $43,000 and Mr [Howell] is to receive a credit for one-half of that sum.

[60] Theoretically Mr [Howell] should also account for half of the $600 he withdrew but on the basis he had to meet his own living costs prior to commencing work and earning income from it, there is to be no adjustment.

Claim for Economic Disparity – Section 15

[61] Section 15 provides a Court may make an order adjusting relationship property where satisfied the income and living standards of one partner are likely to be significantly higher than those of the other partner because of the division of functions within the relationship:

> **15 Court may award lump sum payments or order transfer of property**
>
> (1) This section applies if, on the division of relationship property, the court is satisfied that, after the marriage, civil union, or de facto relationship ends, the income and living standards of one spouse or partner (**party B**) are likely to be significantly higher than the other spouse or partner (**party A**) because of the effects of the division of functions within the marriage, civil union, or de facto relationship while the parties were living together.
>
> (2) In determining whether or not to make an order under this section, the court may have regard to—
>
> (a) the likely earning capacity of each spouse or partner:
>
> (b) the responsibilities of each spouse or partner for the ongoing daily care of any minor or dependent children of the marriage, civil union, or de facto relationship:
>
> (c) any other relevant circumstances.
>
> (3) If this section applies, the court, if it considers it just, may, for the purpose of compensating party A,—
>
> (a) order party B to pay party A a sum of money out of party B's relationship property:
>
> (b) order party B to transfer to party A any other property out of party B's relationship property.
>
> (4) This section overrides sections 11 to 14A.

[62] There are of course two jurisdictional issues to be addressed:

- The spouse needs to have income and living standards significantly higher than the other (disparity); and

- The disparity is because of the effects of the division of functions (causation).

[63] The assessment is made at the date of separation, but the calculation made once the extent of relationship property and shares are established (majority view in *Scott v Williams*[5]).

[64] Mr Jefferson in opening submissions outlined Ms [Howell]'s claim was based on her career being significantly affected by the division of functions within the marriage and "her sacrifices" enhancing the earning capacity of Mr [Howell], although there was little or no evidence of the latter claim except in the affidavit of Mr [Howell]'s witness, Ms Young. In other words, Ms [Howell] based her claim on both diminution and enhancement.

[65] Ms [Howell]'s claim was quantified in two alternate ways. She sought a 70 percent division of relationship property in her favour rather than an equal division but on condition Mr [Howell]'s claim under s.16 was disallowed, which it has not been. Her alternative claim was for a sum of money of somewhere between $1.096 million and $1.326 million based on her expert witness Mr Webber's calculations. Mr Webber in his calculations, adopted the methodology favoured by Arnold J in *Scott v Williams* which was to focus on the disparity in income and living standards and apply a formula.

[66] Mr Carter submits Ms [Howell] is not entitled to a disparity award on the basis spousal maintenance ought to be taken into account in the calculation. Mr [Howell] also presented expert evidence addressing the amount of an award if one was ordered. His advisor, Ms Young, based her assessment on a diminution method – what would Ms [Howell] be earning but for the division of functions. She concluded there was no enhancement because there had been no apparent increase in Mr [Howell]'s income over the relevant period, but in reaching that conclusion she deducted from Mr

[5] *Scott v Williams* [2017] NZSC 185

[Howell]'s income the costs of travel to [Southeast Asia] and accommodation, which I am not satisfied are proper deductions.

[67] Ms Young quantified the economic disparity claim based on the diminution method at $273,168.

Disparity

[68] In this case the parties very different levels of income at separation are obvious. The husband's income was significantly higher than the wife's. He took up employment in [Southeast Asia] earning around NZ$922,000 per annum. His total remuneration package was calculated at $981,341 by Mr Webber. Ms [Howell] was not earning any income at separation, however she was paid spousal maintenance and for the six weeks prior to that order being made on 28 September 2015, utilised the parties joint savings for her support. Maintenance was paid at the rate of $2500 per week increasing to $3000 per week from 1 February 2018 – i.e. $156,000 nett per annum.

[69] In terms of living standards, at separation the wife was living in the family home and owned a rental property in [Australia]. That remains the position. She has vacations away in properties owned by her family and is a discretionary beneficiary in her father's family trust, which has advanced money to her. At separation she had the care of three young children, aged five, four and 21 months, one of whom had and has special needs and requires an additional level of care. The responsibility for the three children now aged 10, eight and six still falls very much on the wife. She is assisted in their care by her parents who have been living in the former family home since separation. They pay no rent.

[70] The husband at separation moved to live in a rental property in [Southeast Asia]. He has subsequently purchased a property in [location 1] and lives in [suburb 1] with his partner in his partner's home. He generally cares for the children for one weekend out of four and during school holidays. He travels overseas for work and holidays.

[71] In a number of ways, the parties living standards appear to be comparable in this case. However, income is often an important indicator of standards of living and inevitably impacts on those standards and this case is no exception. The wife cannot obtain fulltime work because of the extent of her childcare responsibilities. As a result, she has far less discretionary income and leisure time than the husband. In this case income and living standards are inextricably linked and I am satisfied there is a significant disparity in living standards as well, largely because of the income differential.

Causation

[72] The majority of the Judges in *Scott v Williams* held the causation requirement (that is that the division of functions caused the economic disparity) should be assumed unless there is evidence to the contrary.[6] There is no evidence to the contrary. Causation is therefore established, although that does not mean the whole of the disparity results from the division of responsibilities.

The Claim for an Award

[73] In this case I accept there will continue to be a disparity between the likely earning capacity of each party and the responsibility for the care of the three children will continue to largely fall on Ms [Howell].

[74] I am satisfied it is just for an award to be made under s.15 for the purpose of compensation in favour of Ms [Howell].

Should Spousal Maintenance be taken into Account in the Section 15 Calculation

[75] Mr Carter submits account should be taken of the spousal maintenance paid to Ms [Howell] by Mr [Howell] when making the s.15 calculation.

[76] Ms [Howell] received spousal maintenance between 28 September 2015, when an order was made, and 21 April 2019. The total amount paid over that period was

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[6] Elias CJ, Glazebrook and Arnold JJ at paras 204, 264, 291-294, 311, 323 and 354

$496,500. Mr Carter submits if Ms Young's figures were adjusted to include spousal maintenance her net income ($1,018,085) is very close to the "but for" income of $1,144,640. Accordingly, Mr Carter submits Ms [Howell] has no entitlement to an award under s.15.

[77] Mr Jefferson on the other hand, submits it would be wrong to factor in spousal maintenance when calculating the compensation claim because:

- Spousal maintenance is based on a statutory obligation to support one spouse while there is a need to do so and it is not compensation for the loss of a career.

- Ms [Howell] no longer receives maintenance, the order having ceased, but the economic disparity remains.

[78] There is force in Mr Carter's submission "it would be illogical" to not take account of spousal maintenance in the calculation. Spousal maintenance claims have been declined because an award has been made under s.15. Two of the Judges in *Scott v Williams* commented "maintenance is the better avenue to utilise in addressing any failure to support between separation and division of property.[7] Glazebrook J commented if a maintenance order was made it could be taken into account when considering an application under s.15.[8] Clearly a s.15 award and spousal maintenance are more than just inter-related and the payment of maintenance can affect an award.

[79] While I accept a calculation of economic disparity should take into account spousal maintenance that has been paid, that does not provide a final answer as to whether an award should be made. I agree with Mr Jefferson, Ms [Howell] remains in a position where she is hampered in her ability to pursue her career and earn a greater income because of the effects of the division of functions and her ongoing responsibility towards the care of the parties' children. The purpose of a s.15 award is to provide compensation over a period where the recipient is rebuilding a career which is a different focus to maintenance.

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[7] Elias CJ, para 342 and Young J, para 454
[8] Para 200

Quantum

[80] The Judges differed in their valuation methodology in *Scott v Williams* but the majority view was the approach to be adopted is a broad one which will achieve justice in the particular circumstances. As Glazebrook J said:

> "There is no one method, formula or approach that can be applied to calculate a s.15 order as there is no single way to prescribe what is just. This will depend on the individual circumstances of each relationship and each partner."[9]

[81] Unlike the situation in *Scott v Williams* (and many other reported decisions), this was not a relationship which was entered into at the start of either of the spouses' careers. At the time these parties met they both had established careers and there was already a significant income disparity. Mr [Howell] was then aged 38 years and was Managing Partner in a [firm] earning approximately NZ$654,000. Ms [Howell] was 32 years and was a Senior Associate in the same firm earning approximately NZ$264,000.

[82] During the course of their relationship Mr [Howell] continued to work and earn income at a high level. Ms [Howell] worked as a [profession deleted] as well until their first child was born in [month deleted] 2009.

[83] This was also not a lengthy relationship (seven years duration), although that does not detract from the impact the division of functions has had on Ms [Howell]'s career.

[84] The fact the parties were already established in their respective careers when they met and this was not a lengthy relationship, is the precise situation referred to by Arnold J in *Scott v Williams* as being an example of providing a "partial explanation of post-separation disparity":

> "[325] Nevertheless, I accept that it will be legitimate to point to personal characteristics as a complete or partial explanation of post-separation disparity in some situations, as where, for example, a career partner enters a relationship as a well established and successful business or professional person. In that type of case, it may be that only part of the disparity can fairly be said to result from the division of the responsibilities in the relationship. In relationships of

[9] Para 265

> relatively short duration, this may be a complete explanation for post-separation disparity. Again, however, care must be taken in these situations not to undermine the equality of contribution principle that underpins the PRA."

[85] In this case, it is not appropriate to focus on the disparity in income and living standards of the parties and apply the formula adopted by Arnold J in *Scott v Williams* primarily because both parties were well established in their careers at the time they met and this was not a relationship of lengthy duration.

[86] There are some other notable features in this case. The extent of relationship property is relatively modest when considering the very high incomes coming into the household during the period the parties were together. Presumably one of the major reasons for that is the family enjoyed a most luxurious lifestyle which I have referred to earlier. In addition, the [Howell]s decided to leave the Middle East and move to New Zealand as a family, being aware there was no prospect of Mr [Howell] being able to continue to earn at the same level. Mr [Howell] was then unable to obtain employment for around 20 months and the family had recourse to their capital for their support which further depleted the relationship property pool available for division between them.

[87] I do not consider the approach adopted by Mr Webber in his assessment of a s.15 award amounting to between $1.096 million and $1.326 million would achieve justice in this case for the reasons I have already expressed. In short, the parties met when both had already established their careers and already there was a significant income disparity between them. A focus on overall income disparity would assume all of the difference contemplated by s.15 had been caused by the division of functions in the marriage, which it has not.

[88] The aim of just compensation is to remove the disparity not to create a further injustice and there is an expectation the non-career partner will take steps post-separation to become financially independent over time. In my view it would not be just for there to be an award of the entire share of relationship property to Ms [Howell].

[89] I am satisfied the appropriate award should be based primarily on the diminution claim as adopted by Ms Young. I bear in mind Ms [Howell] has property

of some value in Australia, which is her separate property, but Mr [Howell] has also received compensation for his separate property which he owned prior to the marriage.

[90] Both valuers adopted a period of eight years after separation as being appropriate for the purposes of the s.15 calculation having regard to all of the evidence and Ms [Howell]'s responsibilities towards the care of young children. Ms Young conceded the calculation could extend by another five years up to 13 years, by which time the youngest child would be 14 years but, as she said, there would need to be other adjustments. She did not believe that after such adjustments there would be much of a significant difference in her overall valuation of $273,168.

[91] There is no exact science in the calculation of a s.15 award and taking all factors into account, including a limited enhancement claim, I am satisfied it is just to adopt Ms Young's calculation of $273,168. That figure did not take into account spousal maintenance, but it also did not extend over a sufficiently lengthy period of time given Ms [Howell]'s childcare obligations which affect her ability to work and progress her career and it took no account of any enhancement. Overall I am satisfied there needs to be no further adjustment to the value assessed by Ms Young and on this basis I am satisfied the award addresses both the diminution components and enhancement (which is at the lower end).

[92] Accordingly, compensation in the sum of $273,168 is ordered pursuant to s.15.

[93] For the avoidance of doubt, relationship property is to be shared equally as agreed between the parties, but subject to the various adjustments ordered.

Section 18B Claim by Ms [Howell]

[94] Section 18B provides:

> **18B Compensation for contributions made after separation**
>
> (1) In this section, relevant period, in relation to a marriage, civil union, or de facto relationship, means the period after the marriage, civil union, or de facto relationship has ended (other than by the death of one of the spouses or partners) but before the date of the hearing of an application under this Act by the court of first instance.

(2) If, during the relevant period, a spouse or partner (party A) has done anything that would have been a contribution to the marriage, civil union, or de facto relationship if the marriage, civil union, or de facto relationship had not ended, the court, if it considers it just, may for the purposes of compensating party A—

(a) order the other spouse or partner (party B) to pay party A a sum of money:

(b) order party B to transfer to party A any property, whether the property is relationship property or separate property.

(3) In proceedings commenced after the death of one of the spouses or partners, this section is modified by section 86.

[95] Ms [Howell] makes three claims (although stated to be two in Mr Jefferson's closing submissions). She seeks:

- **Compensation for principal reductions made post-separation**

  Mr Carter opposes the claim and submits because Ms [Howell] utilised the maintenance paid by Mr [Howell] to service the mortgage and had the benefit of occupation of the home (together with her parents who have not contributed financially), there should be no credit allowed for Ms [Howell]'s reduction in the mortgage principal. He submits the equity in the home should be calculated by deducting the amount owing on the mortgage as at the date his maintenance obligation ceased (21 April 2019) from the agreed valuation.

  When Judge Grace determined the amount of spousal maintenance payable on 21 June 2016 he removed the principal payments under the mortgage from Ms [Howell]'s budget and reduced her reasonable needs by $37,752. It seems he did so on the basis the parties would approach the bank and reduce the payment regime to one of interest only (see paragraph [75] of decision).

  On that basis, since Ms [Howell] chose to use maintenance to reduce the mortgage, which was a joint debt, she ought to receive the credit for that. Mr [Howell] should not be able to claim the benefit of the mortgage reduction because he was paying the principal when in fact he was not.

I agree with Mr Jefferson's submissions, the most straightforward way to compensate for principal reductions Ms [Howell] has made is to calculate the equity in the home by deducting the mortgage balance owing as at separation from the agreed valuation. By using this method it does not matter that Ms [Howell] did not pay the mortgage principal throughout but paid interest only for part of the post-separation period.

- **Compensation for non-financial contributions for care and upbringing of the children**

It appears from Mr Jefferson's submissions this compensation is claimed as part of the compensation claim particularised below.

- **Compensation for the shortfall between the combined child support and spousal maintenance that was ordered by Judge Grace and that which was paid**

Mr Jefferson submits there should be compensation because when the spousal maintenance order was made Mr [Howell] was paying $20,000 per month direct to Ms [Howell] ($240,000 per annum). Ms [Howell] claims $10,714 related to spousal maintenance and the balance of $9286 per month was to cover school fees and all other costs for the children. She was paying the private school and pre-school fees and for other expenses such as swimming lessons for the children.

When the spousal maintenance order was made directing Mr [Howell] to pay $2500 per week ($130,000 per annum or $10,833 per month) and child support, Mr [Howell] elected to pay the children's expenses direct. Ms [Howell] complains her "financial package" was reduced and points out Mr [Howell] had been paying her the cost of a fulltime teacher aide for [Julia] whereas she only had a part-time teacher aide, meaning she (Ms [Howell]) benefited from the additional funds paid by Mr [Howell] and was able to use them, she said, for other purposes.

Overall Ms [Howell] calculates the shortfall amounts to $1300 per month.

In the spousal maintenance decision, the Judge directed Mr [Howell] to pay maintenance of $2500 per week "and in addition pay school fees for the three children and the child support figure that he is currently paying" (paragraph [110] of decision). He assessed Ms [Howell]'s reasonable needs at $173,193 per annum, noted Mr [Howell] was paying $130,000 and that the shortfall did not take into account Ms [Howell]'s income which she was then earning. The Judge pointed out Ms [Howell] had accumulated savings from the maintenance payments voluntarily made and had not utilised all of the monies she withdrew from the joint account.

I do not accept there are grounds to claim a s.18B adjustment based on Mr Jefferson's analysis. The Judge assessed Ms [Howell]'s reasonable needs and ordered spousal maintenance accordingly. He did direct Mr [Howell] pay other expenses for the children, which he has done – Mr [Howell] pays child support, private school fees and related expenses, swimming lessons, teacher aide costs, therapy costs and some medical costs.

Further, Ms [Howell] appealed the decision which resulted in an increase in spousal maintenance from $2500 per week to $3000 per week. Specifically, she sought to address what she considered was an incorrect approach by the District Court Judge in making orders for child support rather than addressing overall household expenditure and ordering maintenance accordingly. The High Court appears to have rejected that argument because the Judge assessed spousal maintenance by considering the total cost of running the household including the care of the children, deducting other contributions made by Mr [Howell] as child support and taking into account Ms [Howell]'s ability to work and earn income.[10]

I accept there are non-financial contributions made by Ms [Howell] because she is and has been very much the parent with the major responsibility for the care of the children, but she has the benefit of occupying the family home and

[10] Page 353, BOD paragraph [36]

the benefit of assistance from her parents, who also reside in the family home owned by the parties, at no cost to themselves. In the circumstances, I am not satisfied any compensation should be paid.

This claim is dismissed.

Section 20E

[96] Section 20E provides:

> **20E Compensation for satisfaction of personal debts**
>
> (1) If a secured or unsecured personal debt of one spouse or partner (party A) has been paid or satisfied (directly or indirectly) out of the relationship property, the court may make one of the following orders in favour of the other spouse or partner (party B):
>
> (a) an order increasing proportionately the share to which party B would otherwise be entitled in the relationship property:
>
> (b) an order that property that is part of party A's separate property be treated as relationship property for the purposes of any division of relationship property under this Act:
>
> (c) an order that party A pay party B a sum of money as compensation.
>
> (2) The court may make an order under this section on its own initiative, but must make an order under this section if party B applies for such an order.
>
> (3) This section applies whether the debt was paid or satisfied voluntarily or pursuant to legal process.

[97] Mr [Howell] seeks compensation for half of $46,800 being half of the total funds ($93,600) paid out of relationship property into the Australian bank account operated by Ms [Howell] with respect to the [Australian] property. That bank account is accepted as being Ms [Howell]'s separate property.

[98] Mr Jefferson submits the debt cannot be classified as a personal debt because the Act does not apply to overseas immovables and it is not possible to separately classify a debt that attaches to a foreign immovable.

[99] I do not accept that submission. It is possible to classify a debt as a relationship debt even when the Court has no jurisdiction over the asset to which the debt relates (*Penn v McQueen*[11]). It follows it is possible to classify such a debt also as a personal debt and in this case it appears to be a personal debt, not having been incurred for any of the purposes referred to in s.20(1)(b) to (c).

[100] Mr Jefferson's second submission is directed at an evidential issue. The evidence demonstrates $93,600 was paid out of relationship property into the bank account but the evidence around how those payments were used is not clear.

[101] It is acknowledged some money was used to pay the mortgage, some for renovations and some to pay a credit card which may have been used for renovations. Ms [Howell] claims not all transfers were for the house and refers to, for example, paying for air fares using the credit card associated with that account. How much of the money was used to pay the mortgage and renovations is unspecified.

[102] The mortgage and renovation costs would on the face of it be a personal debt but joint expenses such as air fares would not be.

[103] I agree with Mr Jefferson's submissions as to the evidential difficulties in establishing the claim even though the Court of Appeal observed in *M v B*:[12]

> The (Act) is about property rights and entitlements. The (Act), and the regulations which have been promulgated pursuant to it, make it clear that although there is not a fully inquisitorial system, a Court needs only to be satisfied about a state of events which has existed, or which exists. Notions of onus of proof fit uncomfortably within this legislative regime.

[104] I accept there is no burden but Mr [Howell] must provide sufficient evidence to establish and quantify the claim and he has not done so.

[105] Finally, the issue of payment of compensation pursuant to s.20E is discretionary.

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[11] *Penn v McQueen* [2019] NZHC 2192 at 56, Katz J
[12] *M v B* [2006] 3 NZLR 660 (CA) at 39

[106] The purpose of the Act is to provide overall for a "just division of relationship property".[13] I have already taken into account the fact $93,600 of relationship property was used in the main on Ms [Howell]'s separate property when allowing and quantifying Mr [Howell]'s s.16 claim.

[107] Accordingly, the claim for compensation pursuant to s.20E is dismissed.

Application to Vary Spousal Maintenance Order

[108] Ms [Howell] seeks to vary the maintenance order made to take account of her legal and accounting costs in conducting this litigation. She seeks an increase of $2781 per month from 25 November 2016 to "the date of these orders".

[109] Mr Carter raised a jurisdictional issue submitting the maintenance order has expired and accordingly it was not possible to vary an order which no longer exists. He also submitted there had been no change in circumstances at the time the application was filed or following the High Court appeal.

[110] Mr Jefferson formulated Ms [Howell]'s claim differently in his closing submissions and relies now on s.32 of the Property (Relationships) Act, noting Mr Carter's submission there was no jurisdiction to vary the order. Mr Carter has not specifically responded to the proposition the new application can be determined under s.32 of the Property (Relationships) Act rather than s.99 of the Family Proceedings Act because counsels' submissions were filed contemporaneously.

[111] Accordingly, there has been no proper consideration as to whether s.32 was ever designed to cover this situation – that is, an application for past maintenance to cover legal and expert accounting fees incurred both in relation to the spousal maintenance proceedings and the Property (Relationships) Act proceedings. I doubt that it was, as it appears to have been enacted to avoid proceedings having to be filed under two Acts and cover a situation where it becomes apparent it is just to make a maintenance order in the context of a Property (Relationships) Act determination.

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[13] PRA 1976, s.1M(c)

[112] Quite apart from any jurisdictional impediment, I am not satisfied it would be just to make an order Mr [Howell] pay Ms [Howell]'s legal and forensic costs to date in pursuing this litigation. I agree with the comments of Venning J in *R K v D K*[14] – it is more appropriate to deal with costs as a separate issue rather than including them in a maintenance order. I note also Ms [Howell] has chosen to retire one debt (mortgage principal) out of maintenance payments while accruing another for legal and other costs. She is entitled to have made that choice but that does not mean Mr [Howell] should pay that resulting debt which has been accrued.

[113] The application is declined.

Orders

[114] Counsel to draft orders for sealing within 14 days.

Costs

[115] Costs are reserved. If there is no agreement, submissions are to be filed within 28 days.

Signed at Auckland this 29th day of November 2019 at am / pm

S J Fleming
Family Court Judge

[14] *R K v D K* [2011] NZFLR 468