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-2022-090-000475
[2023] NZFC 12310

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[KARL PERRON] Applicant
AND	[CLAUDETTE WINTER] Respondent

Hearing:	7 November 2023
Appearances:	S Bennett for the Applicant A Fletcher for the Respondent
Judgment:	12 March 2024

RESERVED JUDGMENT OF JUDGE KEVIN MUIR

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[1] [Karl Perron] and [Claudette Winter] do not agree on when their de facto relationship started or ended. Mr [Perron] says the relationship lasted "*four years from April/May 2015 to July 2019*". It is Ms [Winter]'s position that Mr [Perron] remained in her home for a good part of that time as a result of a relationship of power and control – of violence. Ms [Winter] says, "*We were in a committed relationship between September 2015 to March 2016*". The issue is important because if Ms [Winter] is

right, their relationship was arguably never a qualifying relationship under s 4(5) of the Property (Relationships) Act 1976 (the PRA). If I decide if that the relationship lasted for less than three years, Mr [Perron]'s claims to a share in her property under the PRA will not succeed unless the Court is satisfied he has made a substantial contribution to the de facto relationship and the Court is also satisfied that failure to make an order for division of relationship property would result in serious injustice.[1]

[2] If I find that this was a qualifying relationship, or if I find that Mr [Perron] might succeed in obtaining compensation as a result of a substantial contribution to the de facto relationship, I need to consider whether or not he should be granted an extension of time because his claim in this Court was filed outside the three-year period from the date he says the parties separated.

[3] Although Mr [Perron] has filed an application for division of relationship property with accompanying affidavits, Ms [Winter] has not responded. She has instead filed an Appearance Under Protest to Jurisdiction with affidavit evidence in support. She was asking that this one-day hearing proceed essentially as an application to strike out Mr [Perron]'s claim. To strike out Mr [Perron]'s claim under r 193 of the Family Court Rules I would need to be satisfied that his application ("the pleading") disclosed no reasonable basis for his claims or that it was otherwise an abuse of the Court's process.[2]

The Issues

[4] The issues that I must decide then are:

(a) Am I able to determine whether this was a qualifying relationship on the basis of the evidence that was put before me?

(b) If I am and if I find that it was not a qualifying relationship, am I able to find whether Mr [Perron] made a substantial contribution to the de facto relationship?

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[1] Sections 14A(2)(a)(i) and 14A(2)(b) Property (Relationships) Act 1976.
[2] Rule 193, Family Court Rules 2002.

(c) If I find that the relationship did not last three years and if I find that Mr [Perron] did not make a substantial contribution to the relationship, is there any other reasonable basis for Mr [Perron]'s application? In this regard I note he pleads there was a specific agreement between he and Ms [Winter] that he would receive some compensation for work he did to a property that she had previously owned with her husband. He says he has an equitable claim – potentially a promissory estoppel remedy is available to him, and it is argued that I can direct compensation independently of any rights he may have under the PRA.

(d) Should I grant Mr [Perron]'s application for extension of time? Does he have a meritorious claim under the PRA? Is there a reasonable explanation for the delay in filing his application? Has Ms [Winter] suffered any irreparable prejudice because of the delay? Is it just for an extension of time to be granted?

(e) Ultimately, am I satisfied there is no reasonable basis for Mr [Perron]'s claims under the PRA?

The Law

Qualifying De Facto Relationships

[5] In deciding whether this was a qualifying de facto relationship I will be guided by the factors set out in s 2D(1) of the PRA. That subsection lists nine criteria that the Court can take into account when deciding whether a qualifying de facto relationship has commenced or whether it subsists. The list of criteria is non-exhaustive. I do not have to consider whether all or necessarily any of those issues can attach such weight to any of the circumstances listed as I think fit.

[6] I will adopt the cautious approach mandated by Heath J in the High Court in *B v F [de facto]*[3] where the Court at paragraph [48] warned:

[3] *B v F [de facto]* [2010] NZFLR 67.

> "*It is important to ensure that property consequences do not flow from relationships formed between two people that are not necessarily indicative of an intent to share property. For that reason some rigour is required in analysing whether a de facto relationship exists.*"

[7] I will also follow the approach recommenced by Gendall and Ellen France JJ in the High Court in *Scragg v Scott* as follows:[4]

(a) I will be undertaking an evaluative exercise in deciding whether the relationship "*moves across the line*" into a de facto relationship.

(b) I need to weigh as best I can "*all of the factors – not only those contained in s 2D*, *but also any others there may be – and (apply) a common-sense objective judgement to the particular case*". I would add that it must be only all the *relevant* factors that I am required to consider.

(c) Generalisations are to be avoided as every case is fact specific.

[8] This analysis does not come down simply to a question of whether the parties were in a relationship, or even a sexual relationship. They must be in a qualifying de facto relationship as defined in the PRA.[5]

What is a Substantial Contribution?

[9] If I find that this was not a qualifying de facto relationship because it is a relationship of short duration, then s 14A of the PRA applies. I can only make an order for division of relationship property under s 14A(2) if I am satisfied that either there is a child of the de facto relationship or Mr [Perron] has made a "*substantial contribution*" to the de facto relationship. I must also be satisfied that failure to make an order would result in "*serious injustice*".[6]

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[4] *Scragg v Scragg* [2006] NZFLR 1076 (HC) at [37].
[5] In particular sexual acts or sexual intercourse even whilst living together will not be decisive in determining this issue – *S v M* HC Wellington CIV-2006-485-1940, 14 April 2007 at [14].
[6] Section 14A(2)(b) PRA.

[10] There is no child of the de facto relationship so if I am satisfied that a substantial contribution has been made and that declining to make an order would result in serious injustice, the Court would then have to determine the share of each de facto partner in the relationship property in accordance with the contribution of each de facto partner to the de facto relationship.

[11] The test for compensation following a relationship of short duration for de facto relationships differs from the test for marriages of short duration. Under s 14(4) each spouse to a marriage of short duration is entitled to share equally in any relationship property that falls for division unless their contribution to the marriage has been "***clearly greater*** *than that of the other spouse*" (emphasis added). The "*substantial contribution*" requirement and the need to show that a serious injustice unless relief were granted in s 14A(2)(a)(ii), which are needed in de facto relationships of short duration before any orders can be made must be something more than the "*clearly greater*" contribution required for marriage. There is no requirement in s 14 to address "serious injustice" in the context of a short marriage.

[12] In the High Court in *L v P [Division of property]* Asher J held that *"substantial"* means "*of real importance or value*".[7] This approach was supported by Mander J in *Picton v Uxbridge*.[8] If I were to adopt the approach endorsed in those two cases, the relevant contributions would not need to be "*over and above*" what is normally expected from partners in a relationship. It is simply a question of whether the contribution is of real importance and value.

[13] With respect to the learned Judges in those cases I prefer the approach taken by Katz J in *PH v GH*.[9] There it was said that a substantial contribution "*would go far beyond* "*the norm*"."[10]

[14] The reasoning in *PH v GH* was as follows:

> [55] In my view, given this statutory context, something more than a "normal" or "expected" contribution to the relationship should be

[7] *L v P [Division of property]* [2008] NZFLR 401 (HC) at [70].
[8] *Picton v Uxbridge* [2015] NZHC 1050 at [37]–[42].
[9] *PH v GH [de facto relationship: no substantial contribution]* [2013] NZFLR 387.
[10] A phrase taken from *Schmidt v Gerrard* [2003] NZFLR 1050 (FC) at [15].

> demonstrated in order to trigger an exception to the general rule. I am therefore attracted to the "departure from the norm" approach originally taken by the Judges of the Family Court, although in my view attempts to define the precise degree of departure from the norm required are not of particular assistance.
>
> [56] In my view a "substantial contribution" is a contribution of importance or value that is "over and above" what would usually be expected from the parties in the normal course of their relationship as a couple. The greater the departure from the norm, the more likely it is that a "substantial contribution" will arise. However, each case will necessarily turn on its own facts.

[15] If I decide it is necessary to undertake an analysis of whether or not there has been a substantial contribution by Mr [Perron] to the relationship, I will be looking for something "*over and above*" the contribution parties in the normal course of a relationship as a couple might expect to make, or might be expected to make.

[16] If I do decide that there has been a substantial contribution by Mr [Perron] I will then have to go on and consider whether or not failure to make an order would result in serious injustice.[11] I agree with the High Court in *L v P* that it would be unusual for there not to be serious injustice if I were to find there was a substantial contribution and yet decline to make an order recognising that substantial contribution.[12]

[17] In assessing whether there might be a serious injustice should no compensation be ordered it will be relevant to compare the contributions of each party and the total value of the relationship property. I respectfully agree with Asher J when he said in *L v P* that "*it is only by considering the broad picture in this way that injustice can be evaluated*".[13]

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[11] Section 14A(2)(b).
[12] *L v P* supra at [72].
[13] *L v P* supra at [72] – a passage that was recently affirmed by the High Court in *Te Hei v Bradford* [2020] NZFLR 371 at [24].

Equitable Claims and the Property (Relationships) Act

[18] There is no statutory provision under the PRA to allow the Court to enforce a verbal promise. The Court's discretionary powers to award compensation are found in ss 18B, 18C and 15 of the PRA. My power under s 25(1)(a) of the PRA for the Family Court to make "*any order it considers just*" is limited to orders determining the respective shares of each spouse in the relationship property and dividing the relationship property using the jurisdiction I have under PRA.[14]

[19] Mr [Perron] asserts that he has an equitable claim to a share in Ms [Winter]'s home at [location B] and/or a claim to compensation. Specifically, he says because of work that he had done at her former matrimonial home Ms [Winter] received $70,000 more than she would have otherwise on sale of the property. He says Ms [Winter] promised or agreed to "*attribute $35,000 of her share of the former family home's profit*". He goes on to refer to "*substantial labour*" he says he carried out to the [location B] property while they were living there, saying that Ms [Winter] "*promised she would put my name on the title, and I said that I would be happy with half the equity in the property*". He says, "*... I wish to be reasonable in so far as the relationship whilst a qualifying relationship was relatively short and I accept the respondent has now moved on. However, I do feel I am entitled to a claim on the property and accordingly seek leave for the application to be accepted for filing*".

[20] In oral submissions Ms Bennett urged me to use the equitable jurisdiction of the Court or at least to find that he had a potential claim in the Family Court under the Court's equitable jurisdiction.

[21] The claims before the Court are claims under the PRA only. Mr [Perron] has not (yet) filed any civil claim for compensation. Under the Family Court Act 1980 I have jurisdiction to hear all claims under the Acts specified in s 11 with no specified limit on value. This differs from the general civil and equitable jurisdiction of the District Court where its claims are limited in value to $350,000.[15]

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[14] Section 25(1)(a)(i) and (ii).
[15] Sections 74 and 76 District Court Act.

[22] In some specific sections of the PRA the Family Court's ability to apply other rules of law or equity is specifically preserved. For example, s 21G is as follows:

> **21G Other grounds of invalidity not affected**
>
> Section 21F does not limit or affect any enactment or rule of law or of equity that makes a contract void, voidable, or unenforceable on any other ground.

[23] The PRA is otherwise a code which contains rules for dividing relationship property which apply instead of the rules and presumptions of common law and equity to transactions between spouses or partners in relation to property.[16]

Extensions of Time

[24] Under s 24 of the PRA an application for division of relationship property should be brought no later than three years after the de facto relationship ended.

[25] Under s 24(2) the Court has discretion to grant an extension of time. The factors set out in *Beuker v Beuker* remain a touchstone for decisions as to whether to grant an extension of time.[17] Those factors are:

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

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

(c) The merits of the case.

(d) Any prejudice to the respondent.

[26] Warnings have been issued against viewing the four factors in *Beuker* as a comprehensive code.[18] No undue weight should be placed on any of those four factors.

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[16] Section 4 PRA.
[17] *Beuker v Beuker* (1997) 1 MPC 20 (SC) at 4.
[18] See the decision of the High Court in *Ritchie v Ritchie* (1991) 80 FRNZ 197 (HC) and *Wayne v Maher* [2019] NZHC 821.

[27] Ultimately, I need to stand back and consider the justice of the situation. The *Beuker* factors are relevant to the issue of whether an injustice arises. Each case turns on its own facts with extensions of time having been granted in cases where there have been delays of up to 15 years.[19] At the other end of the scale delays of as little as five to six months have seen applications for extensions of time declined in some cases.[20]

[28] Generally, unmeritorious cases – that is cases where the likelihood of success with the substantive application is low, or the matters at issue are not significant – are unlikely to be well received. Conversely situations where it is clear there are extensive property rights or issues arising out of the relationship which are unresolved and where it is unlikely that there will be a just resolution without the Court's assistance are more likely to see the Court granting leave - unless the delay is particularly egregious or unless the respondent has suffered significant prejudice as a result of the delay.

The Impact of Violence and/or Coercion and Control

[29] It is accepted that the Court generally has a limited ability to consider the impact of misconduct including violence or coercion and control in the context of the PRA. Section 18A only permits a Court to assess the effect of misconduct when assessing positive contributions to a relationship when it is gross and palpable and significantly affects the extent or value of relationship property.[21]

[30] I accept that the limitations on considering misconduct in the PRA are important. As Cook J said in *Hewson v Deans*:

> "*It is important that those limitations are observed to avoid relationship property issues being unduly dominated by questions of misconduct. The limited role of misconduct is part of the overall policy of the legislation*."

[31] However, the effect of family violence has been considered when determining whether there was a qualifying relationship in a number of cases including:

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[19] *JNL v DN* FC Whanganui FAM-2004-083-863, 21 August 2006.
[20] For example, *Aschenbrenner v Williams* [2015] NZFC 3602, and *Lee v Thompson* [2016] NZFC 3048.
[21] Cook J discussed this in *Hewson v Deans* [2020] NZHC 1465 when he referred to the high threshold that is set by s 18A(3) and confirmed that qualifying misconduct is "*only permissibly taken into account when determining the relative contributions of the parties (and) when assessing whether one of the exceptions to equal division applies*".

(a) *[DMA] v [SMK].*[22] The applicant in this case was the victim of domestic abuse by the respondent although she kept returning to the respondent's house. It was held that the applicant had not established a relationship subsisted during this period of intermittent occupation and the relationship prior was not enough to assist in finding that a relationship existed just because they occupied the same house. The Court clearly took account of the relevant factors in s 2D of the PRA in its evaluative assessment.

(b) *Cooper v Lima*.[23] In this case the respondent spent time away from the family home and she had asked the applicant to leave on several occasions. There was ongoing violence during this time resulting in a protection order. The Court held that during this time they were not in a qualifying relationship.

(c) *Holland v Dollard*.[24] In this case Judge Ginnen commented that the family violence that occurred likely explained Mr Dollard's ability to remain in the house and explained the delay in PRA proceedings being issued. The victim was scared and felt powerless to take action.

[32] I can take account of the impact of violence and/or coercion and control when considering whether the parties de facto relationship subsisted.

Duration of Relationship

[33] Mr [Perron] and Ms [Winter] had known each other at primary school, and they reconnected through a social media site in 2014. Ms [Winter] was separating from her then husband [Jared Winter]. Ms [Winter] and [Jared Winter] owned a house at [location A] together which had work carried out for which a Code Compliance Certificate had not yet issued.

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[22] *[DMA] v [SMK]* FAM-2009-073-000042.
[23] *[AC] v [RL]* FAM-2004-031-000057.
[24] *Holland v Dollard* [2020] NZFC 2051 at [34].

[34] The first contact between Ms [Winter] and Mr [Perron] was made in July 2014. Ms [Winter] separated in November 2014, although she and her husband were still in counselling until the New Year in 2015.

[35] The parties started to date in March 2015. Mr [Perron] says that the relationship began in about April or May of 2015. I find on balance of probabilities that it did not start then. Mr [Perron] was still living with his brother, [David Perron], at that time. Although Mr [Perron] and Ms [Winter] may have started a sexual relationship – they were dating and they were boyfriend and girlfriend – they were not in a de facto relationship then. There are nine "guideline" criteria set out in s 2D(2) of the PRA which are addressed below:

(a) Duration of the relationship: This was a new relationship.

(b) The nature and extent of common residence: They did not have a common residence until at least September 2015.

(c) Whether or not a sexual relationship exists: A sexual relationship commenced at this time.

(d) The degree of financial dependence or interdependence and any financial support: There was no financial dependence, they owned no property together and they were not contributing financially to any mutual costs. Neither was supporting the other in the early stages of the relationship.

(e) The ownership use and acquisition of property: They owned no property together, were not living together and did not acquire any property together until after September 2015.

(f) The degree of mutual commitment to a shared life: There is no evidence that either of them were committed to a shared life together from April or May 2015.

(g) The care and support of children: They did not share any childcare responsibilities.

(h) The performance of household duties: Given that they were not living together, it is unlikely that there was any significant sharing of household duties.

(i) The reputation and public aspects of the relationship: There is no evidence that they were considered a "couple" by anyone else. I accept Ms [Winter]'s evidence that she would have described Mr [Perron] as her boyfriend at that time – a description which is not necessarily consistent with a qualifying de facto partnership.

[36] I accept that the "check list" above is not to be slavishly followed and no item on that list combination of items is regarded as necessary. It is a matter for me to attach such weight to any matters that may seem appropriate in the circumstances of the case. I find on the balance of probabilities that there was no change in the status of their relationship until 1 September 2015 when Mr [Perron] first moved into the [location A] property with Ms [Winter].

[37] I accept that the relationship began in September 2015 and subsisted until at least March 2016. That is the date that Ms [Winter] says the relationship came to an end. It is her evidence that there was a significant argument on that date. Mr [Perron] was demanding compensation for work that he said he had carried out on the [location A] property. In 2015 as a result of a Court Order in proceedings between Ms [Winter] and her former husband Mr [Winter], there was a direction that the [location A] property be sold. Ms [Winter] and Mr [Winter] agreed that she could carry out the work necessary to obtain a Code Compliance Certificate for the property provided Mr [Winter] was not required to contribute cost or work.

[38] Mr [Perron] asserted that $140,000 was added to the value of the former [Winter] family home as a result of the work that was carried out. Mr [Perron] was claiming that he was instrumental in completing the work and was entitled to compensation. There was an incident of violence between Mr [Perron] and

Ms [Winter] during this argument. The police were called. A police safety order was issued against Mr [Perron] which required him to remain away from the home until [date 1] March 2016.[25]

[39] I accept Ms [Winter]'s evidence that she asked Mr [Perron] to stay away from that point on. I also accept her evidence that between then and around 1 April 2017 she and Mr [Perron] were in an "on again and off again" relationship which was punctuated by violent or abusive behaviour by Mr [Perron] towards Ms [Winter]. I am satisfied that the violence was principally a result of Mr [Perron]'s aggression. That is confirmed by the fact that further police safety orders were issued against Mr [Perron] on [date 2] May 2016, [date 3] June 2016, and [date 4] June 2017.

[40] On 26 August 2016 there was a text exchange between Ms [Winter] and a friend of Mr [Perron]'s, [Luke Reed]; Mr [Reed] was expressing a hope that the couple might "*sort out (their) issues*". Ms [Winter] texts included "*[Karl] and I are finished*", and "… *at the point of no return I think. In a relationship you are supposed to build each other up, not tear each other down and there's a point where you hurt the person so much there is no fixing it … He may talk quite nice about me to the other people in our lives but when he is constantly belittling me and abusing me and calling me names it gets a bit much. I have been in that sort of relationship before and don't want to repeat it."*

[41] The serious nature of the violence and the impact of the violence on Ms [Winter] and her two children, [Cory] who was 10 when the relationship started and [Isabela] who was then 14, is corroborated by the fact that on two occasions when the police called and issued police safety orders Ms [Winter] was hiding. On one occasion she had left the home and walked with her son and daughter to a neighbour's house approximately one kilometre away.[26] On another occasion in June 2017 when the police arrived around midnight, Ms [Winter] and her then 12-year-old son [Cory] were found hiding in a very small generator shed behind her home. This was after an incident when Mr [Perron] – who had been drinking with Ms [Winter]'s uncle since

[25] B81.
[26] B84, incident on [date 3] June 2016.

the afternoon – had punched a hole through the bedroom door and was yelling aggressively at her while drunk.

[42] I accept Ms [Winter]'s evidence that she repeatedly asked Mr [Perron] to leave but that he refused to do so. For much of the time between March 2016 and at least April 2017 Ms [Winter] was sleeping on a mattress in the garage or in a room other than the master bedroom – she was not sleeping with Mr [Perron]. I accept that the parties continued to have an on again/off again sexual relationship through until at least November 2018. In November 2018, following an incident of violence the respondent was charged with assault with a weapon and threatening to kill. His bail conditions prohibited contact – in fact for a time his bail conditions prohibited him from travelling north of [details deleted].

[43] Ms [Winter]'s ability to extract herself and her children from the relationship with Mr [Perron] was complicated by a number of factors. He was living in her home. He had some friends and family he could stay with but otherwise nowhere to go. He was working with and for her. Her business, [name deleted – "the company"], had obtained a contract for [details deleted] and Mr [Perron] was principally responsible for carrying out or coordinating that work. Mr [Perron]'s only source of income for much of the parties' time living together was an "*allowance*" that Ms [Winter] paid him. I find on balance of probabilities that her evidence he was paid a total of $800 per week is correct. Mr [Perron] received $300 as a cash deposit to his bank account each week. $100 was paid to his former partner as child support for their child. The remaining $400 was credited to board – all of the costs associated with his remaining at [the location B house].

[44] I also accept that throughout this "*on again/off again*" relationship, Mr [Perron] sometimes performed some work at [the location B house], whether by way of maintenance of the property and grounds or assisting with some modest "*improvements*". Examples included re-graveling the driveway with lime chips from time to time, assisting with digging a trench for power services and assisting with digging a trench around a barn for drainage and flood protection purposes.

[45] I also accept that some of Mr [Perron] and Ms [Winter]'s mutual friends and acquaintances and some of Mr [Perron]'s family may have thought that their relationship persisted without interruption until November 2018. They occasionally took trips together or spent time together. For example, when Ms [Winter]'s friend organised a [birthday] celebration for her at [location C] [in late 2018] Mr [Perron] attended.

[46] Ms [Winter]'s detailed account of the frequent psychological and physical violence she experienced from Mr [Perron] was detailed and credible. Her evidence was not successfully challenged in cross examination. Her answers when questioned about particular incidents were consistent with a woman who had been struggling to cope with a dynamic of power and control. Mr [Perron] was often critical of her and to her to the point of being insulting and abusive. He would throw pans of cooked food at Ms [Winter] if she had not used a lid on the pot as he insisted. He was highly critical of her appearance, making demeaning remarks to her. She was told she was a useless mother and that her children "*were fucked up because of (her)*".

[47] Ms [Winter]'s children both experienced Mr [Perron]'s anger and violence which was exacerbated by his heavy drinking. Ms [Winter] said she was blamed by him for being the cause of his drunkenness. In June 2016 Mr [Perron] became abusive after Ms [Winter] again asked him to leave. She drove with her son and daughter to a neighbour's house, the police were called and another police safety order was issued against him. Mr [Perron] soon returned from Mr [Reed]'s house to Ms [Winter]'s home telling her she "*would regret it if the police were ever called again*". It was from that time on that [Cory] kept a bag packed by his bed ready to leave.

[48] In October 2016 Ms [Winter] was so frightened that she left the home with no bag packed. She told [Cory] to grab his "*go bag*" and drove to a motel where she stayed "*for a week until the applicant calmed down and we could go back to the house*". She did not call the police – she was fearful after the threat Mr [Perron] had issued in June.

[49] In December 2016 Mr [Perron] deliberately slammed her hand in the bonnet of her [vehicle] and head butted her. She took [Cory] and left with him to stay with her mother. Again, she did not call the police.

[50] There were numerous other incidents including a lengthy abusive tirade in March 2017, which Ms [Winter] recorded.

[51] In April 2017 Ms [Winter] sent Mr [Perron] the following text message:

> "*[Karl], this is where I am at with your mum moving out so suddenly that are not her fault or mine. You have two choices and these are not going to change nor negotiable by me. You have one week to enrol in that abusive relationships 19 week course. Attend alcoholics anonymous. And attend an anger management course. That's if you want to sort your issues out and to work on our relationship. I would be willing to go to 6 counselling sessions offered by the courts. Second option is you have two weeks to find a new job and move out. Then we can both get on with our lives. The date to have all your belongings out by is 15th April or sooner if you prefer. I am not going to shoulder your issues anymore nor take blame for your unhappiness. I am not interested in any response from you. I have blocked you on my phone and messenger. This is a chance that you don't deserve but I am offering it. [Claudette]*."

[52] Mr [Perron] did not attend the counselling. He left the home again but begged to come back in May 2017, "*but not for us to get back together, just that he needed a place to stay … we coexisted under the same roof and that was that*".[27] A police safety order was again issued soon after his return.

[53] Ms [Winter] realised in August 2017 that Mr [Perron] had been in a relationship with another woman from May 2017. When she confronted him he became so angry that [Cory] again called the police.

[54] The evidence satisfies me that for a long time Ms [Winter] remained hopeful that their relationship might resume. There were undoubtedly periods of time – sometimes as long as several weeks – when their sexual relationship had resumed although in tenuous circumstances where Ms [Winter] was clearly and understandably fearful about the prospect of further violence. Even as late as November 2018 in emails to Mr [Perron]'s brother in response to a request that

[27] B47, para 55, Ms [Winter], 7 March 2023.

she "*drop the charges*" against Mr [Perron], Ms [Winter] was expressing her regrets. "*I know I miss him terribly and I know I love him still but don't think its reciprocated …*".

[55] I am satisfied that there was never a continuous period of cohabitation as a committed couple with a mutual commitment to a shared life longer than the seven or so months between September 2015 and March 2016. For much of the relevant time after March 2016 Ms [Winter] was hoping that one of two things might happen. Either that she might successfully escape the relationship – persuade Mr [Perron] to leave and leave her alone. Alternatively, Mr [Perron] might change, address his drinking and anger issues, and she might feel safe in a loving relationship with him and be able to recommit. Whichever of those emotions which she was experiencing through that time, I am not satisfied that their relationship met the definition contained in s 2D of the PRA for any sustained period after March 2016. For some of the time they shared a common residence but for much of the time they were sharing that common residence they were not sharing a bedroom regularly.[28] Their sexual relationship was on again/off again.[29] To some extent Mr [Perron] was financially dependent on Ms [Winter] but that was as a result of the "wage" that she was paying him of $800 per week in exchange for his work for [the company] and in particular on [details deleted].[30]

[56] Mr [Perron] and Ms [Winter] never jointly acquired any property. There is no evidence that they owned a vehicle together or that either of them owned a vehicle which the other regularly used.[31] Mr [Perron] regularly used a utility vehicle that was owned by [the company]. Although Ms [Winter]'s son [Cory] was in the home with them, I accept their evidence that there was no mutuality of care and support for him. He was certainly not a child of the de facto relationship.[32] The evidence is that he was scared of Mr [Perron]. At one point he kept a bag packed and a knife near his bed so that he could escape with or without his mother in the event there was further violence.

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[28] Section 2D(2)(b) PRA.
[29] Section 2D(2)(c).
[30] Section 2D(2)(d).
[31] Section 2D(2)(e).
[32] Section 2D(2)(g).

[57] To some extent Mr [Perron] and Ms [Winter] shared household duties. He mowed the lawns and made other contributions to maintenance and improvement and upkeeps around the property. That in and of itself is not sufficient to overcome Ms [Winter]'s reasonable position that she was not committed to a shared life with him.[33]

[58] As for the reputation and public aspects of their relationship Ms [Winter] accepts that she did not disclose the violence in their relationship or all of her difficulties with Mr [Perron].[34] That is not an unusual dynamic in a relationship where there is a strong element of power, control and violence by one party towards the other.

[59] Under s 2E(2) of the PRA I may exclude any period of resumed cohabitation that has the motive of reconciliation and that is no longer than three months when computing the period which have the parties have lived together as a married couple.

[60] Taking account of all the factors set out I am satisfied there was no resumption of cohabitation as a couple for any period – let alone a period of longer than three months – after March 2016. Mr [Perron] and Ms [Winter] were cross examined extensively on the issue of duration of their relationship. Ms [Winter]'s evidence was consistent with and corroborated by the available independent evidence including the police family violence records which were included in the agreed bundle of documents.

[61] I am therefore able to determine whether this was a qualifying relationship based on the evidence before me. There was extensive cross examination on the nature and duration of the relationship. This was not a qualifying de facto relationship.

Substantial Contribution and Injustice

[62] Having found that the parties were not in a qualifying de facto relationship – because their relationship was of short duration – Mr [Perron] can only succeed in obtaining compensation if he establishes that he made a substantial contribution to the

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[33] Section 2D(2)(h).
[34] Section 2D(2)(i).

relationship and that he would suffer an injustice if that contribution is not compensated.

[63] Counsel for Ms [Winter] submitted that the proceedings should be struck out – that Mr [Perron] had not been able to establish that he had made a substantial contribution.

[64] In his 10-paragraph narrative affidavit in support of his application for leave to bring this claim out of time and for division of relationship property, Mr [Perron] gave some evidence about the contributions he allegedly made to what was then Ms [Winter]'s separate property – the home she had owned with her former husband at [location A]. He did not give the dates the work occurred, nor did he give details of the hours that he worked or of any financial contribution.

[65] Similarly in paragraphs 7 to 9 he briefly summarised work that he said was carried out "*when we brought the [location B] property*". He said, "*there was substantial labour during the time we were residing at the [location B] property that I did for free*". Again, no details as to the hours committed to the value of that work was given.

[66] Ms [Winter] contested that evidence from paragraphs 112 to 116 and from paragraphs 128 to 139 of her 142-paragraph affidavit in reply and in support of her appearance and protest to jurisdiction.

[67] Ms [Winter]'s evidence is extensive and detailed. However, there is clearly a real issue as to whether Mr [Perron] made a substantial contribution to the relationship – whether he made a contribution of importance or value "*over and above*" what would usually be expected from parties in such a relationship.

[68] I was not hearing this matter as a defended application for relief under s 14A(2) of the PRA. Ms [Winter] has not yet filed a notice of response to the application for division of relationship property. She instead chose to file an appearance in protest to jurisdiction. Judge Morrison had allocated a three-hour hearing because Mr [Perron]'s application for leave to apply out of time and Ms [Winter]'s notice of appearance under

protest to jurisdiction needed to be determined prior to the substantive proceeding progressing. When this interlocutory application was later set down by me for a one day hearing I directed that the issues for determination were "*the nature and juration of the relationship in light of the applicant's application for leave and extension of time and the respondent's appearance under protest of jurisdiction*". I directed that there be limited cross examination of any relevant witnesses required on those issues only.

[69] In this hearing I was not undertaking an inquiry into the nature and value of contributions to the relationship nor was I in a position to do that. Mr [Perron] might rightly be concerned – if I were to determine that issue now – that he had not had sufficient time to file detailed evidence. It may be that he or Ms [Winter] have receipts, bank statements, diary notes or other documentary evidence that establishes that he did in fact make a substantial contribution. Discovery may not yet be concluded. There may be relevant evidence that is not yet apparent to me from the limited affidavit evidence that has been filed so far.[35]

[70] Ms [Winter] has filed in protest to jurisdiction. It is clear that I do have jurisdiction to determine whether this was a qualifying relationship. I also have jurisdiction to determine whether there was a substantial contribution by Mr [Perron] and whether it would be unjust for him to go uncompensated for any substantial contribution. However, determination of that issue will need to wait for a substantive hearing – if Mr [Perron] elects to continue to pursue this claim now I have found it was a relationship of short duration and if I grant him the extension of time he seeks. Any claim that he does have is likely to be limited given the short relationship. I have not formed a firm view on the extent to which any "*negative contributions*" to the relationship – the violence and coercive and controlling nature of the relationship – might be considered when assessing the overall value of any contribution that Mr [Perron] alleges. Again that would be a question for another day should Mr [Perron] choose to proceed and should I extend time.

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[35] I am not being critical of Mr [Perron] for the limited affidavit evidence that he has filed – it appears he was focused on the extension of time issue in his initial extensive affidavit.

[71] In addition to the appearance in protest to jurisdiction, Ms [Winter] asked that the proceedings be stayed or dismissed. It was submitted that Mr [Perron] had not "*discharged the onus he has on proving, on balance of probabilities that he has evidence to support the Court making the s 25 orders he has applied for*".

[72] That submission somewhat misconstrues the nature and purpose of this hearing. Ultimately at the substantive hearing Mr [Perron] will need to establish that he has made a substantial contribution to the relationship, such that it would be unjust for him not to receive compensation. However, at the protest to jurisdiction/stay/strikeout stage, the onus is on Ms [Winter] to satisfy the Court that Mr [Perron]'s claim ought not be allowed to proceed.

[73] Ms [Winter] asked the Court to "*read the protest to jurisdiction*" as an application to dismiss the respondent's proceedings under r 194 of the Family Court Rules. Rule 194 allows a proceeding to be dismissed if it is found that the application lacks a reasonable basis, is frivolous or vexatious or is an abuse of the Court's process.

[74] As Judge Callinicos outlined in *McCoy v Poots*, the approach to r 194 requires the following:[36]

> (a) Firstly, the basis for a strikeout requires that the plaintiffs (or applicants) claim must be clearly so untenable that it cannot possibly succeed;
>
> (b) Secondly, if the claim is doomed to failure, then the Court takes the approach that there can be no justification in allowing it to continue and to waste finite Court resources;
>
> (c) Further, the onus is on the applicant to show a reasonable basis for the application (to strikeout);
>
> (d) Fourthly, the application proceeds on the assumption that the (claimant) can make out all the factual allegations pleaded; and
>
> (e) In general terms, the jurisdiction to strikeout should be used sparingly.

[75] On the evidence currently before me it does not appear that Mr [Perron] has a strong claim to substantial compensation, but I cannot be satisfied that his claim is so clearly untenable that it cannot possibly succeed. It is possible that with amendment

[36] *McCoy v Poots* [2015] NZFC 5934 at [7].

or with further affidavit evidence and corroborating material, Mr [Perron] might yet be able to establish a claim which crosses the bar of being a substantial contribution to the relationship which justice requires be addressed. The evidence I have so far indicates that any relief he obtains is likely to be small in comparison to the likely further cost of litigating this matter to conclusion. But I cannot say his claim is hopeless.

[76] It follows that Ms [Winter]'s application to dismiss the proceedings, her protest to jurisdiction is not successful.

Application for Extension of Time

[77] It was Mr [Perron]'s position that the relationship subsisted for four to five years "*from April/May 2015 to July 2019*". It appears he may well have genuinely believed that was the duration of his relationship with Ms [Winter] at least absent any detailed legal analysis. I have found in fact the relationship ended in March 2016.

[78] Mr [Perron] did not file his claim until September 2022. That was more than three years from the date Mr [Perron] considered the relationship ended (July 2019) and almost six-and-a-half years from the date of the end of the relationship that I have determined.

[79] In explaining the delay Mr [Perron] says that he went to see a lawyer in March 2021. The lawyer told him that he would email him with the draft proceedings. Nothing was received. He contacted the lawyer again in July 2022 and received an explanation that there had been a delay as a result of the Covid-19 lockdowns. He did not hear from that lawyer again and "*I have managed to find another lawyer who advised me to quickly get a Notice of Claim on the family home and for us to file these proceedings seeking leave to file outside the statutory deadline*".

[80] The Notice of Claim was lodged on 25 August 2022 and Mr [Perron] says that he does not believe there is any prejudice to the respondent "… *as she is aware of my intention to be compensated for work that I did on her first house at [location A] which contributed to the deposit on the family home*".

[81] Ms [Winter]'s addressed the issue of the prejudice she says she suffered as a result of the delay. She says she met her "*current partner*", [Jim Howard] in May 2019 and that [Jim] lent her money from the sale of his house to pay debts incurred during the relationship with Mr [Perron] in her business. It is her evidence that she agrees with Mr [Winter] "*via his brother [David]*" in June 2019 that Mr [Winter] would retain the [details deleted] side of the business, [vehicles and tools associated with the business], she would pay a bill for his dental work, and she would pay any claims brought by the liquidators of her [company].

[82] She says at paragraph 138 that she has been advised that she will need to complete an affidavit of assets and liabilities "*if the Court considers it appropriate to determine the division of relationship property*". She pleads to "*an immense amount of stress and anxiety. I've had to relive and remember the trauma I experienced and try to recall the dates and times when we were together and when we were not*".

[83] I analyse the application for extension of time using the four factors set out by McMillan J in *Beuker v Beuker*:[37]

(a) *The length of the delay*. I do not consider that it would be just to analyse the delay in terms of the almost four-and-a-half years that passed from the date I find the parties' separation occurred. It appears that Mr [Perron] may well have genuinely believed that the relationship subsisted beyond that date. It would be unusual to say the least for a party to bring an application for the division of relationship property when they were continuing to live with the respondent. They could not be expected to bring an application for division of relationship property if they genuinely considered that the relationship was still subsisting.

I will therefore firstly therefore analyse the delay based on the time that elapsed between Mr [Perron]'s contended date of separation in July 2019 and the proceedings being filed in the Waitakere District Court in September 2022. The time limit in s 124(1)(c) of the PRA is three years.

[37] *Beuker v Beuker* supra at n 18 above at [21].

Although six years and six months elapsed between the separation date I have determined and the date of filing, from Mr [Perron]'s position three years and two months passed and he had lodged his notice of claim against the home on 24 May 2022. He was arguing Ms [Winter] had clear notice of his intention to claim within the three-year limitation period.

The length of delay is comparatively short – from Mr [Perron]'s perspective at least. I address the delay from Ms [Winter]'s when I address the issue of prejudice below.

(b) *The explanation for the delay*. Mr [Perron]'s explanation for the delay is credible and reasonable.

(c) *The merits of the case*. I am unable to fully assess the strength or value of Mr [Perron]'s claims. I have concluded that he has an arguable claim – even if it is unlikely to be for a substantial amount.

(d) *Prejudice to the respondent*

(i) Ms [Winter] has given substantial evidence of the prejudice she says she has suffered as a result of the delay. Mr [Perron] accepted in cross-examination that he retained the [company and vehicles and tools associated with the company] and that she paid his outstanding dental costs of around $3,000. He has not had to pay any of the debt that followed the liquidation of [the company]. Mr [Perron] denies that his brother was entitled or authorised to negotiate an agreement on his behalf. It is clear though that he took and kept assets and benefits of considerable amounts after separation. The [company] had a turnover of around $1,800 per week.

(ii) I accept Ms [Winter]'s evidence that she took responsibility for the relevant debts, and allowed Mr [Perron] to retain those

assets in the expectation that would be an end to any property claims he might have after separation. I find that was a reasonable expectation on her behalf. She said, "*I needed the applicant to leave me. I knew the only way was to get him to leave was to give him money*".

(iii) There was no formal s 21A agreement prepared. If Ms [Winter] had known that Mr [Perron] might pursue additional claims against her, it is unlikely she would have allowed him to retain those benefits. It is likely she would have obtained legal advice then.

(iv) I am concerned about the stress that she, and indeed Mr [Perron], will experience if this claim continues to a substantive defended hearing. I am concerned at the cost to both of them, both financial and emotional – particularly where there is a real risk and for Mr [Perron] this might be something of a pyrrhic victory. He might succeed but might not succeed for a substantial amount. However, I am not in a position to quantify his claim with any degree of certainty.

[84] Ms [Winter] will suffer significant prejudice if I allow this claim to proceed out of time. Not only will she incur significant additional legal costs, she may also be exposed to a claim for compensation that is unlikely to have been left unresolved had Mr [Perron] told her promptly following separation that he intended to bring a claim

Overall Justice

[85] The four *Bueker v Bueker* criteria are not "*a checklist*". Success or failure on one or all of length of delay, reasons for delay, merits or prejudice issues does not dispose of the leave issue. I need to stand back and look at the overall justice of the situation.

[86] In doing that I am conscious that declining leave will result in Mr [Perron] being unable to pursue a claim that I have found is arguable – albeit unlikely to yield a large award of compensation.

[87] The prejudice to Ms [Winter] should an extension of time be granted will be significant. It is understandable that she views Mr [Perron]'s claims now as a continuation of the dynamic of coercion or power and control that he exercised during the relationship. Having, from her perspective, settled his claims once, and moved on with her life with her new partner, and substantial new debt she will be required to consider the circumstances of this violent and distressing relationship. Mr [Perron] may be facing the prospect of being "*shut out*" of a potential claim, but on the other hand Ms [Winter] is at risk of him receiving a "*second bite of the cherry*" when she has long ago considered matters closed – albeit at significant financial and emotional cost to her.

[88] Ultimately, even though from Mr [Perron]'s world view his claim was not long delayed, I find that it is contrary to the overall justice of this situation to grant his application for extension of time.

[89] Ms [Winter] has succeeded. I do not consider that Mr [Perron]'s claims were so lacking in merit as to justify increased costs. This matter was litigated with comparative efficiency. Ms [Winter] is entitled to costs on scale 2B and the reasonable disbursements claimable under r 207 of the Family Court Rules and r 14.12 of the District Court Rules.

Signed at Auckland this 12th day of March 2024 at 3.00 pm

Kevin Muir
Family Court Judge