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-2021-090-000655
[2024] NZFC 8913

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[SHU-FEN LEI] Applicant
AND	[RUBEN YIN] [LISA REN] Respondents

Hearing:	24 June 2024
Appearances:	E Kuo for the Applicant Respondents Appear In Person Interpreters are Ms Zeng and Mr Fan
Judgment:	4 September 2024

RESERVED JUDGMENT OF JUDGE KEVIN MUIR

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[1] [Shu-fen Lei] and [Ruben Yin] separated on or about 20 March 2021. Since separation [Ruben] has remained living in the parties' former home at [address deleted – "address 1"]. [Shu-fen] has had principal responsibility for the care of their children, [Sonya] who is seven and [Theo] who is [four years old].

[2] The [address 1] property was registered in the names of [Ruben] and his mother [Lisa Ren] as tenants in common in equal shares.

[3] It is common ground that $480,000 was borrowed from [Lisa] by [Ruben] at the time the home was purchased. $200,000 was borrowed from [Lisa] directly. $280,000 was borrowed by way of a mortgage [Lisa] obtained from BNZ Bank. [Ruben] and [Lisa] now say that [Ruben] was holding his half-share of the [address 1] property for the benefit of his mother. [Shu-fen] disputes that and this is the principal reason the parties have been unable to resolve relationship property issues. However, there are a range of other issues which have meant that it was necessary for this to proceed as a four-day defended hearing.

The Issues

(a) Did the party's de facto relationship commence in June 2012 or September 2016?

(b) Is the [address 1] property the family home and is [Ruben]'s half interest in that home divisible as relationship property? If so:

(i) What is the value of that property?

(ii) Should [Ruben] pay an occupation rent to [Shu-fen] from separation or 20 March 2021 (s 18B)?

(iii) What is a fair market rent for the property as a calculation of s18B compensation?

(iv) What if any of the post-separation expenses claimed by [Ruben] and [Lisa] should be offset against any occupation rental?

(v) Should I make an order for sale under s33?

(c) How much of the "separation costs" claimed by the respondents are payable by [Shu-fen] to [Ruben] and/or [Lisa] (S 18B)?

(d) What was the balance of [Ruben]'s KiwiSaver at the date of separation?

(e) Was there a loan of $10,000 owed to [Lisa] by the parties which was used to buy a car during the relationship?

(f) What, if any, part of the net proceeds of sale of that car is [Shu-fen] entitled to? [Ruben] and [Lisa] allege that there were certain expenses payable.

(g) Was the car that [Shu-fen] purchased after separation relationship property?

(h) What was the balance in the parties' bank accounts at the day of separation?

(i) Which of the loans claimed by [Lisa] as due to her are genuine debts and how much should [Shu-fen] account for?

(j) Is [Shu-fen] entitled to compensation under s 15 of the Act because the income and living standards of [Ruben] are likely to be significantly higher than [Shu-fen]'s as a result of the division of functions during the marriage? If so how much?

(k) What orders should the Court make and in particular, is it necessary to make an order for sale of the [address 1] property and on what terms?

(l) Costs.

Duration of Relationship

[4] Given [Shu-fen] and [Ruben] married on [date deleted] October 2016 and separated on 20 March 2021, their relationship was not a relationship of short duration – the marriage itself lasted at least some four years and five months. The dispute between the parties over exactly when their relationship became a de facto relationship as defined by s 2B of the Property (Relationships) Act 1976 (the Act) does not directly impact on the significant issues between them about the division of relationship property but it may have some relevance to [Shu-fen]'s application for compensation under s 15 of the Act.[1] At paragraph [323] of *Scott v Williams*, Arnold J said that it would be unusual for the assumption that the division of functions enhanced the responding spouses income earning ability, "… *At least in relationships of long duration entered into at the outset of the career partner's career*".[2]

[5] [Shu-fen]'s position was:

> "We started seeing each other in June 2012, and our de facto relationship started then. In 2016 we decided to get married and came to New Zealand in September that year."

[6] The parties' daughter [Sonya] was born on [date deleted] 2017 and their son [Theo] was born on [date deleted] 2020.

[7] [Ruben]'s evidence included:

> "The time when was in Taiwan, [Lei] and I were just boyfriend and girlfriend status. Then [Lei] have come to join me in NZ at end of 2016, Because [Lei] was pregnant." (sic)

[8] In his oral evidence [Ruben] seemed anxious to downplay or minimise the level of commitment he and [Shu-fen] had to each other before marriage.

[9] [Shu-fen] had exhibited photographs of an "informal engagement" gathering of her family and [Ruben]'s family in Taiwan from April 2016. The photographs were

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[1] The "working assumptions" discussed by Arnold J in *Scott v Williams* [2018] 1 NZLR 507 at [311] are more likely to apply and are more likely to impact the availability and quantum of s 15 compensation in an enduring or longer lasting relationship.

[2] *Scott v Williams* [2017] NZSC 185 at [323].

part of information supplied to Immigration New Zealand (Immigration) in support of [Shu-fen]'s visa application. In oral evidence [Ruben] was reluctant to accept that the gathering was to celebrate their "engagement" and was reluctant to acknowledge that the rings they were exchanging had any particular significance. In fact, he initially said "I can't really recall" when asked about whether there had been an exchange of rings.

[10] Those photographs were part of saved attachments on an Immigration document "Form for Partners Supporting Partnership-based Temporary Entry Applications" dating from November 2016. One of the documents attached to that application was a letter from [Lisa] in which she said:

> "[Ruben Yin] and [Shu-fen Lei] has started their relationship since June 2012 in overseas Taiwan". (sic)

[11] In a letter dated 16 December 2016, which [Ruben] and [Shu-fen] signed in support of the application, they had written:

> "We would like to provide more details as your request to show our genuine, stable and very true relationship. We believe in this case will satisfy your assessment this time. … The fact: we are living together all the way since June, 2012 for nearly 12 years." (sic)

[12] The document annexed photographs of a number of holidays that the couple had taken together from 2012 to places such as South Korea, Nantou Province, Tokyo, Hong Kong and Queenstown.

[13] Although both [Ruben] and [Lisa] were anxious to deny that [Ruben] had been in a relationship with [Shu-fen] before the date of marriage, the information that they provided to Immigration paints a different picture.[3]

[14] From [Shu-fen]'s perspective their relationship was exclusive. [Ruben] claimed that he did not believe that he was in an exclusive relationship. He said, "I've got lots of friends and lots of family, including female friends we keep in touch and met sometimes". (sic) However, he acknowledged that he had no independent

[3] It is significant that [Lisa] was acting as [Ruben] and [Shu-fen]'s agent for the purposes of preparing and submitting that information to Immigration.

evidence to support this assertion and apparently could not name anyone else that he was "dating" from the time his relationship with [Shu-fen] commenced.

[15] In a Minute following an initial conference on 17 June 2022, Judge Parsons recorded that the parties agreed on the dates of the relationship, "the agreed date of separation is 20 March 2021 with the beginning of their relationship from June 2012".[4] [Ruben] and [Lisa] have subsequently resiled from that agreement or concession, but it is significant to my assessment of the reliability of their current evidence that the concession was made then.

[16] [Shu-fen]'s evidence was that they were living together in Taipei, spending many of their evenings together. It is not disputed that they had a sexual relationship from 2012.

[17] On the other hand, there appears to have been relatively little coordination of finances prior to their marriage. There is no evidence that the parties had a joint bank account. I have not been given any details as to how they shared living expenses when they were living in Taiwan.

[18] There is no evidence that the parties operated a joint account or that their finances were significantly intermingled after they married. [Shu-fen] seems to have had access to a debit or credit card for household expense purposes but does not appear that she had online access to the principal accounts that [Ruben] operated.

[19] [Ruben] and [Shu-fen] rented a house in Taiwan together for some of the time they were living there. How long they lived together is not clear, but the "engagement party" photos were taken in that home. For some of the time in Taiwan [Ruben] lived in his father's house in Taipei City and [Shu-fen] lived in [city A], which [Ruben] said was "one hour plus" by high-speed train. For some of the time [Ruben] was completing his compulsory military service, but he acknowledged that [Shu-fen] still visited him at [city B].[5]

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[4] Minute of Judge Parsons, 17 June 2022 at [4].
[5] His compulsory military service ran from 2010 to 2012.

[20] In determining whether the parties were in a de facto relationship I need to have regard to the matters that are set out in s 2D(2) of the Act,[6] although I remind myself that those factors are not a "checklist".[7] An analysis which determined that only a few of those matters were satisfied would not necessarily lead to the conclusion that the parties were not in a de facto relationship. There may well be situations where several of the matters listed in s 2D(2) are satisfied but the parties are still found not to be in a de facto relationship. I also remind myself of the warning that Heath J gave in *B v F* of the need to exercise "some rigour" in analysing whether a de facto relationship exists.[8]

[21] Both [Ruben] and [Lisa] adamantly denied that there was a relationship in the nature of marriage between [Ruben] and [Shu-fen] prior to marriage. I found their denials unconvincing. Neither [Ruben] nor [Lisa] were satisfactorily able to explain the statements that they made to Immigration about the duration of the relationship. The evidence [Shu-fen] produced, including the photographic evidence corroborates her account.

[22] It is clear the relationship subsisted from some time in 2012. It is not possible to be more precise given the evidence produced. I accept [Shu-fen]'s evidence that for much of that time they shared a residence in Taipei. They were in a sexual relationship. It is clear from the time they spent together, including their numerous holidays, that there was a degree of mutual commitment to a shared life. I find that their relationship was exclusive from 2012. Again, [Ruben]'s claim to the contrary was uncorroborated, lacking in detail, and unconvincing.

[23] Although [Shu-fen] worked in various cities in Taiwan during their relationship, including [three different cities] and Taipei, their relationship endured as an exclusive relationship.

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[6] Some of which are analysed in the preceding paragraphs above.
[7] See *Benseman v Ball* [2007] NZFLR 127 (HC) at [20] per Priestly J.
[8] *B v F* [2010] NZFLR 67 (HC) at [48].

[24] Taking all of those factors into account along with the written statements that [Ruben] and [Lisa] had previously made about the relationship, I find on the balance of probabilities that the parties were in a de facto relationship from 2012.

[Address 1]

[25] [Lisa] and [Ruben] are registered as tenants in common in equal shares on the title to [address 1]. The Agreement for Sale and Purchase was originally signed by [Lisa] alone and on 6 January 2020 she and [Ruben] signed a Deed of Nomination where they together committed to purchase the property as [Lisa]'s nominees.

[26] The home was lived in by [Ruben] and [Shu-fen] and their children, although it seems that [Lisa] may have reserved a room for herself in the home. [Shu-fen] moved out with the children when she and [Ruben] separated. [Ruben] has remained living in the home to her exclusion since then.

[27] The home is clearly the family home as defined in the Act, although [Shu-fen] accepts that their interest in the home is limited to [Ruben]'s half-share. In the affidavit of assets and liabilities which [Ruben] filed in January 2022, he referred to "my half-share (borrowed $480,000 from [Lisa] to purchase)". In his narrative affidavit filed at the same time he said, "my half-share of [address 1] was purchased and acquired in January 2020 by borrowing".

[28] [Shu-fen] does not dispute the validity of two loan documents that [Ruben] and [Lisa] signed at the time of purchase. Pursuant to one agreement, [Ruben] owes [Lisa] $200,000 with interest payable of 1.05 per cent per annum and with the loan to be repaid in full on 17 January 2040.

[29] At about the same time [Lisa] and her partner, [Vincent Norris], borrowed $280,000 from the BNZ Bank, evidently secured by way of mortgage over another property that they owned.[9] [Ruben] was responsible for paying the interest on the mortgage to the BNZ from the date the home was purchased.

[9] There is no mortgage over [address 1]

[30] [Lisa] also clearly expected [Ruben] to pay at least half of all expenses and outgoings incurred in relation to the home, and he did so.

[31] When [Ruben] filed his original affidavit of assets and liabilities, he listed his half-share in the property as one of his assets under the heading "Homestead".

[32] Given all of that, I could not understand why, by the date of the hearing at least, both [Lisa] and [Ruben] were adamantly saying that [Ruben] had no beneficial interest in the property. In an affidavit he swore on 23 August 2022, [Ruben] said:

> "My share of the house is held as nominee for the mother [Lisa Ren]. As the full ownership of the property has always been with the mother [Lisa] purchased and $971,812.75 she paid funds." (sic)
>
> "I was paying rent … and still paying rent to stay until now. [Address 1] was and is a rental to me. Remained the separate property to me. Non owner [Lei] has no action contribution on separate property." (sic)
>
> In her affidavit of 23 August 2022, [Lisa] said:
>
> "They paid the rent to live at my investment at [address 1], Auckland."

[33] She also said:

> "Actually, according to the fact, simple as it is. It's not hers, not his. Intention and proceeds is my investment property." (sic)

[34] Her justification was that she provided the funds for the initial purchase and that she maintained "the whole house regularly" and "paid whole CV to Auckland Council quarterly". She meant that she paid all of the rates for the home. In reality she has required [Ruben] to account to her for at least half of the rates payments.

[35] I explained to [Ruben] and [Lisa] that I did not understand the basis for their claim that [Ruben] holds his share of the property beneficially for [Lisa]. I explained it made no sense for him to have been nominated as a purchaser nor for him to have borrowed $480,000 from his mother, paid interest on that debt and paid a significant part of the costs of ownership and occupation. He also drew down his KiwiSaver funds and used that as part of the purchase price for his half share.

[36] To the extent that rates or other payments were made by [Lisa] in the first instance, she almost invariably expected repayment. She and [Ruben] allege that a total of $90,123 was owed to her – "$30,123 (living cost debt: $23,429.07; maintain property debt: $6,694) and [name deleted] $60,000 (living costs debt)". [Lisa] and [Ruben] referred on a number of occasions to the generous financial support that [Lisa] had provided to [Ruben] and [Shu-fen]. In fact, it appeared from their evidence that virtually every cent that she had paid she now regarded as a loan to be repaid.

[37] Ultimately, [Ruben] and [Lisa] were unable to explain to my satisfaction why they thought [Ruben] held his legal and beneficial interest in the property for his mother. In cross-examination [Ruben] said, "more like I'm holding a trust subject to a loan, holding [address 1] and subject to the loan". (sic) As best I could understand [Ruben]'s position, he was saying he believed there was no equity in the property or at least no equity in his half-share of the property, and for that reason he thought he had no legal or beneficial interest.

[38] In some documents filed prior to the hearing [Ruben] and [Lisa] had referenced s 13 of the Act and claimed there were extraordinary circumstances rendering equal sharing repugnant to justice. None were detailed in the evidence that I read or heard.

[39] It follows that I find – as I must – that [Ruben]'s half-share of [address 1] is his both legally and beneficially, and hence is relationship property. The main remaining issues are whether there is any equity in [Ruben]'s half-share of the property – what is the value of the property, whether [Ruben] or [Lisa] should retain the property and compensate [Shu-fen] for her share of the property or whether the property should be sold and if so, how?

[Address 1] Value

[40] I heard evidence from Peter Desmond Bates, a suitably qualified registered valuer. In his valuation of 3 March 2023, he fixed a market value inclusive of fixed chattels of $1,200,000 as at 1 March 2023. He had considered an appropriate range of comparable properties in the area. The caveat to his valuation is that he was unable to arrange with [Ruben] entry for an internal inspection of the property.

[41] His valuation evidence was challenged on a number of bases by [Ruben] and [Lisa]. [Lisa] and [Ruben] claimed the property was a leaky building. They produced photographs of some rust to some of the roofing iron and fixings.

[42] There was no independent evidence to support their contention that the home was a "leaky home" or that the roof was significantly corroded. It does appear that some surface water may have entered the home during the heavy rains at the start of 2023. There may be minor leaks in the home, but it appears that the entire home is still capable of occupation. The room that [Ruben] and [Lisa] claimed was a garage and which they claimed was too damp to be occupied was being used by [Ruben] as his bedroom and has been used as his bedroom for a considerable period of time. The evidence satisfied me that it is unlikely the home is compromised by leaks or weather-tightness deficiencies to such an extent as to significantly impact its value.

[43] There is some evidence of "deferred maintenance" such as some areas of corrosion to roofing iron or roof fixtures – but I have no evidence that is to such an extent as to impact the price a buyer would pay. Other alleged issues with the home appeared to be easily remedied, such as trees and other vegetation overgrown near the walls. I accept the house suffered some minor damage from extensive rainfall in early 2023, but not enough to require an evacuation or major repair work.

[44] When Mr Bates was cross-examined his opinion was that the kind of "deferred maintenance issues" [Lisa] was putting to him might at most be impacted in an allowance of $10,000 as a reduction.

[45] [Lisa] suggested that some of the comparison properties Mr Bates had used were inappropriate as they were in [suburb A] point on the southern side of [address 1], rather than in [suburb A]. Mr Bates opinion was that some areas of [suburb A] were in fact perceived as more desirable – more valuable - than some parts of [suburb A] point. His overall view that his comparison properties were appropriate was not shaken.

[46] [Lisa] challenged the currency of his valuation arguing in cross examination of Mr Bates (not in evidence) that prices had dropped in the Auckland market "in 18

months the price dropped 25 per cent to 30 per cent so your quote is on March 2023, if you quoted this price then being high peak time this price 51% out" (sic).

[47] Mr Bates opinion was that the market peaked in November 2021 and prices had fallen 10 per cent to 15 per cent between then and the date of his valuation on 1 March 2023. He described any further fall since that date as "a much more subtle slight slip lately offset somewhat by a slight rise around election time 2023". Perhaps the price of this property might have fallen a further 5 per cent but he considered any further drop would be negligible. He essentially stood by his 1 March 2023 valuation as being the hearing date value.

[48] When the property was listed for sale prior to purchase it was marketed as a five-bedroom property. [Lisa] and [Ruben] disputed that the property had five bedrooms. I accept that one of the rooms was comparatively small, but in the photographs produced it was still large enough to contain a bed, dressing table or bedside table and a wardrobe. There are two paying tenants living in upstairs bedrooms and [Ruben] is occupying a large downstairs bedroom which he and his mother described as a "garage". It clearly has not been used as a garage for a considerable period. The photographs that were used to market the property when it was sold to [Lisa] and [Ruben] and the photographs that are available of the property in online searches clearly show the downstairs room in question set up as a carpeted and furnished bedroom.

[49] The floor plans of the house that were produced clearly showed five bedrooms. The bedroom [Lisa] argued was "too small" and a "study room" measured 2.1 x 2.8 metres – not a large bedroom but clearly used as a bedroom. Overall, the evidence satisfied me the house is used as a five bedroom and is rented as if it were a five-bedroom home.

[50] In the valuation that he produced, Mr Bates listed the number of bedrooms as three, an error which may have had an impact on his valuation but only in perhaps increasing the value that he might otherwise have placed on the property.

[51] No other reliable and admissible evidence of valuation was produced. The respondents were critical that Mr Bates did not enter the home. I accept his evidence that the respondents did not cooperate, and I am satisfied that he had adequate information, including a close viewing of the exterior of the property and comparative market information. I find that the property has a hearing date market value of $1,200,000.

[Address 1] – Section 18B

[52] Both [Shu-fen] and [Ruben] seek compensation under s 18B of the Act in relation to the family home. [Shu-fen] brings a claim for occupation rent. [Ruben] claims for outgoings including rates and mortgage payments post-separation. It is [Shu-fen]'s position that she is due over $15,000 after her calculation of occupation rent is offset against payments made by [Ruben]. [Ruben] and [Lisa] say that his post-separation contributions amounted to approximately $26,800 and that the rent that [Shu-fen] should be able to offset is some $22,500.[10]

[53] I accept [Shu-fen]'s evidence that she left the family home with the children on 1 June 2021 after an incident of violence and that she was initially in a Refuge. [Ruben] and [Lisa] were focused on allegations that [Shu-fen] was having an affair but the reasons or motivation behind the separation are irrelevant to this application. What is relevant is that [Shu-fen] has been excluded from the family home since that date and the children have been in her principal care.

[54] [Ruben] and [Lisa]'s other adamant position is that the home is not the family home but rather "[Lisa]'s investment property" is at odds with their submission that "… [Lisa] and I wanted and suggested that children and her stay back to live at [address 1]. Not take the children and disappear." (sic)

[55] It emerged during cross-examination that for a significant part of the time since separation the house has been occupied not just by [Ruben], but by other tenants. The exact number of tenants, their period of occupation, and the rent they paid is unclear.

[10] [Ruben] and [Lisa]'s closing submission was jointly filed and signed, and it is difficult to identify if any parts of their submission are individual submissions rather than joint submissions.

Some of the tenants may have been relatively short stay tenants. Some of the money paid may have included outgoings or elements of board. What is clear is that all rental payments received were retained by [Ruben] and/or [Lisa]. There has been no accounting to [Shu-fen]. In the course of the hearing, [Ruben] and [Lisa] denied that there were tenants but rather "people staying there" with [Ruben] claiming he was the only tenant. However, in oral evidence [Ruben] accepted that there had been three people living there since January 2024 and "maybe over 10 people" during all of 2023. He also accepted that there was always someone paying rent to [Lisa] (other than [Ruben]) during 2024.

[56] [Shu-fen] is not seeking to be compensated for the rent received. She instead seeks an occupation rent based on the market rental payable for a five-bedroom home in that area.

[57] [Shu-fen] led evidence from Antony Smith, a Property Manager at Quinovic Botany Property Management, who I am satisfied had sufficient experience and expertise. He assessed the market rental in a range of $900 to $1,000 per week for the entire home. The only limitation was that the historic rental information that he was partially relying on did not have information for five-bedroom homes, only one to four-bedroom homes and based on his experience he allowed an additional $100 increment.

[58] No admissible evidence was led by [Ruben] or [Lisa] to challenge Mr Smith's appraisal. Their cross-examination focused on whether the home was a five-bedroom home and whether the home was able to be tenanted. They argued that it did not meet Healthy Homes Standards. Mr Smith's principal response to that challenge was that "currently houses can be rented today and not be Healthy Homes compliant if there is a sitting tenant".

[59] The argument about the state of the property is of marginal relevance in any event. [Lisa] and/or [Ruben] clearly have been earning rental income from the property. [Ruben] and [Lisa] have enjoyed exclusive occupation of the property to [Shu-fen]'s exclusion. [Shu-fen] has long sought to have the home sold or to have her share of the equity in the home released to her. She has had to "stand outside" her

share of the capital that the home represents to her and without any use or enjoyment of the home while [Ruben] and [Lisa] have exclusive use. She has had to incur rental costs for herself and the children.

[60] Alternative rental appraisals were put to Mr Smith in cross-examination, but no alternative experts were called. I find on balance of probabilities that Mr Smith's assessment represents a reasonable rental for the entire property.

[61] [Ruben] and [Shu-fen] have a 50 per cent interest in the property and [Shu-fen] should be compensated for 25 per cent of the market rental.

[62] Occupation rent from 1 June 2021 to the hearing date – approximately 160 weeks at $950 per week would total $152,000 – 25 per cent of which is $38,000.

[63] In order to qualify for compensation under s 18B it is not enough to establish that a contribution has been made. The Court must also be satisfied that it is just in all the circumstances for an order for compensation to be made.[11] There is no presumption that a monetary contribution is of greater value than a non-monetary contribution.[12] The calculation of s 18B compensation is not an arithmetical exercise.[13] It involves the judicial exercise of a discretion.[14]

[64] I accept that there would have inevitably been some delay in making the entire property available for purchase so as to produce an equitable share of the income available post-separation for all three of the owners. There would also have been some delay in preparing the property for market and selling it. In the circumstances I find that a reasonable level of compensation is $35,000.

[65] [Shu-fen] concedes some of the post-separation contributions allegedly made to the family home by [Ruben]. She concedes that he is entitled to $3,420 being

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[11] *C v C* HC Auckland CIV-2007-419-1313, 26 June 2008 at [28] Lang J said, "*The mere fact that one party has made such a contribution is not, however, sufficient to allow an award to be made under s 18B … the Court must also be satisfied that it is just in all the circumstances for such an order to be made.*"

[12] *Chong v Speller* (2004) 24 FRNZ 273, [2005] NZFLR 400 (HC) at [36].

[13] See *Vaifo'ou v Vaifo'ou* [2023] NZHC 3092 at [54].

[14] *R v C* Levin FAM-2005-031-155, 17 June 2008 at [153].

50 per cent of the interest he paid on the $200,000 owed personally to [Lisa]. She concedes that he should receive $983 being 25 per cent of costs he says he paid post-separation. Similarly, he is entitled to $2,425.92 as 25% of total council rates he says were paid totalling $9,703.67.

[66] During the hearing [Lisa] was directed to produce some of her personal bank accounts to establish payments that she had actually received post-separation. [Ruben] and [Lisa] in an updated schedule were claiming that interest only payments had been paid to the BNZ mortgage of $54,890 from the date of separation to 21 June 2024. [Ruben] denied in cross-examination that he had paid any part of the principal.

[67] The bank statements that [Lisa] produced established that [Ruben] was not only paying interest but also principal. [Shu-fen] is not seeking a share in any of the reduced capital – in other words she accepts that the debt owed to the BNZ should be calculated as at the separation date.

[68] I accept the calculations that were set out in [Shu-fen]'s supplementary submissions. A reasonable estimate of the total interest payments made on the BNZ loan post-separation is $32,046.35 not the $46,800 claimed by [Ruben]. [Shu-fen] should pay half of that sum which is $16,023.18.

[69] The calculation then is:

Occupational rent payable by [Ruben] to [Shu-fen]	$35,000.00
Less interest to [Lisa]	$3,420.00
Less interest to BNZ Bank	$16,023.18
Less 25 per cent of post-separation maintenance cost	$983.00
Less 25 per cent of post-separation rates	$2,425.92
Total deductions	$22,852.10
Amount payable to [Lisa]	$12,147.90

[70] Exercising my discretion, I find that the just net s 18B compensation payable to [Shu-fen] is $12,000.

[Address 1] – Section 33

[71] Under s 33 of the PRA the Court has ancillary powers to make all such orders and give such directions as may be necessary or expedient to give effect, or better effect to any order made under any of the provisions of sections 25 to 32 of the Act.

[72] The exercise of s 33 powers is the exercise of a discretion.[15] Although s 33(1) refers to orders under ss 25–32, orders under other provisions of the Act are included by virtue of s 25(1)(b), which empowers the Court to "make any other order that it is empowered to make by any provision of this Act". The ancillary powers can therefore be exercised in relation to orders under other provisions.

[73] Section 33(3)(a) empowers the court to make an order the sale of the relationship property and for the division, vesting, or settlement of the proceeds. Such an order would give effect to the division of the family home in accordance with s 25(1)(a)(ii) of the PRA.

[74] Section 19 of the PRA says that except as otherwise expressly provided in the Act, nothing shall affect the title of any third person to any property. While s 19 effectively makes third parties legal title to property "sacrosanct" in respect of action between the partners,[16] the provision is qualified with the phrase "except as otherwise expressly provided in the Act". Subsequently, third parties may be affected by orders in narrowly prescribed circumstances. This is supported by the Courts obligation under s 37 of the PRA to direct that notice be given to a person where they will be affected by an order under the Act.

[75] The application of the ancillary powers as it relates to third parties has been considered in several cases and the Courts have been open to the possibility of making orders in respect of third parties.

[76] In *Johanson v Johanson*, the Court of Appeal made the following obiter comments:[17]

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[15] *Scott v Williams* [2017] NZSC 185 [2018] 1 NZLR 507 at [393].
[16] *Martin v Martin* (1982) 1 NZLR 307 (HC) at 312.
[17] *Johanson v Johanson* (1993) FRNZ 578 (CA) at 581. Note that this case concerned the equivalent

> "The ancillary powers of the Court include making "(e) an order for the partition or vesting of any property", which may well extend to partition not only of matrimonial property and separate property of the spouses but also partition of property jointly owned by one or both of the spouses and a third party."

[77] In *Hau v Hau*, Duffy J considered *Johanson v Johanson* and held that orders may be made against third parties under s 33 of the PRA, stating:[18]

> [41] Whilst the PRA stipulates who can bring a proceeding it does not define those against whom a proceeding may be brought. Section 33(3)(e) of the PRA (and a number of other provisions) are wide enough to allow for orders to be obtained against third parties. Furthermore, s 37 of the PRA expressly provides for third parties to appear and be heard on applications under the PRA.
>
> [42] The open-ended allowance for who may appear and be heard in proceedings under the PRA coupled with the ability under the PRA to obtain orders against third parties informs me that Parliament contemplated proceedings being brought against third parties who at the material times have or had a joint interest in property owned by one or both spouses.
>
> [43] In *Johanson v Johanson* funds from the sale of relationship property were expended on property owned by a third party and one of the spouses then sought unsuccessfully to make a claim under the Matrimonial Property Act 1976 (as the PRA was then known) for a share of that property. The Court of Appeal found this legislation did not extend to cases where the land in question was always owned by the third party and the spouse was making a claim against the third party. Instead the remedy was for the spouse to make a claim based upon constructive trust or other equitable interest in the subject land on the basis funds from relationship property were applied to enrich the value of that land.
>
> [44] *Johanson v Johanson* is not a barrier to what Mrs Hau attempts here. The present case is distinguishable from *Johanson v Johanson* because here the rights for which Mrs Hau seeks recognition under the PRA accrued at a time when her deceased spouse was a co-owner of the Mangere property.
>
> [45] Accordingly, the fact Osai Hau was never in a relationship with Mrs Hau is no barrier of itself to Mrs Hau bringing proceedings under the Act against him.

[78] *Johanson v Johanson* and *Hau v Hau* were then considered in *Zhou v Yue* in the context of a claim of beneficial ownership by one of the spouses against a third party.[19]

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provision of the old Act – Matrimonial Property Act 1976, s 33.

[18] *Hau v Hau* [2018] NZHC 881 at [41]-[45].

[19] *Zhou v Yue* [2019] NZHC 2167 at [47]-[50].

[79] In *Zhou v Yue*, Lot C of a property was held in the joint names of Tony and Bonnie. Mr Zhou, the father of Bonnie, claimed Tony held his half share of Lot C on trust for him. Mr Zhou sought an order vesting Tony's share in him.

[80] Associate Judge Smith in the High Court considered that the Family Court did have jurisdiction under s 33(3)(e) or (j) to make the vesting or transfer orders Mr Zhou was seeking.[20] Judge Smith noted that Mr Zhou had participated by filing affidavits after he was served and in this way, he was a party to the Family Court proceedings.

[81] It is therefore open to the Court to make ancillary orders affecting third parties where property is jointly held by a third party and a spouse or partner in relationship property proceedings.

[82] Though not a party to the relationship between [Ruben] and [Shu-fen], [Lisa] is a named Respondent and has filed affidavit evidence and participated throughout the proceedings.

[83] [Lisa] was joined as a party following the filing of an interlocutory application by [Shu-fen] on 29 July 2022, made on the ground that [Lisa]'s presence before the court was necessary to enable the Court to effectively and completely adjudicate on and settle all questions involved in the proceeding. Subsequently, the courts obligation under s 37 to allow persons with an interest in property to be heard has been discharged.

[84] [Ruben] has limited means – in absence of the sale of the property he may not be able to meet the costs of compensation that would be required to be ordered in favour of [Shu-fen] in a timely manner.

[85] Additionally, this is consistent with the principles of the PRA, as provided by s 1N(d), that questions arising under the Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice. Sale of the property is a simple way to ensure relationship property can be speedily distributed and allow a clean break between the parties.

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[20] At [54].

[86] In order to achieve prompt resolution it is necessary for me to make an order for sale relying on the Courts ancillary power under s 33(3)(a) of the PRA. However, I consider it reasonable to allow [Ruben] and [Lisa] an opportunity to acquire "[Lisa]'s interest" in the home at the market value I have determined if they wish, before the property is placed on the market for sale.

[Ruben]'s KiwiSaver

[87] The entire balance of [Ruben]'s KiwiSaver at date of separation of $5,679.52 is relationship property. While [Ruben] had a pre-separation date balance in his KiwiSaver account it was withdrawn in its entirety to pay part of the purchase of [address 1]. All the additional contributions were made during the relationship.

[88] [Shu-fen] is not seeking any increase in value because of interest or investment gains since 31 March 2021. [Ruben] must pay an adjustment of $2,839.76 to [Shu-fen].

Loan by [Lisa] of $10,000 – Mazda 3 Vehicle

[89] [Ruben] and [Lisa] allege that there was a loan of $10,000 owed to [Lisa] used to purchase the family car, registration [deleted]. The car was sold for $11,750 after separation. The initial issue was whether half of that sum was payable to [Shu-fen] or whether she was only entitled to the difference between the loan and the net sale proceeds, 50 per cent of which would be $875. New evidence emerged in cross-examination of [Ruben] on the last day of hearing which disclosed that he continued to own a Mazda 3 vehicle which was in Taiwan which had been purchased in 2014.

[90] [Ruben] and [Lisa] alleged that $3,500 had been incurred post-separation in repairs to the family car prior to its sale. They produced no invoices. No dates or times were given for the work carried out. There is insufficient evidence to persuade me on balance of probabilities that there is a post-separation contribution by [Ruben] that [Shu-fen] should contribute to in relation to repairs to the vehicle. Maybe there were some maintenance or repair costs incurred, but on the other hand [Ruben] had

exclusive use of the car from date of separation until February 2022 when it was sold. No adjustment for that is required.

[91] The evidence of the loan [Lisa] claimed was in a loan agreement signed and dated 30 December 2020 by [Ruben] and [Lisa]. The loan agreement did not say what the purpose of the advance was. In his affidavit of assets and liabilities, [Ruben] said that it was used to purchase a car. He said in his narrative affidavit that there were additional loans from his mother of $2,300 for repairs to the car (presumably during the relationship). No details were given and there is no other evidence of the advance, and I am unable to find on balance of probabilities that that is a relationship debt owed by [Ruben] and [Shu-fen] to [Lisa].

[92] As for the $10,000 from [Lisa] to [Ruben] allegedly to purchase the car, there is no evidence the loan was made beyond the loan agreement itself. [Shu-fen] denied that $10,000 was borrowed from [Lisa] and alleged that the loan agreement was not genuine or was not genuinely created at the time it was dated. That challenge appeared in the affidavit she swore in July 2022. Although [Ruben] addressed the loan issue in subsequent affidavits neither he nor [Lisa] ever produced any relevant bank statements showing the transfer of the $10,000. This was information in their exclusive power and control.

[93] In the first conference Minute issued on 17 June 2022, Judge Parsons noted that there were issues about whether the loan agreements could be relied upon. She allowed time for voluntary disclosure. [Lisa] addressed the issue of the $10,000 loan on 1 August 2022 but again simply stated the amount was borrowed on 31 December 2020 without referring to any corroborating documents such as bank statements. [Ruben] and [Lisa]'s evidence aligned on this issue, but [Ruben] and [Lisa]'s evidence was aligned on a range of issues, some of which were simply unsupportable.[21]

[94] [Ruben]'s understanding of the English language was comparatively limited, and it appeared that many of the documents filed, including his affidavits, had been drafted by his mother. I do not consider their statements that the money was borrowed to be proof to the relevant standard of the balance of probabilities.

[21] An example being their assertion [Ruben] had no real interest in the Family Home.

[95] Mr Gandy was appointed as counsel to assist the Court and in the memorandum filed 21 September 2022, he pointed out that no details were provided as to the advance of the $10,000 loan beyond the loan agreement. The issue was never addressed by [Ruben] and [Lisa] although they had ample opportunity to do so. On 9 December 2022 at a directions conference Judge Parsons directed that better evidence of the loan was to be provided. It never was.

[96] In deciding division of relationship property, the Family Court is essentially charged with an inquiry into the nature and extent of the relevant assets and liabilities and any rights to compensation that may arise. However, litigation is conducted conventionally, and the process is adversarial. In general, a party who asserts a fact such as the existence of a loan bears the onus of proof.

[97] In the relationship property jurisdiction, there is often a significant monopoly of information – that is, it is often the case that one party has had control of the finances or significant aspects of the finances and has complete control over the information that is relevant to those transactions. The situation here is that [Ruben] and [Lisa] assert that the $10,000 loan was advanced. They are the only ones who can prove that through the production of bank records or other corroborative information. They knew that the legitimacy of the loan transaction was being challenged.

[98] It follows I can and do reasonably draw an inference from [Ruben] and [Lisa]'s failure to provide any real evidence that the funds were never drawn down from [Lisa]'s accounts and were never paid to [Ruben]. I find on balance of probabilities that the $10,000 loan claimed is not in fact due to [Lisa].

[99] In cross-examination [Ruben] was challenged about a payment of $23,000 that was made on 23 December 2019. He said it was money paid into his grandmother's account. He said it was money he owed her for a car and "*other things in Taiwan*".

[100] [Ruben] said that he had borrowed $23,000 from his grandmother in 2014 to buy a car. He said that the car was still in Taiwan, stored with his father.

[101] The advance made by his grandmother was repaid using relationship funds. That would be reasonable if the car that was purchased was relationship property. The vehicle was purchased during the relationship and while the parties were living together in Taiwan. I infer from this that it was a chattel acquired for a family purpose during the relationship and it falls within the definition of relationship property in s 8 of the Act as a family chattel. I have no evidence as to the current value of that car. [Ruben] had not disclosed its existence until he was cross-examined on the last day of the hearing. Given that he used relationship property savings to repay the debt of $23,000, the just outcome is to require [Ruben] to account to [Shu-fen] for the car in Taiwan at a value of $20,000, so that he will pay and she will receive $10,000.

[Shu-fen]'s Car

[102] [Ruben] and [Lisa] conceded that the car [Shu-fen] purchased after separation was her separate property. No adjustment is required.

Balance of Bank Accounts at Separation

[103] There is no dispute that the parties' Westpac joint account balance of $405 should be divided equally. [Ruben] had the benefit of it and adjustment of $202.50 in [Shu-fen]'s favour is required.

[104] During cross-examination, [Ruben] accepted that the closing balance of $2,306.69 in his ASB account should be adopted. There should be an adjustment in [Shu-fen]'s favour of $1,355.85.

Miscellaneous Loans by [Lisa]

[105] At page 289 of the Bundle, [Ruben] exhibited a "*Spreadsheet of sum owing to [Lisa Ren]*". Listed under two headings "*Debts incurred for Bring up our children and managing the affairs of the household of living standards*" (sic) which was said to total $23,429 and *"Debts incurred for maintain property during the relationship*" (sic) with a total of $6,694, alleging total loans of $30,123.

[106] The money allegedly advanced included:

(a) $200 cash weekly paid by [Lisa] for 52 weeks for a period from October 2016 to October 2017 when [Ruben] was on an unemployment benefit.

(b) Alleged borrowings of $4,122 said to be 18 weeks at $229 per week [Ruben] "*don't want on benefit*" (sic) between August 2017 and February 2019.

(c) Vehicle expenses of $2,300 were allegedly borrowed between October 2016 and March 2021.

(d) $3,000 "*[Lei] borrowed. [Lei] Immigration Fee June 2017*".

(e) *$1,250 PLU Nov 2019* $1,750.

(f) *"Removal 3/11/16, 7/9/19, 19/1/20"* $607.00 allegedly borrowed.

(g) $3,000 "*borrowed for raise child*" (sic), "*30/6/17 [Sonya] was born*".

[107] Only some of these advances were specifically addressed in evidence. [Shu-fen]'s position was that the $3,000 "*borrowed for raise child*" (sic) was a gift given by her mother-in-law on the day [Sonya] was born. She described it as a "*red envelope gift*" or a customary cultural gift. [Lisa] and [Ruben] denied this. However, when cross-examined about the circumstances in which he received the money from [Lisa] [Ruben] said, "*because she gave it to me and she didn't say anything but after, I don't know few weeks later, she said: "this money you borrowed from me you have to return one day*". *I said* "*Okay*"."

[108] [Ruben]'s discussion with [Lisa] indicates that he was initially given the money and his mother later told him she expected it to be a loan. [Ruben] said, "*I really can't recall that either the envelope or transaction but I remember, I thought was gift but from [Lisa]'s mind she said it wasn't a gift*". (sic) The circumstances of the advance

make it much more likely that it was a gift. A gift of cash is complete on delivery.[22] A gift once completed is prima facie irrevocable.[23]

[109] I find on the balance of probabilities that the $3,000 was a gift and there is no debt owed to [Lisa]. Once the money was given to [Ruben] by [Lisa], it was not open to her to change her mind and change the character of the advance from a gift to a loan.[24] The legal and beneficial interest in the money had already passed to [Ruben] and [Shu-fen].

[110] Both [Lisa] and [Ruben] often mentioned the "*generous*" support that [Lisa] had provided.

[111] There is no evidence that [Shu-fen] agreed to borrow $3,000 from [Lisa] for her Immigration costs. I accept that [Lisa] may have paid this claimed amount to enable her daughter-in-law to gain entry into New Zealand, but there is no evidence that [Shu-fen] and [Lisa] ever agreed that it was a loan.

[112] There is some evidence that the balance of the debts claimed totalling $23,429 were actually paid but there is nothing to confirm that they were a loan rather than a gift. The concept that all of this money was gifted does not sit with [Ruben] and [Lisa]'s frequent assertions about her generous support during the marriage.

[113] The Court of Appeal in *Johnson v Johnson* confirmed that the presumption of advancement, that advances from a parent to a child are presumed to be a gift, continues to exist.[25] However, the presumption is always rebuttable by evidence that there was no intention to make a gift.

[114] In *Johnson v Johnson*, Brown J explained that unless found to be a sham a loan document will usually be sufficient to displace the presumption.[26] There are no loan documents for any of the alleged loans totalling $23,429.

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[22] Gifts of both chattels and choses in action such as cheques are complete on delivery – Halsbury Laws of New Zealand Gifts at [35] and [37]
[23] Halsbury Laws of New Zealand Gifts at [57] citing *Villers v Beaumont* (1682) 23 ER 342.
[24] *Johnson v Johnson* [2023] NZCA 566 at [51].
[25] *Johnson v Johnson* [2023] NZCA 566.
[26] At [50].

[115] Grice J in *Wu v Tan* set out the correct position in relation to the presumption of advancement, as enunciated by the Court of Appeal, as follows:[27]

(a) The presumption is as to a resulting trust when there is an advance or transfer of property. Equity was prepared to presume a gift where a parent advanced assets to a child.

(b) Any presumption is merely the most likely inference of fact in the absence of evidence to the contrary.

(c) Any inferred obligation on a parent to apply assets to a child will depend on the circumstances, including those of the dependence or otherwise of the child. It is difficult to see any rationale for the operation of the presumption of advancement where an adult child is well established in life.

(d) The law has moved on in response to changing social and economic conditions. The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it.

(e) Any obligation to advance and any relationship, and the nature of that relationship, ought more properly to be matters of evidence to be taken into account, along with all other relevant evidence, to determine what the intention of the person arranging the transaction was, and not something which gives rise to a presumption.

[116] I accept that the Court needs to look at the relevant circumstances at the time the transaction was implemented.

[117] The presumption of advancement was usefully discussed by Judge Broughton in *Su v Shui*.[28] I agree with Her Honour. The presumption of advancement is simply

[27] *Wu v Tan* [2023] NZHC 3747 at [36].
[28] *Su v Shui* [2023] NZFC 3368.

presumption as to the most likely inference of fact in the absence of evidence to the contrary.

[118] There are other circumstances that also led me to conclude the most likely inference in relation to the total of $23,429 in total which [Ruben] and [Lisa] claim is that they were gifts rather than loans:

[119] This was money passing from mother to son in circumstances where she recognised he had pressing financial needs.

[120] He and her daughter-in-law [Shu-fen] were living with their young grandchildren.

[121] Other significant loans alleged by [Ruben] and [Lisa] had been the subject of documentation, specifically the loan agreement for the funds advanced for the purchase of the home and the $10,000 they claimed was advanced for the purchase of the car.

[122] I conclude on balance of probabilities that [Shu-fen] should not be required to account for any part of the $23,429 claimed, the money was given, not loaned.

[123] Similar considerations apply to the "debts incurred for maintained property during the relationship" said to total $6,694.[29] It appears from the evidence that there were times that money was paid by [Lisa] to meet costs incurred at [address 1]. [Shu-fen] was unaware of any of these alleged "debts" before proceedings were issued. Significant physical work was carried out by [Ruben] on the [address 1] property and on another property owned by [Lisa]. The work he was carrying out may well have been, at least in part, viewed as offsetting money [Lisa] had paid to him.

[124] The presumption of advancement applies in this context too and the most likely explanation is that the money claimed were advanced and received as gifts – as part of [Lisa]'s generous support for this struggling young family. I note there is no evidence that there was any expectation of repayment prior to these proceedings being

[29] B289 – *"Spreadsheet of Sum Owing to [Lisa Ren]"*.

issued. No demand appears to have been issued. No acknowledgement of debt or loan agreements were ever prepared. No payments were ever made on account of the alleged debt.

Section 15 Claim

[125] Compensation under s 15 of the Act is available when the Court is satisfied after the end of a marriage that the income and living standards of one spouse are likely to be significantly higher than that of the other because of the division of functions within the marriage.

[126] Glazebrook J in *Scott v Williams* summarised the proper approach to s 15:[30]

> [263] Section 15 permits an order to be made which compensates for a disparity in income and living standards between partners after the end of the relationship if this disparity was caused by the division of roles in the relationship. Living standards will normally (but not always) be equated with income.
>
> [264] The assessment of disparity is a broad one and it must be considered in light of provisions in the PRA that treat all contributions made by both partners to the relationship as equal. In long-term relationships where one partner has had primary responsibility for home-making and child-care and the other partner for income-earning activities, this means that the PRA operates on the assumption that any disparity at the end of the relationship is equally attributable to both partners. This assumption can be rebutted but this would not be easy to do in the case of long-term relationships. In shorter or differently organised relationships, the principle of equal contribution may also mean that the assumption applies, but it will likely be much easier to show that all or some of the disparity following separation resulted from something other than the division of functions in the relationship.
>
> [265] The amount of an order under s 15 is limited to the extent of relationship property. Any order made under s 15 must be just. Thus it must compensate for the disparity but cannot create an injustice for the other party. 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.

[127] [Shu-fen] was clearly a significantly experienced and skilled [profession deleted] who worked in a variety of [positions] while she was in Taiwan. Her [qualifications] have not been accepted in New Zealand and a significant course of study and significant expenditure would be required in order for her to attain full

[30] *Scott v Williams* [2017] NZSC 185, [2018] 1 NZLR 507 at [263]-[265].

recognition of her skills, experience and qualifications in New Zealand and earn the potential income that she would have been entitled to had she remained living in Taiwan. The first barrier for her is improving her English to the point she can pass her IELTS qualifications.

[128] I accept that there is a causal link between a reduction in [Shu-fen]'s potential income and the division of functions during the marriage. [Shu-fen] was principally responsible for raising [Sonya] who is now seven, and [Theo] who is now four years old. Those responsibilities were a significant barrier to her studying and re-entering the workforce.

[129] I also accept that she has done what she can within reason to earn to the best of her ability since separation. She has accepted work in the aged care sector.

[130] [Shu-fen] produced an actuarial opinion prepared by Bernie Higgins. Mr Higgins filed an affidavit, and he was cross-examined. I have no issue with his expertise, he is clearly suitably qualified and experienced.

[131] Mr Higgins based his opinion on the assumption that [Ruben]'s gross income post-separation was $60,000 per annum or $48,000 net of tax while [Shu-fen]'s earnings were $30,000 gross per annum or $25,000 net of tax initially. Based on those assumptions he applied appropriate contingencies and adjustments, and he projected [Ruben] and [Shu-fen]'s income over 10 years arriving at a present value of lost earnings for [Shu-fen] of $223,070. After a 20 per cent discount for contingencies the "net capitalised amount of income shortfall" was $178,456. Fifty per cent of that was just over $89,000 and that is the figure that [Shu-fen] is claiming as compensation under s 15.

[132] I accept that applying the *Scott v Williams* criteria there was a division of functions in this relationship along "traditional lines".[31] The "working assumption" discussed in *Scott v Williams* by Arnold J at [293] would apply here given that the parties relationship endured for almost 10 years and that there were young children involved. If there is a significant post-separation disparity, there is no evidence of any

[31] *Scott v Williams* above n 21 at [293] per Arnold J.

other causative factor to displace the working assumption that any disparity is a result of that division of functions.

[133] [Ruben] and [Lisa] tried to suggest that [Shu-fen] might have had an opportunity to earn more or obtain her "requalification" earlier but there is no evidence to support that contention. It is also the case that [Shu-fen] is now in New Zealand parenting young children without significant local family support and that the children are in her sole care six days a week. Her competence in English remains limited.

[134] The key issue with [Shu-fen]'s claim is whether [Ruben]'s income and living standards are in fact significantly higher than [Shu-fen]'s.

[135] Before appearing in Court Mr Higgins had received and analysed updated income information from [Shu-fen] and he revisited his calculation using the assumption that [Shu-fen]'s annual income was $38,000, which reduced the calculated compensation from $89,000 to $63,000. That calculation involved Mr Higgins ignoring the accommodation supplement that [Shu-fen] was receiving.

[136] At the date of the hearing [Ruben] was unemployed and had been for some time. I accept his evidence that he is suffering significantly from depression. He is not in receipt of an employment benefit or any income from WINZ. He described how because of stress, including stress from the separation, he lost his motivation at work, kept making mistakes and lost his employment. He is still on medication.

[137] [Shu-fen] reminds me that comparatively minor differences in annual income can be sufficient to found a s 15 claim. For example, in *B v B* an $8,000 difference in annual income was sufficient to secure a lump sum payment of $16,000.[32]

[138] The relationship property available for division between the parties is relatively modest here. Neither of them will be in a comfortable position after the property is divided. There is no evidence that either of them has access to any other resources or advantages that are likely to secure a significantly higher "living standard".

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[32] *B v B* [2004] NZFLR 653 (FC).

[139] While I accept that [Shu-fen]'s income potential has been adversely affected with a causative link to the division of functions in the relationship, I cannot conclude, having regard to the likely earning capacity of each spouse or partner based on the position they are in now, that the income or living standards of [Ruben] are likely to be significantly higher than the income and living standards of [Shu-fen]. It follows that [Shu-fen]'s application for compensation under s 15 is unsuccessful.

Result

[140] The total that [Ruben] is to pay to [Shu-fen] is $35,218.51 made up as follows:

(a) $2,839.76 being half the KiwiSaver.

(b) $5,875 being half the proceeds of sale of the family vehicle.

(c) $1,355.85 being a net balance due to her for the bank accounts in their possession at separation.

(d) $15,147.90 as net compensation under s 18B.

(e) $10,000 representing 50 per cent of the value of the Mazda in Taiwan.

[141] [Ruben] is to have the option to retain the parties' interests in [address 1] at the valuation of $1,200,000. 50 per cent of that is $600,000. The net value after the deduction of the $480,000 owed to [Lisa] at date of separation is $120,000, so he would be required to pay $60,000 to [Shu-fen] as compensation for retention of the home. If [Ruben] and/or [Lisa] elect not to acquire [Shu-fen]'s interest, the home is to be sold.

[142] I set out the following conditions for the sale of [address 1]:

(a) [Ruben] and/or [Lisa] have 14 days from the date this order is sealed to advise [Shu-fen] in writing whether they wish to acquire her interest in the home.

(b) If they elect to purchase they have a further 21 days to settle the purchase.

(c) If they elect not to purchase, then the parties are to obtain sales proposals from three local agents, from which the parties are to nominate their chosen agent by 27 September 2024.

(d) The method of sale is to be discussed and agreed with the chosen agent and the parties are to be bound by the recommendations of the chosen agent.

(e) In consultation with the chosen agent the parties are to set a sale price which must be accepted by them or set a reserve should auction be the chosen method of sale.

(f) If they cannot agree they are to file a memorandum with the options and points of disagreement clearly set out to be referred to me in chambers for resolution. The reference to chambers should include any sales or marketing plans or recommendations made by the chosen agents.

[143] [Ruben] is to make the property presentable for sale and will permit access for inspections from potential purchasers and for Open Homes. [Shu-fen] will be entitled to inspect the property before it is listed for sale and from time to time, but no more than weekly during the sale process on giving at least 24 hours notice.

[144] Upon sale the net proceeds will be applied as follows:

(a) Firstly, to pay real estate agents commission and any costs of sale or conveyancing costs.

(b) Secondly 50 per cent of the net proceeds shall be paid to [Lisa].

[145] From the remaining 50 per cent [Lisa] shall be repaid the $480,000 that is due to her. The balance is to be divided between [Ruben] and [Shu-fen] equally, but before

distribution to [Ruben] the $35,218.51 that he is required to pay [Shu-fen] under this judgment shall be paid to [Shu-fen].

[146] In the event there is any dispute over the terms or method of sale despite these orders being followed the matter is to be referred to me in chambers for resolution.

[147] If [Ruben] elects to retain the home with [Lisa] $95,218.51 is payable by [Ruben] to [Shu-fen].

[148] [Ruben] is to be responsible for any debts owed to [Lisa] and he is to indemnify her from any claims [Lisa] may seek to bring for any of the debts claimed dealt with in this judgment.

[149] [Shu-fen] is to file a draft order for sealing by 18 September 2024. If [Ruben] or [Lisa] disagree with any of the calculations or wording, they are to file a memorandum by 25 September 2024 and the file is to be referred to me. Otherwise the draft order can be sealed after 25 September.

Costs

[150] Pursuant to r 207 of the Family Court Rules 2002 (FCR) costs are at the discretion of the Court. The Courts discretion is broad, however it must be exercised in a principled manner.[33]

[151] Section 40 of the Act says that a Judge "may make any order as to costs that they think fit".

[152] Rule 207(2) of the FCR provides that r 14.2–14.12 of the District Court Rules 2014 (DCR) apply to the Family Court so far as applicable and with all necessary modifications. Rule 14.2 sets out the general principles to apply to the determination of costs:

> (a) the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds:

[33] *SB v DH* Auckland CIV-2011-404-1005, 4 October 2011.

(b) an award of costs should reflect the complexity and significance of the proceeding:

(c) costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application:

(d) an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application:

(e) what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs:

(f) an award of costs should not exceed the costs incurred by the party claiming costs:

(g) so far as possible the determination of costs should be predictable and expeditious.

[153] Historically, Family Court Judges have often determined that costs should lie where they fall. In *[M] v [G]*, Judge Ellis stated:[34]

> "… in the absence of clear evidence of improper or unreasonable conduct, deliberate non-compliance or other wrongdoing on the part of the applicant, the costs to individual parties involved in such proceedings will – as in most other family cases – lie where they fall."

[154] Although her s 15 claim was unsuccessful, in relation to most of the issues that occupied the Court's time, [Shu-fen] was the successful party. On the raw principle that costs should follow the event I would award her costs.

[155] [Shu-fen] has argued that the case has been complicated by the fact that the respondents chose not to have legal representation.

[156] Fisher J in *Aplin v Lagan* said that while self-represented litigants should not be penalised on that account alone, if the result is to throw an extra burden of legal costs on the represented party, there is no reason why some recognition should not be given for that.[35]

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[34] *[M] v [G]* FC Wellington FAM-2003-085-002431, 28 May 2004 at [39].
[35] *Aplin v Lagan* (1993) 10 FRNZ 562 (HC) at 576.

[157] I accept and share the view of counsel appointed to assist the Court, Mr Gandy, that there was "a pattern of behaviour by the respondents in consenting to orders or directions to provide discovery and then failing to comply with those orders or directions".

[158] I also accept that [Ruben] and [Lisa] adopted positions that were untenable including their position that [Ruben] had no beneficial interest in the family home. However, I am equally conscious of [Ruben]'s parlous financial situation and the limited pool of property from which any compensation might be paid. While [Ruben]'s financial situation of is not a primary consideration in the Court exercise of its discretion,[36] it is still a relevant consideration.

[159] Taking all those matters into account, I accept that [Shu-fen] is entitled to costs on a 2B scale, notwithstanding the fact that she was legally aided. She will have to repay her grant of Legal Aid. [Shu-fen] sought 14 days to file a memorandum with a 2B calculation. I grant that request. She is also to provide details of the actual legal costs that she has incurred at Legal Aid rate as the costs awarded cannot exceed the costs incurred.

Signed at Auckland this 4th day of September 2024 at 11.30 am

Kevin Muir
Family Court Judge

[36] *F v M* HC Rotorua AP2/01, 29 June 2001; *Smith v Sanders* (1991) 8 FRNZ 249, [1992] NZFLR 412 (FC).