IN THE SUPREME COURT OF NEW ZEALAND

SC 95/2016
[2017] NZSC 185

BETWEEN	SCOTT Appellant
AND	WILLIAMS Respondent

Hearing:	14 and 15 March 2017
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	D J Goddard QC, S H Ambler and S L K Shaw for Appellant S L Robertson QC and J M McGuigan for Respondent
Judgment:	11 December 2017

JUDGMENT OF THE COURT

A The appeal is allowed to the extent set out below.

B The cross-appeal is dismissed.

C The vesting order made by the Family Court is restored.

D The valuation by the Family Court of the respondent's law practice is restored. The appellant's share is $225,000.

E An order in the appellant's favour of $520,000 is made under s 15 of the Property (Relationships) Act 1976. If not able to be agreed, the parties may file submissions on interest on or before 1 February 2018.

F Costs of $25,000 are awarded to the appellant, plus usual disbursements to be set by the Registrar if not agreed. The Court allows for two counsel.

REASONS

GLAZEBROOK J

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Introduction

[1] Ms Scott and Mr Williams were married in 1981. They separated in June 2007. This judgment[1] concerns the following aspects of their ensuing relationship property dispute:

(a) Should the High Court have made an order (affirmed by the Court of Appeal) that the parties' residence in Remuera and the adjoining section (the Remuera properties) be sold? This order overturned the Family Court order that they be vested in Ms Scott.

(b) Was the approach taken in the lower Courts to the valuation of Mr Williams' law firm correct?

(c) Was the amount awarded to Ms Scott under s 15 of the Property (Relationships) Act 1976 (the PRA) correct?

[2] I will deal with each of these questions in turn but first set out the background in more detail.

Background

[3] Mr Williams has degrees in law and commerce but has worked all his career in the legal field. In the 1980s he started his own suburban law firm. In 2002 this merged with another sole practice and became a very successful two partner firm. The other sole practice had been operating in the area since 1987. Its principal, Mr D, and Mr Williams had known each other since university.

[4] The bulk of the work of the combined firm is conveyancing, commercial and estate work. There are some seven staff, including two legal executives, who largely deal with the routine conveyancing work. The client base is diverse and derived mostly from the area around where the firm is situated. In any year, the ten largest clients account for only some 16 per cent of the total fees. The firm is very well run

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[1] Ms Scott's application for leave to appeal and Mr Williams' application for leave to cross-appeal was granted by this Court on 9 November 2016: *Scott v Williams* [2016] NZSC 149.

and profitable. The gross revenue of the firm ranks above the 75th percentile in the University of Waikato New Zealand Benchmarking survey.[2]

[5] Ms Scott's first degree was in commerce. While at university, she worked part-time as an accounting clerk. After university, she worked as an accountant, first with an accounting firm and then in the commercial sector, ending up by September 1982 as a group accountant for a group of three freight forwarding companies. She resigned from this accounting role in 1984 because the stress was not conducive to the couple's wish to start a family. After that, she first worked briefly as a real estate agent and, in 1986, commenced study for a law degree.

[6] In 1989 Ms Scott began working as a lawyer but, just prior to the birth of the couple's first child in 1990, took some ten months maternity leave and then reduced her hours. She resigned from her position before the birth of their second child in 1992. That child was unwell as a baby and toddler and required extensive medical treatment. Ms Scott was the primary caregiver but did provide part-time accounting services for Mr Williams' law firm and, from 2001 to 2002, also worked part-time for an accounting firm.[3] She resigned from that position to undertake a development on the Remuera section, which did not in the end proceed.

[7] After separation, Ms Scott worked for an accounting firm from 2008 until the end of 2010. She attributed her resignation to the stresses of the current proceedings, as well as difficulties she experienced in progression as a result of being an older person in the workplace after an extended time away from full-time work. Since 2011, Ms Scott has been running her own homeware and gift business.[4]

[8] During their marriage, the parties had built up a substantial pool of assets:

(a) the Remuera properties;[5]

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2 A financial survey conducted by the University of Waikato Institute for Business Research which collects data from accountants and generates financial information on New Zealand businesses.

3 Ms Scott also worked briefly for a finance company in 1994.

4 Mr Williams maintains that Ms Scott could have had a successful career in accounting after separation but this issue is not before us. Ms Scott's actual income is not challenged before this Court.

5 The Remuera properties were bought as one property and subdivided in 2004.

(b) three commercial properties in New Lynn;

(c) a half share in a commercial property in another Auckland suburb;

(d) a beach house in Omaha, a half share in a Fiji property and another property in Auckland; and

(e) Mr Williams' interest in his legal practice.

[9] As indicated above, the parties separated in 2007. Attempts had been made to settle the division of relationship property but agreement was not reached on all issues. Proceedings were filed by Mr Williams on 9 April 2009. The Family Court hearing began in July 2013, when Mr Williams was 58 and Ms Scott was 53.[6]

[10] By the time of the Family Court hearing, the properties referred to at [8](b) and (d) had been sold. Agreement on some matters had been reached, including Mr Williams purchasing Ms Scott's share of the commercial property referred to at [8](c) at an agreed valuation.

[11] The dispute between the parties was dealt with by Judge McHardy in a judgment of 27 May 2014. Judge McHardy was able to dispose of a number of issues by way of consent order.[7] The remaining issues were:

(a) the division of the remaining relationship property, including the valuation of Mr Williams' legal practice and super profits, the valuation of the Remuera properties and whether those properties should be vested in Ms Scott;

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6 The Family Court judgment, originally released in February 2014, says that Mr Williams was 58: *Williams v Scott* [2014] NZFC 7616 (Judge McHardy) [FC decision] at [8]. The High Court decision, released in October 2014, says that Mr Williams was turning 60 in that month: *Williams v Scott* [2014] NZHC 2547, [2015] NZFLR 355 (Faire J) [HC decision] at [12]. The only way for this to be possible is if Mr Williams was 58 at the time of the Family Court hearing in July 2013 (not at the date judgment was delivered). For the purposes of these reasons I assume he turns 65 in October 2019. If, however, he was 58 at the time the Family Court judgment was released in February 2014, then William Young J would be right in treating him as turning 65 in October 2020: see below at [465]. Oddly, we have not been able to find the parties' exact birth dates in the voluminous affidavit evidence before the Court.

7 Including the settlement of the commercial property referred to at [8](c) and [10] above, a Fijian bank account, motor vehicles, Airpoints, chattels, New Zealand bank accounts, insurance and shares in a business: FC decision, above n 6, at [6].

(b) a claim under s 15 of the PRA by Ms Scott to address economic disparity as a result of the division of functions during the marriage;

(c) a claim under s 18C of the PRA by Ms Scott for compensation as a result of alleged material diminution in the value of the Omaha property;

(d) a claim by Ms Scott for spousal maintenance;

(e) a claim by Mr Williams under s 18B of the PRA for compensation as a result of contribution to relationship property; and

(f) a claim by Mr Williams for occupation rent.

[12] Judge McHardy fixed the value of the Remuera properties as at the date of hearing[8] at $2.75 million and $1.65 million respectively[9] and vested those properties in Ms Scott.[10] He valued the legal practice at $450,000,[11] and the super profits from date of separation to the date of the hearing at $1,093,000.[12] A s 15 order of $850,000 was made to Ms Scott, encompassing both the diminution in earning capacity of Ms Scott and the enhanced earning capacity of Mr Williams.[13] No adjustment was made for Mr Williams' s 18B claim[14] or Ms Scott's s 18C claim.[15] No spousal maintenance was awarded.[16] Mr Williams' claim for occupational rent also failed.[17]

[13] The Family Court judgment was originally issued on 20 February 2014 but was recalled and reissued to correct calculation errors. In the original judgment, upon the division of relationship property, Ms Scott was to pay Mr Williams $1,032,146.10. After the corrections, the division resulted in Mr Williams being required to pay Ms Scott $51,591.

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8 At [292]. Ms Scott had argued that the presumption in favour of the date of hearing as the assessment date should be displaced. This argument was unsuccessful: see below at [26].
9 At [294].
10 At [480]–[481].
11 At [232].
12 At [243]. Interest of $182,000 to 31 July 2013 plus further interest to be calculated to the date of settlement was also awarded: at [246].
13 At [366]. Interest was ordered to be paid from the date of the decision to the date of payment: at [367].
14 At [381].
15 At [413].
16 At [476].
17 At [379]–[380].

[14] Judgment on an appeal and cross-appeal against that decision was delivered by Faire J on 17 October 2014.[18] Mr Williams' appeal was largely allowed with the vesting order overturned and an order made that the Remuera properties be sold at auction.[19] Faire J valued the interest in the legal practice at $300,000[20] but accepted Judge McHardy's treatment of super profits and interest.[21] He adjusted the s 15 order to $280,000 on the basis that the super profits awarded should have been taken into account as well as Mr Williams' impending retirement.[22] He also considered that there was no evidential foundation for the enhancement component in the Family Court's s 15 order.[23] Ms Scott's cross-appeal on spousal maintenance and various other issues was dismissed, as was Mr Williams' appeal on s 18B and occupational rent.[24]

[15] Leave to bring a second appeal was granted by Faire J[25] on whether the High Court erred in ordering the sale of the Remuera properties,[26] whether the valuation of the legal practice was correct,[27] whether the s 15 order was correct[28] and whether super profits should have been taken into consideration when determining maintenance.[29]

[16] The Court of Appeal's decision of 29 July 2016 held that Faire J did not err in ordering the sale of the Remuera properties.[30] The Court of Appeal was also satisfied that the High Court valuation of the legal practice was correct.[31] The Court was, however, of the view that Faire J had erred in deducting the super profits sum from his calculation of the s 15 order.[32] The Court of Appeal made a revised order under s 15 of $470,000. The Court also concluded that, in the circumstances of the proceeding,

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18 HC decision, above n 6.
19 At [195].
20 At [108].
21 At [117]–[118].
22 At [161]–[166]. No allowance for interest was made: at [170].
23 At [167].
24 At [204], [210] and [214].
25 Applications to the Court of Appeal for leave to appeal and cross-appeal amending these questions were denied: *Scott v Williams* [2015] NZCA 258.
26 *Williams v Scott* [2014] NZHC 3385 at [35].
27 At [41].
28 At [48].
29 At [49].
30 *Scott v Williams* [2016] NZCA 356, [2016] NZFLR 499 (Ellen France P, Harrison and Kós JJ) [CA decision] at [23].
31 At [53].
32 At [81].

the super profits should have been taken into consideration when determining whether Ms Scott was to receive spousal maintenance.[33]

Vesting order

Evidence

[17] Three valuers gave evidence in the Family Court on the value of the Remuera properties: Mr Gardner (called by Ms Scott), Mr Buckley (called by Mr Williams) and Mr Swan (a court-appointed valuer). In coming to their valuations, all three valuers considered the location of the Remuera properties, their current condition, the market conditions and comparative sales in the area.

[18] Mr Buckley used a wider geographic scope of comparator sales than the other two valuers. Mr Swan and Mr Gardner considered there was sufficient evidence within Remuera to assess value. Mr Buckley also placed more emphasis on sales in the same street as the properties owned by Mr Williams and Ms Scott. Mr Gardner commented on the sales referred to by Mr Buckley, saying that they were of properties significantly superior to the Remuera properties and that one particular sale relied on by Mr Buckley was considered by real estate professionals in the area to be "significantly in excess of the current market value". Terralink recorded the sale as being a "non bona fide sale".[34]

[19] Mr Swan elected to make comparisons with similar sized properties and, in light of the resource consent required for pre-1940 structures, compared the Remuera property in its current state "with other improved properties rather than with properties that are able to be redeveloped, as of right". Mr Buckley did not agree that the fact there was a pre-1940 structure would affect the valuation.

[20] Mr Buckley said in his affidavit that the best method to determine the market value would be to sell the properties on the open market, given the limited availability of similar properties. In cross-examination, Mr Gardner accepted that the best method to value a property was to put it on the market. Mr Swan, when asked in

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33 At [128].

34 Mr Buckley disputed this, saying it was a "completely above board market transaction".

cross-examination if he was saying that putting the properties on the market was the only way to ascertain the actual market price, replied that he honestly thought "why aren't these properties being put on the market?"

Family Court decision

[21] Judge McHardy held that Mr Swan's valuation was the appropriate valuation. He considered that the zoning designation would affect the value of the properties and that there were issues with Mr Buckley valuing "potential value" as against "fair market value". Further, the fact that Mr Swan and Mr Gardner were within five per cent of each other (and Mr Buckley was not) gave weight to those valuations being in the correct range.[35]

[22] The Judge was of the view that Ms Scott had raised "compelling reasons" for being able to retain the properties as part of any relationship property division so long as the clean break principle could be met.[36] However, the only reason explicitly identified by Judge McHardy was that Ms Scott operated a business from the home.[37]

[23] Other arguments mentioned in the judgment were that Ms Scott offered to sell in 2007 and Mr Williams refused, before himself making an application for sale in 2011, which Ms Scott argued contained deliberate misrepresentations.[38] No specific findings were made on these matters but the Judge said:

> [287] … [Ms Scott], in my view, has been genuine in her desire to get to a resolution and this has been frustrated by [Mr Williams] seemingly because of his, at times, woolly thinking which has clouded his judgment and his apparent adoption of a siege mentality which I find was not justified on the evidence. He himself accepted that there had been "flip flops" on his part as to how he saw resolution from time to time but says he did not have that on his own.
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> [288] This is highlighted by the misrepresentations that have been identified in his application for sale. He represented his position to be something that it simply was not – re purchase of a home for himself.

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35 FC decision, above n 6, at [289]–[290].

36 At [285].

37 At [251]. Mr Williams had argued that the business was contrary to the District Plan. Ms Scott said that, if a resource consent was required, she would apply for one, leading the Judge to refer to this argument as a "red herring".

38 At [264]–[266].

[24] Judge McHardy held the Remuera properties should be vested in Ms Scott.[39] If, as a result of the division of relationship property, Ms Scott owed Mr Williams an amount she could not pay, however, then the properties would have to be sold.[40]

[25] When the division of relationship property was first computed by the Judge in his judgment released on 20 February 2014,[41] Ms Scott would have had to pay Mr Williams just over $1 million to retain the properties. Judge McHardy gave Ms Scott two months to pay this sum. If Ms Scott was unable to pay, the properties were to be listed for sale. When the corrected version of the judgment was released on 27 May 2014, the new calculations meant instead that Mr Williams was required to pay Ms Scott $51,191.[42]

[26] Ms Scott had also argued that the s 2G presumption in favour of valuation at the hearing date should be displaced. This was because all other residential and investment property had been valued and sold in 2011/2012. It was argued that this gave Mr Williams a benefit to which he had not contributed and that it was his conduct that had resulted in the delay to the hearing. Judge McHardy was not persuaded by this argument and the valuation date for the property remained as the date of the hearing.[43]

High Court decision

[27] Faire J held that Judge McHardy was not justified in departing from the experts' view that the best method of testing the true value of the properties was by ordering a sale.[44] He did not consider that Mr Williams had unreasonably refused to sell in 2007.[45] In any event, Faire J held that conduct was irrelevant unless it met the s 18A threshold of "gross and palpable" and only then to the extent permitted by s 18A(2) and (3).[46] Further, it was "unfortunate" that, when Judge McHardy first

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39 At [285].
40 At [286]. Judge McHardy did not accept that each party taking one property would be a fair result given the history of the dispute: at [287].
41 See above at [13].
42 FC decision, above n 6, at [485].
43 At [292].
44 HC decision, above n 6, at [192].
45 At [179].
46 At [52] and [55]. The Court of Appeal did not comment on this issue.

released his judgment, this showed a different financial outcome than in the recalled judgment.[47]

[28] Faire J accepted that "the relative strengths of each party's past and present associations with an asset are often the determining factor in resolving conflicting claims to that asset"[48] but considered that in the current case Ms Scott's association did not outweigh that of Mr Williams.[49] The children were 22 and 20 at the date of the hearing and therefore Faire J placed less weight on their interests than if they had been minors or dependent children living at home. He recognised that ordering the sale would result in an inconvenience for Ms Scott and her business but this did not outweigh the positive factors in favour of a sale.[50]

[29] The Judge was also of the view that, given the PRA requires an equal sharing of assets,[51] if a property has the potential to have a significantly greater value, then that is what should be shared.[52] Faire J, relying on *GFM v JAM*,[53] noted that the properties would have increased in value since the hearing in the Family Court. Further, as in *GFM v JAM*, the increase in value was passive as a result of the rising Auckland property market, not the endeavours of either party. It would therefore be unjust if the windfall accrued wholly to Ms Scott. Finally, again as in *GFM v JAM*, Ms Scott had had the benefit of living in the home rent-free since separation.[54]

[30] An auction was ordered.[55] Faire J noted that Ms Scott's available capital position when bidding at the auction would be substantially stronger than that of Mr Williams on the basis that Mr Williams would have to pay her a large sum to

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47 At [192]. Earlier in the judgment Faire J had said that he was concerned that the Family Court Judge "cannot have had a clear picture of the relationship property when he made decisions such as the quantum of the s 15 award, due to the significant difference occasioned by the recalled judgment" and that he "would have expected at least some alteration to the Judge's reasons": at [10].

48 At [195], citing RL Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.54].

49 At [195].

50 At [195].

51 Pursuant to s 11 of the Property (Relationships) Act 1976 (PRA), which provides that on the division of relationship property, each partner is entitled to share equally in the family home, chattels and any other relationship property.

52 HC decision, above n 6, at [194].

53 *GFM v JAM* [2013] NZCA 660, [2014] NZFLR 418.

54 HC decision, above n 6, at [194], relying on *GFM v JAM*, above n 53, at [116]–[118].

55 HC decision, above n 6, at [195].

equalise the division of relationship property when the properties were no longer vested in her, as well as paying the s 15 order and the rates on the properties.[56]

[31] Faire J did not address the issue of whether Judge McHardy's conclusion on the valuation of the properties was correct, given his conclusion that the properties were to be sold on the open market. The cross-appeal on this issue was therefore moot.[57]

Court of Appeal decision

[32] The Court of Appeal was not persuaded that Faire J had erred in ordering the sale of the properties. The Court noted that there was no presumption in favour of vesting orders for the family home.[58] It was satisfied that Faire J had identified four valid reasons why the Family Court had erred:[59]

(a) the PRA requires equal sharing of assets meaning that, if a property has significantly gained in value, this must be shared;

(b) the value of the properties was uncertain and the experts had agreed the best means of testing value was by ordering a sale. In addition, Ms Scott would have half the bid price, half the remaining property and the amount awarded under s 15 to bid with;

(c) Ms Scott's association with the property did not compel vesting in preference to sale; and

(d) the Family Court Judge had not reconsidered remedies afresh when he corrected his judgment.

[33] The Court of Appeal said that uncertainty in value combined with significant passive increase in value meant that, all other things being equal, a sale should have been ordered. It did not consider this was a case where the timing of other real property

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56 At [193].
57 At [197].
58 CA decision, above n 30, at [24].
59 At [32].

distributions made a difference because the other property had been distributed and therefore could have been reinvested by each party.[60]

[34] Ms Scott had argued that it was unfair that, through the sale order, some property was in effect valued at 2016/17 (so that Mr Williams would share in post-hearing gains) whereas other property had been valued as at the hearing date.[61] She also maintained her argument that there should be a change in valuation date to July 2011. This in her submission would ensure that the property received by the parties was valued at roughly the same time, so that one party's share was not "skewed by the effect of the passage of time on value".[62]

[35] The Court of Appeal was not persuaded by these arguments. It said:[63]

(a) as the Court had upheld Faire J's sale order no valuation date adjustment was required;

(b) the gain in value was due to inflation and not the effort of one of the parties and therefore should be shared equally; and

(c) Mr Williams did not acquire any advantage by acquiring his share of the matrimonial property as at July 2011 as the proceeds of the sale of the other properties prior to the Family Court hearing were divided equally.

[36] It followed, the Court held, that there was no "skewing" by one party getting real property early and the other getting it late. Both parties got the proceeds of some real property early and both parties would get the proceeds of other real property later. There would, however, be distortion if Ms Scott alone received the gains from an inflationary rise in property values by vesting the Remuera properties at 2011 values.[64]

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60 At [33].
61 At [21](c).
62 At [36].
63 At [38]–[40].
64 At [42].

Parties' submissions

[37] Mr Goddard QC, for Ms Scott, submits that there was no proper basis for the High Court and Court of Appeal to revisit the exercise of discretion by the Family Court directing the vesting of the Remuera properties. In particular, the assumption (with no evidence) that the properties had significantly increased in value between the hearings in the Family Court and those in the High Court and the Court of Appeal was not a proper reason to order a sale. Any uncertainty in value, as demonstrated by the differences in the valuations, was the ordinary level of uncertainty inherent in any property valuation exercise. It is also unfair to value part of the relationship property at one date and the balance at another.

[38] Ms Robertson QC, for Mr Williams, submits that the High Court and the Court of Appeal were correct to make an order for sale of the Remuera properties. The High Court identified errors in the Family Court judgment. In Ms Robertson's submission the order for sale was rightly made in light of the large proportion the properties represented out of the relationship property pool, the requirement of equal sharing under the PRA and the fact that neither party's association with the properties outweighed that of the other. Ms Robertson also submits that the value put forward by Mr Williams' valuer was not an outlier and noted that the appeal against the valuation reached by the Family Court has never been determined.

Issues

[39] I examine the reasons given by the High Court (accepted by the Court of Appeal) for overturning the vesting order as follows:

(a) Association with the properties[65]

(b) Post-hearing gains[66]

(c) Valuation issues[67]

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65 See above at [32](c).
66 See above at [32](a).
67 See above at [32](b).

(d) Failure to reconsider[68]

[40] I then deal with the additional submission by Ms Robertson that conduct was wrongly taken into account by Judge McHardy.

Association with the properties

[41] Both the High Court and the Court of Appeal considered that there were no compelling reasons for a vesting order to be made – for example young children or a high level of association with the home.[69] If those Courts considered that compelling reasons are required before a vesting order is made, I do not agree.[70] If there is reasonable opposition of one party to a vesting order or both parties want a vesting order, there would need to be a reason for a vesting order in one of the parties but I do not accept that this reason has to be compelling.[71]

[42] Where possible, vesting assets in the parties is sensible. It avoids the costs and risks of sale (especially in what in some cases might be a fire sale). When the property has been the family home, the emotional needs of at least one of the parties and the children (even if adult) can be satisfied, while still, with a proper valuation process, satisfying the equal sharing provisions.

[43] In this case the Family Court held that Ms Scott's attachment to the home (including for business reasons) was greater than that of Mr Williams. I agree. At least by the time of the Family Court hearing, Ms Scott wanted a vesting order. This was on the basis of her attachment to the home and the fact that she was running her business from there. Mr Williams wanted the properties sold. He was thus prepared to accept having only a chance of buying them and therefore accepted the risk that the properties would be lost to both of the parties and their children. Mr Williams had also been equivocal about his attachment to the matrimonial home. He had said in an affidavit sworn in response to an application made by Ms Scott: "I have avoided

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68 See above at [32](d).

69 See HC decision, above n 6, at [195]; and CA decision, above n 30, at [31].

70 The PRA does not prescribe how the division of relationship property is to be implemented.

71 I accept, however, that, where both parties seek a vesting order, if there is no reason to favour one party over the other ordering a sale may be the fairer outcome.

entering the interior of our [Remuera] home because it has such unhappy and unpleasant memories for me".

[44] The Family Court Judge also considered that, because of the animosity between the parties, the two Remuera properties had to be treated as a block as it would not be appropriate for the parties to be living next door to each other. I agree this meant that, if there were to be a vesting order, it had to be for both properties.[72] Even though Mr Williams said he was going to onsell the section if he did buy it, this could not be guaranteed.

Post-hearing gains

[45] The main reason given by the High Court and the Court of Appeal for ordering sale was the need to ensure equal sharing in an inflationary market where the value of the properties was uncertain and any post-hearing gains were passive.[73]

[46] The usual date for valuation of relationship property is the hearing date.[74] Any gains or losses after the hearing date, whether passive or active, are normally not taken into account. There may be particular reasons why post-hearing gains (or losses) should be shared but, if that is so, there would need to be a valuation date adjustment under s 2G(2). I note, however, that this Court has said that, after the enactment of ss 18B and 18C of the PRA, there is less need than in the past to depart from the default position that all relationship property is valued at the hearing date.[75]

[47] Both the High Court and the Court of Appeal referred to the case of *GFM v JAM* as authority for the approach they took.[76] If that case is authority for the general proposition that inflationary gains accruing after the date of hearing and therefore after the normal valuation date should always be shared, even if there is no valuation date adjustment, then it was wrongly decided.[77]

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72 Ms Scott in any event says that the adjoining section is in fact the back garden to the matrimonial home and that both sections are used as a single residential property.

73 Equal sharing is required by s 11 of the PRA, set out above at n 51.

74 Section 2G(1).

75 *Burgess v Beaven* [2012] NZSC 71, [2013] 1 NZLR 129 at [25].

76 *GFM v JAM*, above n 53.

77 I make no comment on whether the outcome was appropriate in the particular circumstance in that case.

[48] The Court of Appeal quite rightly rejected Ms Scott's argument that the Remuera properties should be valued as at July 2011.[78] The reasons the Court gave for rejecting that argument did not, however, apply to her argument that it was unfair to order a sale because that would mean post-hearing gains on those properties were shared while the other major asset, the business, had been valued as at the hearing date.

[49] Since the hearing date in the Family Court, Mr Williams has had the benefit of the whole of his partnership interest in the legal practice, essentially being his share of the super profits earned after the hearing date. He has therefore had funds available to use (either directly or through borrowings) to invest in other assets. That is of course quite appropriate as he had purchased Ms Scott's share in the partnership as at the hearing date. Ms Scott, by contrast, had invested in the Remuera properties by "buying" Mr Williams' share in the properties. Any increase in value after the hearing date in the Family Court was therefore rightly hers.

[50] The Court of Appeal seems to have been under the impression that the proceeds from the sale of the Remuera properties are to be shared equally.[79] While that is true in the sense that all relationship property is shared equally, the actual proceeds from any sale would go substantially to Ms Scott, as Faire J recognised.[80]

[51] In effect, by ordering a sale on appeal and therefore having the proceeds come in at a different date than the default valuation date (the date of the Family Court hearing), the High Court and the Court of Appeal were changing the valuation date without clearly indicating that this is what was being done and without explaining why the presumption of valuation at the hearing date was displaced, for only one part of the relationship property. This was not appropriate.

[52] There would usually be unfairness in overturning a first instance decision on vesting in other than a flat market as, unless the valuation dates of other assets are changed, assets will have been valued at different dates. Thus, contrary to the views

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78 Consistent with *Burgess v Beaven*, above n 75, at [26].
79 See above at [35]–[36].
80 See above at [30].

expressed in both the High Court and the Court of Appeal,[81] the sale order in this case tended to defeat rather than promote equal sharing.

Valuation issues

[53] I accept that all three experts in this case said that the best means of testing value was by sale.[82] That is undoubtedly true but the logic of the position in the High Court and the Court of Appeal[83] is that equal sharing would require properties always to be sold as sale is the only way of ensuring that true market value is obtained, at least in an uncertain, rising or presumably falling market (and markets are usually one of the three).

[54] While different valuers can come to different views on the value of properties, I do not accept that valuations are so uncertain that a court is not able to come to a view on the appropriate valuation to apply for the purposes of s 11(1)(a) of the PRA,[84] whatever the state of the market or however unique the property in question.[85]

[55] If the High Court and the Court of Appeal were concerned that the Family Court Judge may have been wrong as to the value he attributed to the Remuera properties as at the hearing date, then sale at a later date was not an appropriate means of assessing this, except if the market had been flat (and in this case, according to the High Court and the Court of Appeal, there was an inflationary market).[86]

[56] The proper course if there had been a concern about the proper valuation would have been to decide whether there was an error of principle in the valuation decision (not suggested in this case) and, if not, whether the valuation reached was within an

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81 See above at [29] and [36].

82 See above at [20]. The experts' view was acknowledged by the Family Court: FC decision, above n 6, at [253].

83 See CA decision, above n 30, at [32](b). See also HC decision, above n 6, at [192].

84 As was said by Hardie Boys J "[w]hilst it is no doubt true that in these days of rapidly increasing property prices, any valuation can only be a somewhat transitory thing, nonetheless I am sure it is possible for a qualified valuer to place a fair figure on a property at a given date. If that were not so, there could rarely if ever properly be orders entitling one spouse to buy out the share of the other: and yet such orders are common": *Wesselingh v Wesselingh* (1981) 4 MPC 210 (HC) at 211.

85 And these properties were not unique. All of the valuers found comparators they considered suitable.

86 See above at [45].

acceptable range.[87] If the valuation was outside the acceptable range, then the appropriate result was not to overturn the vesting order but to adjust the value (and therefore the amount to be "paid" by Ms Scott for the properties).

[57] I am not, however, suggesting that the Family Court did not value the properties appropriately. The fact that the court-appointed (and thus independent) valuer and the valuer called by Ms Scott reached values within five per cent of each other is a strong factor in favour of the Family Court finding.[88] While the valuer called by Mr Williams said he was not taking into account a possible premium over market, I would accept Mr Goddard's submission that the flavour of what he says suggests that subconsciously he might have been.

[58] Ms Robertson was critical of Mr Swan's view that the fact the house was built before 1940 affected its value. There is, however, no indication as to how much the lack of that factor impacted the value given by Mr Buckley. Nor was there any indication in Mr Swan's evidence as to how much this factor affected the value he reached, apart from relating to his choice of comparator properties.[89] The reason for using comparator sales is to compare like with like and it is therefore difficult to criticise Mr Swan for using comparator sales of properties that share the characteristics of the property to be valued.

Failure to reconsider

[59] As to the fourth reason (that Judge McHardy did not reconsider the remedies after correcting the errors in the calculations made in the version of his judgment released earlier),[90] it seems to me, if anything, that the correction of the mistake made

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87 It is true that this Court has said courts have consistently held that there is one market value and that this value is capable of determination by objective criteria: *Worldwide NZ LLC v NZ Venue and Event Management Ltd* [2014] NZSC 108, [2015] 1 NZLR 1 at [15]. However, this Court also recognised, at n 12, that "it may be somewhat of a legal fiction that there is only one market price for goods and services" and further that there may be practical difficulties in ascertaining market value, particularly where there is no established market. Valuation is not an exact science, as noted by two of the experts in the current proceedings as well as the High Court and the Court of Appeal: HC decision, above n 6, at [190]; and CA decision, above n 30, at [54].

88 FC decision, above n 6, at [275] and [290].

89 See above at [19].

90 CA decision, above n 30, at [32](d).

vesting fairer, given Mr Williams was not going to have to wait two months for his money.[91]

Conduct

[60] Finally, the submission that Judge McHardy wrongly took conduct into account must be addressed.[92] While there is a passage in the Family Court judgment that suggests that Mr Williams' conduct may have had some influence on the decision, it is not given as an explicit reason by the Judge for the vesting order.[93] For these purposes, I will assume that the Judge did take conduct into account. I do not accept, however, that the Judge's purpose in making his vesting decision was to punish Mr Williams for any misconduct.[94] That would have been inappropriate.

[61] The fundamental point to be made regarding conduct is that it cannot be used to affect one party's share in relationship property unless the conditions in s 18A are met. This is not to say that the consideration of conduct is not allowed where it is otherwise relevant. For example, in a decision relating to vesting, conduct could be relevant to assessing the parties' relative attachment to a property.

[62] I agree, however, with Faire J[95] that Mr Williams' refusal to sell in 2007 was not unreasonable in light of the conditions attached to the offer by Ms Scott. But this does not affect the other factors supporting a vesting order discussed above. Nor does it affect the fact that a sale now will wrongly share post-hearing gains. Therefore, even if Judge McHardy did erroneously take conduct into account, this does not mean that the vesting order should have been overturned.

[63] I do stress that parties should take care to introduce conduct evidence only to the extent necessary and relevant. This is not an opportunity to air irrelevant grievances. Extensive affidavit evidence was filed by both parties in this case, much

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91 See above at [25].
92 See above at [27].
93 See above at [23].
94 I agree with William Young J on this point: see at [403] of his reasons.
95 See above at [27].

of which appears to be irrelevant and should therefore not have been proffered. Judges should refuse to admit irrelevant evidence.

Summary and conclusion

[64] A vesting order can be the simplest, most efficient and most cost-effective way of achieving an equal division of relationship property. Equal sharing can be achieved through a vesting order at an appropriate valuation. In this case the valuation was appropriate.[96]

[65] Valuation of relationship property is done at the hearing date. The High Court and the Court of Appeal were therefore wrong to conclude, absent a valid reason for a valuation date adjustment under s 2G(2), that a vesting order was inappropriate. In particular, they were wrong to hold that passive post-hearing date gains should be shared, particularly in a case where any benefit from other assets accrued to one party only.

[66] For the above reasons, the vesting order made by the Family Court should not have been set aside. Consequently, the appeal on this point should be allowed and the vesting order made in the Family Court restored.

Valuation of the legal practice

Methodology in this case

[67] The valuation method used by all of the experts called by the parties has been referred to as the "capitalisation of super profits". It requires an estimate of the firm's future maintainable earnings (FME).[97] There is then a deduction of a notional market salary and for tax. A multiple is applied to the remaining "super profit". The resulting

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96 I agree with William Young J that, considering the background, the decision to vest the properties in Ms Scott was "not particularly surprising": see at [397] of his reasons.

97 The future maintainable earnings can be expressed as earnings before interest, tax, depreciation and allowances (EBITDA), earnings before interest and tax (EBIT), profit before tax (PBT) or profit after tax (PAT). This figure is also often normalised for factors such as non-work related expenditure, shareholder or director salaries above or below market rates, and unusual items that occurred in the past but are not likely to impact on future earnings: Brendan Lyne and Robyn von Keisenberg "Valuation and Expert Financial Evidence in PRA Cases" (New Zealand Law Society Seminar, June 2016) at 37–38.

amount, adjusted for work in progress and partner current accounts, is the value attributed to the firm.[98] The retaining partner's[99] share in the firm is then calculated. This was the method of valuation used by the Court of Appeal in *M v B*.[100] The valuation exercise is conducted as at the date of hearing.

[68] The couple[101] also shares equally in the retaining partner's share of super profits (less tax) from the date of separation until the hearing date. This recognises that such super profits are relationship property.[102]

[69] As Faire J said in the High Court, Judge McHardy's calculations appear to be based on an FME of $425,000 (half of $850,000[103]) minus $200,000 (the salary component).[104] This equals $225,000 which, less 33 per cent (tax), gives $150,750. The multiple of three means a valuation of Mr Williams' interest in the partnership of $452,250, which rounded down gives a value of $450,000.

[70] The FME figure used by the Family Court in the valuation exercise was not challenged in the High Court[105] and was not specifically addressed in the Court of Appeal.[106] The notional salary of $200,000 allowed to Mr Williams is also not challenged in this Court.[107] The parties still disagree on the appropriate multiple to be applied to the super profit.

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98 Lyne and von Keisenberg also add surplus assets (those that are not required for the business to continue operations such as surplus cash or buildings that could be sold and leased back to the business less any costs of realising the asset) and deduct debt to find the total enterprise value: at 39. This step is not apparent in *M v B* [2006] 3 NZLR 660 (CA).

99 Meaning the partner to the relationship who retains and remains working in the law firm or other business.

100 *M v B*, above n 98, at [171]. It was also briefly mentioned in *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 292.

101 I use this term to distinguish the parties to the relationship from the partners in a law firm.

102 There was dispute as to the correct calculation of super profits in the Family Court but the decision of the Family Court to use the actual post-separation earnings of the firm rather than estimates was upheld by the High Court and not challenged in the Court of Appeal or in this Court: see FC decision, above n 6, at [241]; HC decision, above n 6, at [117]; and CA decision, above n 30, at [9](c).

103 Mr Williams' share in the firm, given it is a two partner firm.

104 HC decision, above n 6, at [81].

105 HC decision, above n 6, at [68].

106 CA decision, above n 30, at [54]–[55].

107 The figure was subject to argument in the Family Court but upheld in the High Court: FC decision, above n 6, at [186]–[204]; and HC decision, above n 6, at [92].

Evidence

[71] Three valuers gave evidence in the Family Court. Mr Lyne was called by Ms Scott. Mr Weber and Mr Goodall were called by Mr Williams.

[72] Mr Lyne, called by Ms Scott, used a multiple of three. He said this was consistent with *M v B*[108] but, in adopting that multiple, he had had regard to the relatively personal nature of the services in a smaller legal firm; the risks of the business; the dependence on the small partner group; the age of Mr Williams (and the lack of a compulsory retirement age); the substantial, established and relatively broad client base; the profitability of the firm; consistency in earnings and future prospects; and the competitive and economic environment. Mr Lyne considered three a reasonable multiple, basing this on his experience, including his own database of transactions. The resulting valuation was consistent with a "selection of sale and purchase transactions in the [range] from $45,000 to $450,000" recorded in Bizstats.[109] In particular, Mr Lyne noted a sale of a practice in June 2010 in Christchurch which sold for $500,000.[110]

[73] In his second affidavit, Mr Lyne said that he did not consider it plausible that a half-interest in a firm generating earnings of $425,000 per partner per year would only be worth the value ascribed to it by Mr Goodall.[111] Mr Lyne said that he would have strongly advised Mr Williams that he was "giving away significant value" had he decided to sell at this price and that, if he had been approached by purchasers to advise them, he would have told them that they were getting "a steal".

[74] Mr Lyne was asked in cross-examination about the differences between the firm at issue in *M v B* and Mr Williams' firm. He accepted that the firms were different. In particular, the number of partners in the firm at issue in *M v B* was higher and partners are more likely to enter and exit in a bigger firm than in a smaller two partner suburban firm. Mr Lyne said he allowed for the small partner group in coming to his multiple. Mr Lyne also said that the firm at issue in *M v B* got the vast majority

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108 *M v B*, above n 98.
109 Bizstats records sales of businesses throughout New Zealand.
110 Mr Lyne noted that the earnings of the practice were less in that case but the goodwill was higher.
111 See below at [79]–[82].

of its work through the Crown warrant, leading to all of the risks inherent in having essentially one customer or client. He noted that the dangers of such dependence had been highlighted by recent reviews of Crown warrants, including reviews of the level of fees. He accepted that there was certainty of work with a Crown warrant so long as it was retained but noted that volume and price was an issue for holders of the Crown warrant.

[75] Mr Lyne did not consider that Mr Williams' firm, despite its length of time in the area, relied on the partners having a personal relationship with the clients. He considered that the firm's location, together with its efficiency and reputation, were more important in its success than personal relationships with the partners. In addition, while the clients would have a stronger relationship with one partner than the other, Mr Lyne considered that the structure of a general practitioner firm (as opposed to a boutique firm) was such that clients develop a relationship with the person actually doing the work, often the legal executive. He was satisfied that such relationships would be likely to be transferred within the firm rather than leave with a partner. He thought that there was a minimal risk of the firm ceasing on the retirement of the partners (both being of a similar age). Given the profitability of the firm, there would be a purchaser.

[76] Mr Weber, called by Mr Williams, adopted a multiple of two, after considering the commercial and operating risks associated with the firm, the high dependence placed on the two partners for the revenue and the lack of growth potential in the medium term. He considered it likely that there was substantial personal goodwill and this was of particular relevance in a situation where there had been an amalgamation of two sole practices as recently as April 2002.

[77] In cross-examination Mr Weber agreed that the firm was very well run and that it had maintained consistency of earnings even through the global financial crisis of 2007–2008. The firm was, however, in a well-established area with little potential for growth without further capital expenditure. He considered the growth seen over the last few years was largely a result of inflation or harder work. In his view a multiple of three implied growth, which was possible in *M v B* given it was a large firm. Growth was, in his view, a key factor influencing a multiple. He agreed that one would hope

that there was a residual value in Mr Williams' firm that was lacking in *M v B*.[112] Mr Weber also agreed that the other restrictions in *M v B* that led to a multiple of three being adopted, being Crown work generated at a lower level of remuneration than other firms and the relatively restrictive nature of the work, did not apply to Mr Williams' firm.

[78] Mr Weber said he would advise a young lawyer to pay $131,000 for the half interest in the firm. Mr Weber also said that he would advise Mr Williams to seek that sum from any purchaser. When asked whether he would advise Mr Williams to sell his interest for $131,000, however, Mr Weber said there was a difference between valuation and price and that it comes down to the value to the owner and how much he would sell his share for in light of having no further access to the asset. Mr Weber said this was a different question again.

[79] Mr Goodall, instructed by Mr Williams after receiving Mr Lyne's and Mr Weber's analysis, agreed with a multiple of two. He said that the multiple is a reflection of risk: "the higher the risk, the lower the multiple". In his assessment a multiple of two was appropriate because the firm, while well-established, attracted work through the reputation of its partners. It was not dependent on a few large clients for the bulk of its billings but, unlike *M v B*, a level of assured fees was not available and so the multiple adopted in that case was not appropriate. Given the personal relationship between the partners and the clients, the lower multiple of two was appropriate to reflect the potential for loss of clients for an intending purchaser of the interest in the firm.

[80] Mr Goodall was of the view that the multiple of three adopted in *M v B* was broadly in line with the goodwill payable by an incoming partner into that firm on a lock-step basis and to a large degree justified the use of that multiple.[113] Mr Goodall accepted that four of the reasons relied on in *M v B* for adopting a multiplier of three (being the age of the husband, the Crown work at a discounted rate, the inability to

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112 *M v B*, above n 98, at [93] per Robertson J.

113 At [95] Robertson J used the lock-step calculation as a check. Hammond J was of the view that where there is a known lock-step, this ought to be the primary method of assessment: at [230]–[232]. As there was no lock-step in place in this case we do not need to decide on the appropriateness of using the lock-step, either as a check or a primary methodology.

sell the partnership interest and the specialised nature of the work) did not apply to Mr Williams' firm.

[81] Mr Goodall was asked if he would advise Mr Williams to sell his interest in the firm for $183,000 (being the updated valuation of the interest he gave). He said: "Well if it was an absolute cash sum, and walk away the answer would probably be no."[114]

[82] In cross-examination, Mr Goodall also said the multiple chosen was "in the context of what someone would notionally pay to buy into the practice". He said that the risk associated with the firm related to the fact that "the ability to derive those earnings is functional on both those partners continuing in the firm and working as hard as they have apparently historically done". Mr Goodall said it was inevitable that each of the partners would have "quite a personal following" given the length of time they had each practised in the area and that there was no certainty all clients would be retained if one partner leaves. He did, however, say:

> Well I would accept that if the two partners stay in practice together in the foreseeable future and they both maintain good health and so forth there would be minimal risk in terms of the ability to continue to generate, you know, reasonable sort of income.

Family Court decision

[83] Preferring the evidence of Mr Lyne, Judge McHardy adopted a multiple of three. Overall, Judge McHardy was satisfied that Mr Lyne's evidence reflected the actual concept (a "notional sale") that the Court must assess, whereas the experts for Mr Williams had somewhat limited their assessment by being influenced by "what might happen in the marketplace".[115] As well their evidence tended to "reflect more of an approach that the market place is largely determinant" and that the legal practice is a business "for which there is no market".[116] The Judge said that the enquiry must be as to the realistic commercial value to determine "what, in the absence of a market, a person desiring to buy the legal practice would pay the applicant who is willing to

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114 From what followed in cross-examination it appears that this answer assumed a restraint of trade would be given.

115 FC decision, above n 6, at [222].

116 At [221].

sell it at a fair price but not desiring to sell".[117] The difficulty with Mr Williams' analysis was that "it seems to ignore that the market does include [Mr Williams], his partner Mr D and [Ms Scott]."[118]

[84] In the Judge's view, Mr Lyne's evidence was "more comprehensive and compelling" and highlighted the flaws in the assessments undertaken by Mr Weber and Mr Goodall.[119] The Judge did not, however, totally accept Mr Lyne's views as to the risk for the ongoing performance of the legal practice. It is a suburban legal practice and in his view there was a risk another party would set up in competition. This factor influenced Mr Weber and Mr Goodall in their assessments "but to too great a degree".[120] Mr Williams' half interest in the firm was valued at $450,000 and Ms Scott was therefore entitled to $225,000.[121]

High Court decision

[85] As indicated above, the FME of the firm was not challenged on appeal.[122] The notional salary was challenged but Faire J did not depart from the $200,000 figure accepted by Judge McHardy.[123] He did, however, adopt a multiple of two rather than three. This gave a value for Mr Williams' share of the firm of $300,000 and Ms Scott was therefore entitled to $150,000.

[86] Faire J identified the important features and nature of the firm as a suburban conveyancing firm that relies on prior personal contact with clients for new instructions.[124] Although in theory a restraint of trade should go some distance to preserving the value of the firm, the partners themselves were the reason that the firm is so successful. This means that there was much greater risk than in the case of entry into a large partnership. The comparison Mr Lyne drew was therefore not appropriate as the risk of the firm was greater than in *M v B*.[125]

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117 At [223].
118 At [224].
119 At [228].
120 At [231].
121 At [232].
122 See above at [70].
123 HC decision, above n 6, at [92].
124 At [102].
125 At [103].

[87] Faire J considered that the firm will face an issue in five to eight years as the partners seek to exit legal practice, particularly as there is no partnership development plan. This was another reason a multiple of two was appropriate: the relative brevity of the remaining length of the partners' practising lives as against the 50 year old practitioner in *M v B*.[126]

[88] Faire J said:

> [105] When I weigh all these considerations, I conclude that there is a greater risk associated with the cost of acquiring this practice. Therefore a multiple of 3 is too high and the comparison that Mr Lyne drew with *M v B* is not appropriate. I adopt a multiple of 2.

Court of Appeal decision

[89] The Court of Appeal agreed with Faire J's assessment of the firm's value.[127] The Court identified as the heart of Faire J's assessment his disagreement with the multiple applied by Judge McHardy.[128] The Court of Appeal was satisfied that a multiple of three was incorrect. In its view, out of Mr Lyne's seven factors[129] supporting a multiple of three, only two would support a similar multiple to *M v B*.[130] The Court said that Faire J considered the evidence with "considerable care" and identified the considerations going against the multiple of three.[131] Faire J then concluded that *M v B* was not a good comparator because a greater degree of risk would have to be factored in. Consistent with the evidence of two of the experts, Faire J adopted a multiple of two instead. The Court of Appeal did not consider his analysis was capable of being faulted.[132]

Ms Scott's submissions

[90] Mr Goddard argues that there is an air of unreality in the valuation of the legal practice. Under the High Court's approach, Mr Williams would continue after the hearing date to earn income in excess of $180,000 after tax for seven years, assuming

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126 At [104].
127 CA decision, above n 30, at [53].
128 At [53].
129 Set out above at [72].
130 CA decision, above n 30, at [56]. The Court did not identify these two factors.
131 Summarised above at [86]–[87].
132 CA decision, above n 30, at [58].

retirement at 65. Mr Goddard further submits that it is increasingly common for professionals to work to 70 or beyond.[133] In addition, Mr Williams would retain the capital value of his share in the firm when he eventually retires (assuming a sale after retirement).[134] On the approach of the High Court, Ms Scott receives a one-off payment of $150,000. In Mr Goddard's submission, this is far from equal.

[91] More generally, Mr Goddard submits that, in the case of closely held businesses such as law partnerships, a "fair market value" assessment leads to the value of such businesses being underestimated. Instead, a "fair value" assessment should be undertaken. This should be based on what Mr Williams gained and what Ms Scott gave up as a result of his acquisition of her relationship property interest in the firm. In his submission, this methodology gives better effect to the purpose and principles of the PRA. In Mr Goddard's submission, the focus on fair market value in this case meant Ms Scott was underpaid for her share of Mr Williams' interest in the firm.[135]

[92] In Mr Goddard's submission the issue should be referred back to the Family Court for valuation to be assessed on a fair value basis or, at the least, the Family Court valuation of Ms Scott's share as $225,000 should be restored.

Mr Williams' submissions

[93] Ms Robertson supports the valuation of the High Court which was upheld in the Court of Appeal. The High Court set out the correct legal principles, considered the experts' assumptions and completed a reality check as to what the firm was worth before determining the appropriate multiple of two. This, in her submission, was the correct approach. In her submission, the evidence established that, given the high dependency on the partners, there was risk in the firm maintaining the FME going forward. Nor was it clear that Mr Williams would receive the entire capital sum in an

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133 This calculation was based on the super profits calculation for the six years from separation until hearing date of 31 July 2013 of $1,093,000 (after tax).

134 Mr Goddard points out that a sale was not factored into the valuation in this case, although it was a possibility, unlike in *M v B* given the nature of the partnership in that case.

135 For example, Mr Goddard submits that a conservative FME was arrived at. This is because the average earnings from 2007 to 2011 were used to calculate the FME, when there were increased earnings in the latter years from 2011 to 2013 and there was no indication that these higher earnings would not be maintained.

eventual sale or that Mr Williams would continue working for some years beyond his retirement age.

[94] Ms Robertson submits that the fair market value standard is well established and Ms Scott has not raised sufficient policy or legal reasons to depart from this standard. Nor is there evidence about the fair value method before the Court. In her submission, an exercise that requires assessment of what one party has gained and the other has given up is an invitation to introduce numerous subjective and differing valuations of the same asset as denounced in *M v B*.[136] By contrast, the fair market value standard enhances predictability and certainty in decision-making.

Issues

[95] A number of issues arise from the submissions. I propose to deal with these as follows:

(a) Appropriate valuation standard

(b) Valuation methodologies

(c) Capitalisation of super profits

(d) Reliance on *M v B*

(e) Appropriate multiple

(f) Retirement

(g) Remission to the Family Court?

(h) Summary and conclusion

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136 *M v B*, above n 98, at [167](b) and (c) per William Young P.

Appropriate valuation standard

[96] Mr Lyne said that he had adopted for his valuation in this case "fair market value, which is the standard of value typically adopted in relationship property valuations".[137] Mr Weber also used fair market value,[138] as it appears did Mr Goodall.[139]

[97] Mr Lyne, in an appendix to his first report provided in evidence, differentiates between fair market value and fair value. Fair market value is described in the appendix as the "highest price … that is likely to be able to be agreed for the property between a hypothetical willing buyer and seller in a notional open market, with neither party under any compulsion to transact". It assumes "the existence of a notional market based on the economic conditions prevailing at the market date" and also that the property would be on the market for a reasonable period.

[98] Fair value is described in the appendix as "distinct" and "based upon the desire to be equitable to both parties" by recognising that the transaction is not on an open market. It assumes the bringing together of a buyer and seller without other potential parties involved. At a minimum, it involves taking into account what the seller gives up and what the buyer acquires.

[99] The aim of any valuation exercise in this context is to ensure a fair and just division of relationship property, in line with the principles and purpose of the PRA.[140] It is possible that this may require, in cases where there is no ready market, that a fair value standard be employed.[141] However, this was raised for the first time in this Court and there has therefore been no consideration of the implications of any change in

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137 In a recent seminar, Mr Lyne said "[t]he intent of the [PRA] suggests that fair value is the applicable standard to be applied but in reality courts have consistently applied the standard of fair market value": Lyne and von Keisenberg, above n 97, at 33–34.

138 Mr Weber's report was on the basis of the fair market value, defined as "the highest price available in an open and unrestricted market between informed, prudent parties, acting at arm's length and under no compulsion to act, expressed in terms of money or money's worth".

139 See above at [82]. Mr Goodall also said, however, that the value could be assessed as what Mr Williams might be prepared to pay to retain his interest in the firm.

140 See PRA, ss 1M(c) and 1N. See also *Reid v Reid* [1980] 2 NZLR 270 (CA) at 272; *Haldane v Haldane* [1981] 1 NZLR 554 (CA) at 562; and *Walker v Walker* [2006] NZFLR 768 (HC) at 785.

141 There is no suggestion that a fair value standard would use other than standard valuation methodologies. I therefore do not accept Ms Robertson's submission (above at [94]) that it would lead to any more subjectivity than a fair market value standard, particularly where the actual market is thin.

valuation standard in the Courts below. I thus leave the issue open. The same applies to the issue of personal goodwill discussed below at [102].

[100] I do, however, comment that the manner in which the fair market value assessment has been explained and applied in the leading cases means that there may in fact not be significant differences between the two approaches. This is because in any valuation exercise the retaining partner in the business is treated as a potential purchaser.[142] Indeed, both partners in the relationship can be treated as potential purchasers.[143] In order to ensure equivalence between a potential third party purchaser and the partner retaining the business, it would also be assumed that, if it were purchased by a third party, a restraint of trade would be given.[144]

[101] Especially where both spouses or partners are considered as potential joint purchasers, this will often lead to the same result as a fair value methodology, with the possible exception of the treatment of personal goodwill. If a fair value assessment is used it is likely that any valuation would be on the basis that the personal goodwill of the partner retaining the business would remain with the firm. Under a fair market valuation standard that may not be the case. I do note, however, that in many cases where professional practices are transferred or partners retire, there are attempts made to transfer personal goodwill through, for example, transitional consultancy arrangements.

[102] It seems to me that, in the PRA context, excluding personal goodwill from a valuation of a professional firm may well be inappropriate.[145] The other relationship partner will have contributed, through his or her role in the relationship, to the building up of the personal goodwill.[146] Indeed, in this case Ms Scott says she had a role in

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142 See *Z v Z* [1989] 3 NZLR 413 (CA) at 415 per Richardson J.

143 I use this term for convenience to cover both spouses and partners.

144 *Z v Z*, above n 142, at 416.

145 It is possible that different considerations may apply where a firm is not involved and the issue is the valuation of the business of a "sole trader", such as a barrister or orthopaedic surgeon. Some of the cases on the latter are set out at [413] of William Young J's reasons.

146 All forms of contribution to the relationship are treated equally, whether monetary or otherwise: see in particular s 1M(b), s 1N(b) and s 18 of the PRA.

marketing. If correct, this would mean that she had been, at least partially, directly responsible for any personal goodwill built up through her efforts.

[103] Further, the retaining partner will continue to benefit from his or her personal goodwill as long as he or she remains with the firm.[147] As I have mentioned above, when the retaining partner does retire, every effort would usually be made to pass on any personal goodwill to any incoming partner.[148]

[104] There could also be significant difficulties in distinguishing between personal and firm goodwill. I note further that, if personal goodwill is earning capacity as William Young J maintains,[149] then it would have to be taken into account under s 15. This would increase the complexities already involved in that section.[150]

Valuation methodologies

[105] As with the valuation standard, valuation methodologies should be aimed at ensuring a fair and just division of relationship property. This means that the appropriate valuation methodology will depend on the type of business to be valued. Where a business is likely to continue as a going concern and is not very asset dependent, income based valuations, such as a discounted cash flow analysis or a capitalisation of earnings method, discussed below, may be the most appropriate methodologies.

[106] Experts should explain in their evidence why they used a particular methodology and, where appropriate, could compare their results with other possible methodologies or market transactions. However, market transactions must be used with caution in the case of professional firms because of the thin market.

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147 Taking account of personal goodwill in the valuation of a business does not accord with the approach taken in *Briggs v Briggs* (1996) 14 FRNZ 404 (HC). To the extent that *Briggs* was referred to by this Court in *Thompson v Thompson* [2015] NZSC 26, [2015] 1 NZLR 593, this was in the context of restraints of trade: see at [33]. It was not discussed in the context of valuing of a business for the purpose of the division of relationship property and it cannot therefore be taken as having decided the point.

148 Often achieved through a lock-step arrangement.

149 See for example at [425]–[429] of his reasons.

150 In this case, neither the High Court nor the Court of Appeal took personal goodwill into account under s 15.

[107] I understand that the capitalisation of super profits approach for the valuation of legal practices has become increasingly used since *M v B*.[151] While this can be, depending on the circumstances, an acceptable methodology, it should not be thought of as the only possible approach to valuing professional firms. If, in the particular circumstances, a different valuation method is appropriate in order to arrive at a fair and just division of relationship property, then that method should be used. The methodology and result in any case reflects the particular circumstances in that case and the particular evidence given.[152] Treating any case as binding precedent on methodology is not appropriate.[153]

[108] It is sometimes said that any valuation reached must be subjected to a "reality check".[154] If all that means is that there should not be a slavish reliance on the results of any particular valuation methodology, then this must be correct. The judge should always consider whether the result reached by any particular methodology is fair and just. Any such "reality check" must not, however, be an arbitrary assessment by the judge but must be based on an evaluation of the evidence. The essential question is not what is the right valuation method, but what is the right result, being a result that achieves a fair and just division of relationship property.[155]

Capitalisation of super profits

[109] The capitalisation of super profits methodology is a variant of the capitalisation of earnings approach, which is in turn a simplification of the discounted cash flow analysis.[156] The discounted cash flow analysis calculates the present value of cash

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151 *M v B*, above n 98.

152 See the comments of Cooke P in *Holt v Holt* [1987] 1 NZLR 85 (CA) at 90. See also the comments in *Garty v Garty* [1997] 3 NZLR 66 (HC) at 70–71.

153 I accept, however, that there are benefits in terms of certainty and likelihood of settlement in following guidance from earlier cases, as long as the situations are sufficiently similar to justify doing so.

154 See for example *M v B*, above n 98, at [55] and [91] per Robertson J and at [171] per William Young P.

155 *Clark v Clark* (1988) 4 FRNZ 567 (HC) at 574.

156 In *M v B*, above n 98, at [170]–[171] William Young P referred to the use of Ogden Tables in England with regard to personal injury claims and described the super profit method as a variation of this approach. Ogden Tables are actuarial tables published by the United Kingdom Government Actuary's Department to assist lawyers and judges to assess damages for loss of earnings in personal injury cases: Government Actuary's Department *Actuarial Tables with explanatory notes for use in Personal Injury and Fatal Accident Cases* (7th ed, The Stationery Office, London, 2011). See also Harvey McGregor *McGregor on Damages* (19th ed, Sweet & Maxwell, London, 2014) at [38–070] and following for a discussion of the use of the Ogden Tables.

flows over a defined period and adds the present value of the terminal, or residual, value of the project or business.[157]

[110] By contrast the capitalisation of earnings approach assumes that one year's earnings, being the FME, will be generated by the business in perpetuity.[158] It is easiest applied where earnings are stable and growth is at a constant rate, whether positive or negative. As well as growth, the capitalisation rate will depend on the risk profile of the enterprise and the market overall.[159]

[111] One commentator has described the capitalisation of super profits methodology as a:[160]

> … useful method of valuation in a small business where an owner spouse works in the business and takes an income from the business. In that case, an allowance can be made for an adequate salary for the effort put in. The balance taken by the owner spouse is then described as excess profit and can be given an ongoing value on a capitalisation basis. The appropriate multiple must be arbitrarily determined in order to arrive at a final figure.

[112] A multiple should not be determined "arbitrarily". There can be no fair and just division of relationship property if any part of the process is arbitrary. Experts must explain all their inputs, including how they arrived at the particular multiple and what it represents (for example how it relates to risk and/or growth). This means explaining the factors taken into account in deciding on the appropriate multiple with, as far as possible, an indication of how much (in numerical terms) the particular factor plays in the assessment as to the appropriate multiple. This enables the differences between the experts to be identified and an appropriate adjustment made if a judge does not accept the evidence of an expert on one or more of the factors relied on by that expert.[161]

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157 James R Hitchner *Financial Valuation: Applications and Models* (3rd ed, John Wiley and Sons, Hoboken (New Jersey), 2011) at 143.

158 Lyne and Von Keisenberg, above n 97, at 37.

159 The capitalisation of cash flows method assumes that, in addition to growth, risk is constant in perpetuity: Hitchner, above n 157, at 141–142.

160 Nicola Peart (ed) *Brookers Family Law – Family Property* (online looseleaf ed, Thomson Reuters) at [PR2G.07(5)].

161 See for example *DMG v RMG* (2003) 22 FRNZ 745 (FC) at [45]–[48].

[113] While regard can clearly be had to multiples used in similar cases, it must be remembered that the multiple in a particular case was chosen as a result of the evidence in that particular case and there must be some caution exercised when making comparisons between cases to ensure like is being compared with like.

[114] The experts in this case did explain their reasoning for the multiple chosen but did not ascribe a numerical value to the factors they saw as important. Further, as noted below, the only choice given by the experts and considered by the Courts below appears to have been between a multiple of either three, as used in *M v B*, or two.

[115] Mr Weber, in cross-examination, said he had never seen a multiple in excess of 3.5 used in the valuation of a legal firm, meaning that he accepted other than whole number multiples are possible.[162] If only whole numbers are considered, the multiple used makes a large difference to the valuation. Such a large difference may not be justified by the particular factors that lead to the choice of multiple. In this case, as Faire J pointed out:[163]

> In short, a multiplier of 1 provides a valuation of approximately $150,000. A multiplier of 2 provides for an overall valuation of approximately $300,000 and a multiplier of 3 provides for a valuation of approximately $400,000.

Reliance on M v B

[116] In this case the parties, their experts and the Courts below had a tendency to use the multiple in *M v B* as a benchmark, identifying factors that differentiated the firm at issue in this case from that in *M v B* and considering whether the multiple should be the same or lower than in that case in light of that comparison.[164] The multiple reached in *M v B* was, however, a function of the evidence in that case and the particular circumstances.[165]

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162 I do not know whether any of the experts in this case considered but rejected other than whole number multiples. I assume the 3.5 multiple Mr Weber refers to relates to purchases by third parties.

163 HC decision, above n 6, at [101]. This was using a salary figure of $200,000 and an FME of $425,000 to value Mr Williams' interest in the practice.

164 *M v B*, above n 98.

165 See above at [107].

[117] More importantly, the point of using comparators is to compare like with like. The firm in *M v B* and Mr Williams' firm (and the related risk profiles) are so dissimilar that the multiple used in *M v B* could say very little about the suitable multiple in this case. The multiple in *M v B* should, therefore, not have been used as a benchmark when considering a very different firm. In fact, the experts in this case accepted that most of the factors that led to a multiple of three being adopted in *M v B* were not present in the current proceedings.[166]

[118] Mr Williams' firm has two partners and for the main part provides general conveyancing services for a large number of clients within the relevant suburban area. By contrast, the firm in *M v B* had a far greater number of partners and relied on the Crown warrant for most of its income. The dependence on the Crown warrant meant that it did face a relatively significant level of risk in the medium and long term, as pointed out by Mr Lyne in evidence.[167] The Crown warrant is personal to a particular partner and not a warrant for the firm and the warrant can change or be restructured.

[119] There were other but very different risks associated with a small suburban firm like that of Mr Williams. More suitable comparable firms should have been found, as Mr Lyne attempted to do. There are no details in terms of the size of the Bizstat firms, but the other sales he referred to included those of a sole practitioner and a firm of some three partners.[168]

Factors taken into account

[120] Turning to an assessment of the appropriate multiple in this case, Mr Weber said that one of the main issues in terms of the multiple in this case was the lack of growth potential for the firm.[169] It does not seem to me, however, that this was the point of difference between Mr Goodall, Mr Weber and Mr Lyne. From Mr Lyne's

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166 See above at [74], [77] and [80].
167 See above at [74].
168 See above at [72]. However, as set out above, there is a danger in using comparators in a thin market: see at [106].
169 See above at [76]–[77].

evidence it does not appear that growth for the firm was a large factor (at least as the firm was currently constituted) in his assessment of the appropriate multiple.[170]

[121] The issue that did divide Mr Lyne from Mr Goodall and Mr Weber was the level of risk associated with the firm and also the issue of whether there was personal goodwill and the effect of this on valuation. In Mr Lyne's view there was little personal goodwill. His view was that the loyalty of clients would be to the firm and not particularly related to the individual law firm partners. This would mean that the loss of one or other of the partners would not affect the value of the firm.[171]

[122] By contrast, the experts called by Mr Williams were of the view that there was significant personal goodwill and therefore a real risk for any third party purchaser. Mr Goodall did concede that, if both partners remained, there was in fact little risk that the firm would not continue to generate a reasonable income.[172] He would also not have advised sale at his valuation if there had been a restraint of trade.[173] Mr Weber also seemed to accept there might be a difference between a price for a third party purchaser and the value of the firm to Mr Williams.[174]

[123] I would accept Mr Lyne's evidence that any goodwill involved was largely that of the firm and not personal to the partners. This view is reinforced by the fact that Mr Williams was absent from work through illness for eight months from November 2011 to July 2012, with seemingly little impact on the practice.[175]

[124] There remains the issue of the risk that Mr D might leave the partnership, and/or the possibility of a competitor firm setting up in the area. There was, however, no indication in the evidence of Mr Weber and Mr Goodall as to how much these

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170 Mr Lyne did consider the future prospects of the firm, which may have included growth, but he was not explicit on any growth assumptions: see above at [72].

171 See above at [75].

172 See above at [82].

173 See above at [81].

174 See above at [78].

175 Mr Weber (for Mr Williams) had not been aware of Mr Williams' absences. See FC decision, above n 6, at [209]. I also note that Mr Williams had looked after Mr D's practice before the merger when Mr D was ill for some six months. Further, according to Mr Williams, Mr D continues to suffer ill health which means he is often absent from work.

factors affected the multiple chosen. On the basis of what evidence there was, these last two factors would not appear to be particularly significant risks.

[125] As to the risk of Mr D leaving the firm, he and Mr Williams have been in partnership in this very successful and well run firm since 2002. Absent personal issues arising between the partners and possible inability to work through illness, it would seem unlikely that either partner would have an incentive to leave the firm before retirement. Even were Mr D to leave the firm, however, on the analysis of Mr Weber and Mr Goodall, he would take his personal goodwill. There is nothing to suggest this goodwill was significantly greater than that of Mr Williams. It is not clear therefore that the loss of Mr D would significantly affect the value of Mr Williams' half share, even assuming the existence of personal goodwill.[176]

[126] Turning to the risk of a competitor setting up in the area, the evidence was that Mr Williams' firm has been very well-established in the area over a long period and both partners had practised in the area before the merger. This is likely to mean that a competitor firm would have difficulty establishing itself in what appears to have been a relatively saturated market.[177] As the High Court noted, it appears that no other lawyers have to date been successful in setting up in competition with Mr Williams' firm.[178]

Retirement

[127] In the High Court, Faire J considered that an additional factor that had not been taken into account by the Family Court was that Mr Williams, and indeed Mr D given they were of a similar age, would be retiring in the relatively near future.[179]

[128] Mr Lyne's view was that the partners' retirement would not make a difference as the firm at that stage could be sold for effectively its full value, given the lack of personal goodwill. His view was that, should either one or both of the partners retire, there would be a purchaser who would be prepared to pay a good price, because of the

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176 As noted above at [123], I accept that the goodwill in this case was firm goodwill and not personal.
177 As noted by Mr Weber: see above at [77].
178 HC decision, above n 6, at [102](i).
179 At [83].

well run nature of the firm and its consistent profitability. In this regard, he pointed to evidence of sales of similar small firms. There was also no compulsory retirement age and therefore Mr Williams and Mr D could continue in partnership until they wished to retire.[180]

[129] In preferring Mr Lyne's evidence, the Family Court Judge can be assumed to have accepted this assessment. While, as Faire J noted, there was no retirement plan in place, there is no suggestion of the imminent retirement of either partner. This means there is still time to put a plan in place to ensure, as far as possible, that both personal (if any) and firm goodwill is available for a purchaser.[181] Such a plan would be sensible to maximise the return from any sale of the firm on retirement and one has to assume the partners will behave rationally when the time comes.

[130] Mr Goodall and Mr Weber, as noted above, took a different view on personal goodwill from that taken by Mr Lyne. It does not appear, however, that they saw any difference between the value of the firm up until the retirement of Mr Williams and/or Mr D and after retirement. It is possible that a multiple could be adjusted[182] to take into account the different risks before and after retirement but that did not appear to have been the way Mr Goodall and Mr Weber analysed it. Their multiple of two appears to have been based on a third party purchasing the interest as at the hearing date and not on retirement of the partners.

[131] It may be that, if retirement had been considered imminent, a discounted cash flow analysis until the projected retirement date with a terminal value (as there was a possibility of a sale of the firm after retirement) may have better captured what was, assuming the existence of personal goodwill, the different risk profile before and after retirement but none of the valuers did such an analysis.[183]

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180 See above at [72].

181 As Faire J said this would likely be done through a traditional lock-step arrangement: HC decision, above n 6, at [86] and [106].

182 However it must be remembered that this methodology assumes a constant level of risk and growth: see above at [110].

183 It appears that both experts in *M v B* had used a discounted cash flow analysis, possibly because of the time limited period, given there was no possibility of sale on retirement in that case: *M v B*, above n 98, at [61] and [62]. One of the valuers did use as an alternative a multiplier approach: at [92].

Remission to the Family Court?

[132] Mr Goddard submitted that the matter should be returned to the Family Court to assess a "fair value". I do not accept this submission as this was raised for the first time in this Court. I have left open whether or not "fair value" would be an appropriate valuation standard in cases of this kind.

[133] In any event, as noted above, if the fair market value standard assumes the retaining partner is a potential purchaser, as Mr Lyne did, there is not likely to be a significant difference between the two standards, especially where, as we have accepted to be the case, there was no or limited personal goodwill.

[134] If, as Mr Goddard submits, the law firm was nevertheless undervalued by, for example, using a conservative FME, that is a function of the evidence Ms Scott chose to call.[184] Mr Williams has not been given a fair opportunity to respond to the points made by Mr Goddard. His submissions were (understandably given it is a third appeal and there was no new expert evidence) largely confined to the unfairness in going beyond the evidence actually before the Court.[185]

[135] I accept that there may have been a tendency in this case to feel constrained by the *M v B* methodology and the multiple used in that case. This may have affected the experts' view of the appropriate multiple but again, in the absence of contrary expert evidence, I have no means of assessing the effect of any improper influence.

[136] It would be unfair for Ms Scott to be able now, on a third appeal, to have the matter returned to the Family Court for the opportunity to provide different evidence, in circumstances where there is nothing to show that this would mean a significantly different result from that reached by her expert whose evidence was largely accepted by the Family Court and now upheld by this Court.

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184 See above at n 135.

185 There was no application to adduce further expert evidence in this Court. I of course make no comment on whether any such application would have succeeded.

Summary and conclusion

[137] The aim of a valuation of a business in this context is to ensure a fair and just division of relationship property.[186] Where there is no ready market, it may be that a fair value standard could be used rather than a fair market value standard. I leave this question open. However, in many cases (including this) there is unlikely to have been a significant difference between a fair value and fair market value standard for one or more of the following reasons:[187]

(a) a restraint of trade has been assumed with regard to third party purchasers;

(b) the retaining partner has been considered a potential purchaser; and

(c) the amount the couple would pay to retain the business has been assessed.

[138] Any valuation methodology chosen should be suitable for the particular business and the particular circumstances.[188] Comparison with other cases should be undertaken with care as the method used, the inputs and the result will have been related to the particular business and to the evidence called in that case. Where firms are very different (as this firm was from that in *M v B*) comparisons are unlikely to be helpful. By contrast, where the firms are sufficiently similar, a comparative analysis can save time and expense.

[139] The multiple of two used by Mr Weber and Mr Goodall seems largely to have been based on the risks to a third party purchaser of the loss of personal goodwill. The High Court and Court of Appeal relied on their evidence. I consider, however, that the Family Court Judge was correct to accept Mr Lyne's evidence that the goodwill was firm goodwill and not personal. His multiple of three was based on that view. It was also based on comparable market transactions.

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186 See above at [99].
187 See above at [100].
188 See above at [107].

[140] As to other risks, I do not consider the risk of Mr D leaving the firm or another firm setting up in the area to be significant. There is also sufficient time to rectify the lack of a retirement plan referred to by Faire J. It has to be assumed that the partners will act rationally when the time comes to enable them to realise the full value of the firm. Further, the experts called by Mr Williams accepted they would not have advised Mr Williams to sell at their valuations. In these circumstances the valuation reached by the Family Court should not have been overturned.

Section 15

The legislation

[141] The current s 15 of the PRA came into force in 2002.[189] It gives courts the power to provide compensation from relationship property in cases where, at the end of the relationship, the income and living standards of one partner are likely to be significantly higher than those of the other partner as a result of the division of functions within the relationship. Section 15 provides:

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

[189] By the Property (Relationships) Amendment Act 2001, s 17. Minor changes were made by the Property (Relationships) Amendment Act 2005, s 3 to recognise civil unions.

(3) If this section applies, the court, if it considers it just, may, for the purpose of compensating party A,—

(a) order party B to pay party A a sum of money out of party B's relationship property:

(b) order party B to transfer to party A any other property out of party B's relationship property.

(4) This section overrides sections 11 to 14A.

[142] Section 15A was enacted at the same time as the new s 15 and allows similar orders to be made where one spouse or partner has contributed to an increase in the value of separate property. The cross heading to ss 15 and 15A reads: "Court may make orders to redress economic disparity".

[143] As with any proceeding under the PRA, the purpose and principles of the PRA are relevant:

1M Purpose of this Act

The purpose of this Act is—

(a) to reform the law relating to the property of married couples and civil union couples, and of couples who live together in a de facto relationship:

(b) to recognise the equal contribution of both spouses to the marriage partnership, of civil union partners to the civil union, and of de facto partners to the de facto relationship partnership:

(c) to provide for a just division of the relationship property between the spouses or partners when their relationship ends by separation or death, and in certain other circumstances, while taking account of the interests of any children of the marriage or children of the civil union or children of the de facto relationship.

1N Principles

The following principles are to guide the achievement of the purpose of this Act:

(a) the principle that men and women have equal status, and their equality should be maintained and enhanced:

(b) the principle that all forms of contribution to the marriage partnership, civil union, or the de facto relationship partnership, are treated as equal:

(c) the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners arising from their marriage, civil union, or de facto relationship or from the ending of their marriage, civil union, or de facto relationship:

(d) the principle that questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.

[144] Mr Goddard submits s 18 is also relevant. That section provides:

18 Contributions of spouses or partners

(1) For the purposes of this Act, a contribution to the marriage, civil union, or de facto relationship means all or any of the following:

(a) the care of—

(i) any child of the marriage, civil union, or de facto relationship:

(ii) any aged or infirm relative or dependant of either spouse or partner:

(b) the management of the household and the performance of household duties:

(c) the provision of money, including the earning of income, for the purposes of the marriage, civil union, or de facto relationship:

(d) the acquisition or creation of relationship property, including the payment of money for those purposes:

(e) the payment of money to maintain or increase the value of—

(i) the relationship property or any part of that property; or

(ii) the separate property of the other spouse or partner or any part of that property:

(f) the performance of work or services in respect of—

(i) the relationship property or any part of that property; or

(ii) the separate property of the other spouse or partner or any part of that property:

(g) the forgoing of a higher standard of living than would otherwise have been available:

(h) the giving of assistance or support to the other spouse or partner (whether or not of a material kind), including the giving of assistance or support that—

(i) enables the other spouse or partner to acquire qualifications; or

(ii) aids the other spouse or partner in the carrying on of his or her occupation or business.

(2) There is no presumption that a contribution of a monetary nature (whether under subsection (1)(c) or otherwise) is of greater value than a contribution of a non-monetary nature.

Legislative history

[145] In March 1988, a Working Group on Matrimonial Property and Family Protection was established. The aims of the Working Group's review were to:[190]

(a) revise and update the Matrimonial Property Act 1976;

(b) provide for the devolution of matrimonial property on death;

(c) revise and update the Family Protection Act 1955; and

(d) make suitable provision for couples living in de facto relationships.

[146] The report of the Working Group was published in October 1988. Recommendations were made with regard to the devolution of property on death and the treatment of those in de facto relationships. The repeal and replacement of the Family Protection Act 1955 was recommended. Some changes to the treatment of matrimonial property were suggested to ensure that more women would leave a relationship with an amount of property equal to that of their husbands.[191] These changes included the introduction of provisions designed to give the courts more

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190 Ministry of Justice *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) [*Report of the Working Group*] at 1–2. Arnold J also refers at [282] to the 1988 Report of the Royal Commission on Social Policy.

191 At 14.

power when dispositions of property had been made to trusts and companies with the intent to defeat the matrimonial property regime.[192] The Working Group also recommended that all matrimonial property be divided equally, subject to rules about short marriages and repugnancy to justice.[193]

[147] The Working Group recognised that working in the home "usually diminishes the earning capacity" of the stay at home partner and that he or she will ordinarily leave the relationship with less capacity to earn a reasonable income in comparison to the other partner.[194] The Working Group did not, however, recommend that future earnings be treated as an item of matrimonial property available for distribution.[195] It also did not consider that the principles of equal sharing in the Act should be distorted by adjusting shares in matrimonial property to take account of disparity of living standards.[196] Rather, the Working Group recommended that the courts make greater use of the power to award lump sum maintenance where there appeared likely to be a disparity in living standards.[197]

[148] The issue of economic disparity came to the forefront again in 1997 in the case of *Z v Z (No 2)*.[198] The Court of Appeal in that case said that there was "growing recognition" that the division of matrimonial property was "operating harshly on those women who have forgone their own participation in the workforce" having "supported the advancement of their husband's careers by managing the household and caring for the children of the marriage".[199] As a result, at the time of the dissolution of the marriage, one party is "in the advantageous position of being able to recover from the effect of the division of the matrimonial assets and earn, sometimes in a relatively short time, a substantial income" while the other is "ill-equipped to rejoin the workforce and earn an income" as a result of the roles assumed in the relationship.[200]

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192 At 13.
193 At 13.
194 At 5.
195 At 9.
196 At 10–12.
197 At 14.
198 *Z v Z (No 2)*, above n 100.
199 At 275.
200 At 275.

[149] The "essence of the criticism" of the matrimonial property regime was that, while "it achieves formal equality between the spouses in that the conventional items of property are divided equally, it does not achieve actual equality".[201] The Court of Appeal said that this outcome "cannot be easily reconciled with the objectives of equality and justice underlying the Act."[202] The Court of Appeal concluded, however, that it had not been the Legislature's intention to include enhanced earning capacity within the scope of matrimonial property. The Court commented that it was difficult to refute the contention that excluding a spouse whose contribution to the relationship was to manage the home and the care of children from the increased earning power of the other perpetuated the injustice that the Matrimonial Property Act aimed at remedying.[203]

[150] The Matrimonial Property Amendment Bill 1998, drafted under the National Government, was introduced on 25 March 1998. It addressed the "major anomaly" in the then current law by extending the Act to marriages which ended by the death of one spouse.[204] The Bill also empowered the courts to take into account contributions made after the end of the marriage to matrimonial property and care of children, as well as dissipation of property. As suggested by the Working Group, it also gave greater power to the courts to address dispositions of matrimonial property to trusts and companies.[205]

[151] The Bill was considered by the Government Administration Select Committee and reported back on 15 September 1999. The Committee acknowledged that a "large number" of submissions had expressed concern at the Bill's "failure to address the ongoing financial needs of the non-career spouse".[206] Three options had been put forward by submitters: the discretion to award unequal sharing of relationship property when necessary to provide an equitable outcome; to treat enhanced earning capacity or future earnings as property; or to address the issue through spousal maintenance.[207]

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201 At 275.
202 At 276.
203 At 280.
204 Matrimonial Property Amendment Bill 1998 (109–1) (explanatory note) at i.
205 De facto partners were addressed in a separate Bill, the De Facto Relationships (Property) Bill 1998 (108–1).
206 Matrimonial Property Amendment Bill (109–2) (select committee report) at xiv.
207 As recommended by the Working Group: see above at [146].

The Committee adopted the latter as a "direct way of addressing the future needs of the non-career spouse".[208]

[152] No changes were, however, recommended to the existing s 15 of the Matrimonial Property Act.[209] This was on the basis that any change would remove flexibility rather than increase it. The existing s 15 provided that matrimonial property[210] was to be shared equally unless one spouse's "contribution to the marriage partnership has been clearly greater than that of the other spouse". If so, the share of the balance of the matrimonial property was to be determined in accordance with the contribution of each to the marriage partnership.[211]

[153] A change of government in December 1999 meant that it was a Labour-Alliance coalition that moved the Bill through its later stages. The Hon Margaret Wilson, then Associate Minister of Justice, opened the parliamentary debate on the select committee report on 29 February 2000 by indicating that more extensive changes were warranted and would be introduced by Supplementary Order Paper (SOP). She said:[212]

> However, the fact remains that the bill still fails to address fundamental issues – in particular, those issues relating to de facto and same-sex relationships. Just as important is that it fails to adequately address the important question that was the subject of the 1988 ministerial working-group, which was how we address the economic disadvantage experienced by non-earning spouses. In other words, the presumption of equal division and the clean cut has, over the years, acted to the detriment of many women and their children. Therefore, it was necessary for the law to take account of changing circumstances. We had hoped there would be an opportunity to do that through this bill.
>
> From reading the report of the select committee, it is apparent that the majority decided not to take advantage of, or listen to, many of the 105 submissions made on various issues. The Government will therefore relook at the issues raised in those submissions. We will look at the possibility of ensuring there is more extensive coverage on the breakdown of a relationship when it comes

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208 Matrimonial Property Amendment Bill (109–2) (select committee report) at xiv.

209 At viii.

210 Excluding the family home or homestead and family chattels, which were to be divided equally unless there were extraordinary circumstances that made equal sharing repugnant to justice: Matrimonial Property Act 1976, ss 11, 12 and 14.

211 The Working Group had recommended that the distinctions between the family home and chattels and remaining relationship property in the Act be removed: *Report of the Working Group*, above n 190, at 25–27.

212 (29 February 2000) 582 NZPD 832–833.

> to property. We will do this by way of the introduction of a Supplementary Order Paper. …
>
> … In particular, we are concerned about the whole issue of economic disadvantage for non-earning spouses. At times it is difficult to realise and understand the distress that many women – and their dependent children – experience when they have performed the role and function of spouse to their husband, and then have been discarded for a newer and younger model at the very time when they are most in need of some reciprocity in terms of the partnership arrangement they thought they had entered into. These women frequently find themselves with very limited earning capacity because they have, in effect, sacrificed the development of their own skills in the marketplace to enable their husbands to be able to earn more.
>
> The matter is a complex one, and that is not denied, but its complexity does not mean it should not be addressed. There have been suggestions that it should be addressed through the reintroduction of notions of maintenance. In the past, one of the real difficulties of following this route was seen to be that it locked parties into a continuing relationship at the very time when it was important that they were given the resources to get on and manage their own lives without continuing the conflicts and disputes that had arisen from the breakdown of the marriage.

[154] The promised SOP was introduced on 16 May 2000.[213] This contained the purpose provision eventually enacted as s 1M and what is now ss 15 and 15A. In addition, the SOP extended the matrimonial property regime to de facto partners (including same-sex partners) and changed the name of the Act to the Property (Relationships) Act.

[155] The Justice and Electoral Select Committee reported on the Matrimonial Property Amendment Bill and the SOP. The Committee recommended the addition of the principles section to guide the achievement of the purpose provision.[214] It noted that ss 15 and 15A had general support but that concerns had arisen in relation to a perceived increase in uncertainty and unpredictability as a result of the introduction of the sections and a subsequent increase in litigation. The majority of the committee was satisfied that case law would develop to assist in the exercise of the discretion and provide reasonable certainty.[215] In conclusion, the majority said:[216]

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213 Supplementary Order Paper 2000 (25) Matrimonial Property Amendment Bill 1998 (109–3).

214 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 (109–3) (select committee report) at 4–5.

215 At 17.

216 At 33. The minority of the Select Committee (made of National and ACT MPs) did not support the amendments put forward by the SOP: at 34 onwards.

> The well-documented experience of people using the Matrimonial Property Act 1976 over the past quarter century is that it was a great improvement on what went before, but that it contains fundamental weaknesses. The most dramatic of these is that the legislation sought equality of division at the time of the property split, rather than aspiring to create equality of outcome. There are substantial differences in these two approaches, since the frequently differential impact of a marriage or de facto relationship on career paths (and thus earning potential) does not cease with the end of the legal relationship. A common pattern is that the responsibilities taken on by the caregiver of children and/or the keeper of the home in the relationship (usually the woman) have caused a significant break in full-time work, and subsequent inhibition of their careers and reduction of income levels well below what would otherwise have been the case.
>
> A 50:50 division of property at the time of break-up, even reinforced by subsequent child support payments, has frequently embedded the financial advantages attaching to the non child-rearing partner. The argument that this delivered "certainty" has some superficial attraction. However, the reality is that, all too frequently, the greatest certainty was that one partner would suffer disadvantage. That is not something which responsible legislators could ignore. Thus it is, in our opinion, quite appropriate for the Courts to be given the capacity to award lump sum payments to one partner. We do not regard this as incompatible with the retention of the 50:50 approach as the underlying principle of the legislation.

[156] At the third reading of the Bill, Ms Wilson noted that the legislation was "fundamentally about fairness" to "ensure that each partner has a fair division of resources, and that each is placed on a fair footing to deal with life after separation".[217]

Methods used to date

[157] Up until now there appear to have been two main approaches to s 15. The first is to value what the disadvantaged partner would have earned in the future absent the division of functions in the relationship (the diminution method). The second is to assess how much the advantaged partner's future earning capacity has been enhanced by the division of functions (the enhancement method).[218] In some cases both diminution and enhancement methods have been used.[219]

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[217] (29 March 2001) 591 NZPD 8625–8626. The Bill received the Royal assent on 3 April 2001 and largely came into force on 1 February 2002. In these reasons I refer to this as the 2002 reforms.

[218] These methodologies are related to the two situations described in *X v X [Economic disparity]* [2009] NZCA 399, [2010] 1 NZLR 601 at [118] per Robertson J (referring to Joanna Miles "Dealing with Economic Disparity: An Analysis of Section 15 Property (Relationships) Act 1976" [2003] NZ L Rev 535) and at [170] per O'Regan and Ellen France JJ.

[219] See for example *Jack v Jack* [2014] NZHC 1495.

[158] The Court of Appeal in *X v X [Economic disparity]* said that these are not the only available approaches to s 15. In applying the diminution method in that case, O'Regan and Ellen France JJ said:[220]

> … we do not say that the methodology is the only appropriate one for cases of this kind. Rather, we endorse its use in this case and cases like it. The methodology is unlikely to provide a complete answer for every case of this type: the statutory requirement is that the award be just, and that is the overriding consideration.

Issue

[159] It was not contested in the High Court and the Court of Appeal that the requirement for a s 15 order (significant disparity in income and living standards as a result of the division of functions within the marriage) was met.[221] The quantum of the order was and remains in issue.

Expert evidence in this case

[160] Mr Lyne, called by Ms Scott, said that she had very good career prospects when she gave up work at a period when New Zealand was about to enjoy significant economic growth. He adopted $300,000 as the appropriate approximate income level Ms Scott could have achieved if she had pursued her career. This figure was based on the 1998 Hudson Survey, which reported annual income at the 80th percentile for chief financial officers in a consumer organisation as $319,410.[222]

[161] A 35 per cent "allowance for non-collection"[223] was applied to provide for the possibility that the assumptions in the s 15 calculation were "too optimistic". This was to encompass risks such as Ms Scott not earning the $300,000 figure he had used or the disparity not lasting until she was 65.[224] Mr Lyne said that he had used a

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220 *X v X*, above n 218, at [175]. See also Robertson J at [125], [129] and [135].

221 Mr Williams argued in the Family Court that the disparity between incomes was trivial and, even if there was disparity, it was not caused by the division of functions within the marriage. Judge McHardy was satisfied that the evidence presented by Ms Scott, demonstrating the significant role she played within the relationship and in caring for the family's children and the significant role she played in the legal practice (including, it appeared, adding value to it), established a causal link between the division of functions and the disparity: FC decision, above n 6, at [291] and [311]. This was not challenged in the High Court: HC decision, above n 6, at [126].

222 A survey completed for the New Zealand Institute of Chartered Accountants.

223 Referred to in these reasons as a contingency rate.

224 It appears that the disparity he was talking about was between the income she would have achieved

contingency rate of 35 per cent consistent with the methodology in *X v X*.[225] The total difference was halved, again on the basis of *X v X*, and rounded to come to a total of $633,000.[226]

[162] Mr Lyne also considered whether there had been enhancement to Mr Williams' income. In his view, Mr Williams' income would have been $150,000, had there been no division of functions in the marriage, compared to the $200,000 notional salary used in the law practice valuation.[227] In cross-examination Mr Lyne said that the $150,000 figure was based on his "judgement on what [he considered] the position may have been". A 20 per cent contingency rate was applied but only from 2012 (the date of the report) onwards on the basis that, from separation until the date of the report, the enhanced earnings were in fact earned by Mr Williams. Again, the calculation was halved and the total came to $151,000.

[163] Mr Peebles, another expert called by Ms Scott, adopted a projected income of $450,000[228] and an estimated actual income of $84,000. Mr Peebles rejected the Hudson Survey relied on by Mr Lyne given the possibility for bias in the small sample size and the possibility that the survey and others like it are not always relevant to the market being considered, which in this case was a placement at the higher end of the market. Mr Lyne adopted Mr Peebles' figures in his second affidavit as alternative inputs. In cross-examination Mr Lyne said he deferred to Mr Peebles' evidence on Ms Scott's likely income as it was Mr Peebles' area of expertise.[229]

[164] Mr Goodall, called by Mr Williams, agreed with the approach of Mr Lyne of assessing Ms Scott's likely income, assuming no division of functions. He, however,

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had there been no division of functions within the marriage and her actual income, but this is not explicitly stated.

225 *X v X*, above n 218.

226 In *X v X*, the majority halved the s 15 order but noted that whether this was appropriate depended on the circumstances: at [229] and [234]–[236] per O'Regan and Ellen France JJ. Robertson J did not halve the award, but his calculations were based over a shorter time period and so in any event his order came to the same amount as that of the majority: at [132].

227 See above at [70].

228 Meaning what Ms Scott would have earned had there been no division of functions within the marriage.

229 In his second affidavit Mr Lyne also put forward another approach where he calculated the value of a business deriving an income of approximately $450,000 (given that there was evidence Ms Scott would have earned similar amounts to Mr Williams had she remained in the workforce). He noted that this was close to the figure reached using Mr Peebles' inputs.

disagreed with the inputs. Specifically, in his view the $300,000 projected income figure was only obtainable for CFOs at companies with gross revenues higher than $100 million. He assessed the appropriate income figure as $180,000.[230] Mr Goodall used a commencing actual income of $60,000 in 2008, increasing $15,000 per year for nine years before settling at $180,000 until Ms Scott retired. This calculation resulted in the disparity ceasing at age 56. In his view, Ms Scott's business endeavour was entirely her decision and should have no effect on a s 15 claim. A 35 per cent contingency rate was applied, which he said in cross-examination had been taken from *X v X*. The resulting calculations were halved, giving a disparity of $102,148.

[165] In his second affidavit, Mr Goodall said that investment income should be taken into account and also that it was double counting to make a s 15 order from the date of separation as well as ordering a share of post-separation income. Mr Goodall recalculated using a projected income figure of $120,000.[231] On this basis, if the claim ran from the date of the hearing to the date disparity of income ended and excluded investment income, Mr Goodall said that the s 15 order ought to be $18,355.

Family Court decision

[166] Judge McHardy held that there was no requirement that Ms Scott return to highly stressful work to maximise her income.[232] He accepted Mr Lyne's evidence that an accurate estimate of Ms Scott's future earning capacity was around $84,000.[233]

[167] The Judge preferred the evidence of Mr Peebles as to Ms Scott's projected income but said that, as a result of the uncertainties as to what the situation would have been had there been no division of functions, a conservative approach was required.[234] Mr Peebles' figure could be seen as a generous assessment. The Judge said that it was

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230 This was calculated by way of a "hybrid approach" using the average income figures from five chartered accountant categories in the Hudson Survey.

231 This figure was taken from an affidavit of Mr Jaine, a director of a recruitment company aimed at board members and senior executives. In Mr Jaine's view, based on Ms Scott's career history and market observations, her likely career progression would have resulted in an income between $80,000 and $120,000. The latter was considered "the absolute maximum".

232 FC decision, above n 6, at [305]. The Judge also placed "little weight" on the argument advanced by Mr Williams that the Court should have regard to Ms Scott's decision not to pursue her career in accounting during the marriage. The Judge noted that the decision was made within the context of the relationship: at [313].

233 At [343]. This figure is no longer challenged in this Court.

234 At [342].

"not drawing a long bow to accept an income figure of around $330,000".[235] On this assumption the income shortfall was $744,439.[236]

[168] Judge McHardy used an approach suggested by Professor Henaghan as a "starting point in considering a just resolution to [the] claim".[237] He said that a 10 per cent share of the relationship property pool value (a figure in the range of $850,000) would be appropriate for consideration.[238] He compared this to the total of the calculation using the diminution method and added the enhancement income of $151,000 argued for by Mr Lyne. This came to $895,439, which Judge McHardy concluded was "not too dissimilar".[239] He rounded this figure down to $850,000, including both diminution and enhancement calculations, as in his view both were justified in this case.[240]

High Court decision

[169] In the High Court, Faire J took the view that there had been two primary errors of principle in the approach in the Family Court. In his view, the Family Court Judge erred by not having a clear picture of the relationship property before him at the time he considered the s 15 issue and also by not standing back and considering whether the outcome he had reached was just. Faire J said that, had this been done, the fact that Mr Williams' "income from the legal practice is likely to cease on his attaining the age of 65" would have been taken into account. This meant that disparity in income and living standards might not exist after 2020.[241] The Judge also considered

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235 At [342].

236 At [344]. It is not set out exactly how this was calculated. However, the High Court accepted that a spreadsheet provided by counsel demonstrated calculations coming very close to this figure: HC decision, above n 6, at [161] and Appendix B. A copy of this spreadsheet is annexed to my reasons as an appendix. The table's calculations take half of the cumulative difference between Ms Scott's estimated actual gross earnings and the projected income of $330,000 from 2008 to 2025 (with the yearly difference discounted at a 35 per cent allowance for non-collection, a deduction for tax and a discount rate of three per cent (based on CPI)).

237 FC decision, above n 6, at [351]. Professor Henaghan has suggested a rule of thumb whereby an award of between five to 15 per cent more of the relationship property is made to the disadvantaged partner. The percentage chosen would depend on the degree of disparity in the parties' positions at the end of the relationship: Mark Henaghan "Dealing to Disparity" (2008) 6 NZFLJ 51.

238 At [351].

239 At [352].

240 At [366].

241 HC decision, above n 6, at [159]. Faire J considered Mr Williams would likely retire in 2019, presumably on his 65th birthday in October of that year. See above at n 6 for the calculation of Mr Williams' age at the time of the Family Court hearing.

the super profits awarded to Ms Scott should have been taken into account (essentially by crediting the super profit award to the projected disparity calculation).[242]

[170] Further, Faire J held that the enhancement methodology should not have been used when calculating the s 15 order. He considered that there was no proper evidential foundation for the use of the method as no relevant causative nexus had been made out.[243] Mr Lyne had admitted in cross-examination that there was no specific foundation for his view that the division in functions had enhanced Mr Williams' income. The Judge held that the assistance Ms Scott had provided had already been taken into account in the valuation of the legal practice.

[171] Faire J took the view that the Henaghan percentage approach Judge McHardy took, in addition to the *X v X* methodology, was "within his discretion, and was not wrong".[244] He also did not consider the Judge was in error in adopting a potential actual income of $84,000, noting that "both parties seem to agree that this is the case". He also upheld the projected income of $330,000 for Ms Scott.[245]

[172] Faire J considered whether to remit the case to the Family Court but decided there was sufficient evidence for him to determine the appropriate order.[246] In light of the errors of principle he identified above, he reduced the sum ordered to $280,000 to reflect the disparity from 2013 to 2020.[247] Because Ms Scott had received her share of the super profits up to the date of hearing, Faire J found there was no disparity between separation and the date of hearing. Therefore, there was no sum due at the date of hearing and no justification for an order of interest.[248]

Court of Appeal decision

[173] The Court of Appeal was satisfied that super profits were not relevant to a s 15 order and therefore that Faire J erred in taking them into account in his disparity

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242 At [160].
243 At [167], relying on William Young J's comments in *M v B*, above n 98, at [201].
244 At [158].
245 At [158].
246 At [168].
247 See above at [169].
248 HC decision, above n 6, at [170].

calculation.[249] The Court said that the distribution of super profits did not alter the disparity in income earning capacity of the two parties after separation. It was pointed out that in *X v X*, both actual and projected income inputs were limited to income earned from working and did not include investment returns from relationship property.[250] Further, the *X v X* calculation focuses only on Ms Scott's actual and projected income and not on that of Mr Williams. Ms Scott would also have been awarded the super profits regardless of the divisions of functions in the marriage.

[174] The Court upheld Faire J's rejection of enhancement compensation, for the reasons given by the Judge.[251] The Court also considered that the enhancement was mutual in this case in that Mr Williams supported Ms Scott while she obtained her law degree.

[175] The Court was not convinced that the 10 per cent figure used by Judge McHardy as a cross check necessarily has any utility. Each case will depend on its own facts and no rule of thumb can be offered.[252] The Court did, however, accept that it is necessary to "step back" after applying the *X v X* methodology and "consider if the outcome is just to both parties. A broad brush assessment may be necessary."[253]

[176] Applying the *X v X* methodology for a term of 14 years would produce an order of $570,000.[254] In concluding that this was too high, the Court had regard to its gross amount, the proportion of the total relationship property it represents,[255] relativity with other cases, the likelihood that Ms Scott will have a longer working life than

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249 CA decision, above n 30, at [81]–[90].

250 At [89], relying on *X v X*, above n 218, at [172] per O'Regan and Ellen France JJ. See also Robertson J's comments in that case at [88].

251 At [106]–[111].

252 At [112].

253 At [91], citing *X v X*, above n 218, at [54], quoting *M v B*, above n 98, at [179].

254 At [92]. This figure appears to be approximately half of the disparity up to 2020 and Ms Scott turning 60 on the basis of the calculations submitted by counsel in the High Court and accepted by Faire J. See above at n 236 and the table attached to my reasons as an appendix. This approach appears to rely on *X v X* where the nominal retirement age for Mrs X was accepted by the experts as 60: see CA decision, above n 30, at [92]–[93]. It was not appropriate to carry the *X v X* retirement date over automatically to this case. The nominal retirement date in *X v X* was set because of the particular circumstances and evidence in that case. However, taking the calculations until Ms Scott was 60 was reasonable in this case as Mr Williams would have turned 65, his nominal retirement date, in October of the previous year, or if William Young J is correct, in October of 2020.

255 The percentage appears to have been about 5.5 per cent of the relationship property.

Mr Williams, the substantial asset pool available to each party after division of the relationship property, and the income that could be generated from investing the amount ordered under s 15.[256]

[177] Taking these factors into account, the Court considered there should be a 10 year term from separation in 2007 to March 2017[257] instead of a 14 year term, and arrived at an order of $470,000.[258] Mr Williams could be expected to retire within three years of that date but Ms Scott could be expected to work for eight years more. Ms Scott had argued that the High Court erred in saying that Mr Williams was likely to retire at 65 and that there was a high chance he would continue in practice past 70. The Court considered the issue had been overtaken by its decision on quantum. In any event, the Court did not accept her argument. It said that the relevant period of compensation will be "a matter of impression".[259]

[178] I note here that the Family Court awarded interest on the s 15 sum from the date of hearing until the date of payment. The High Court did not award interest because it considered no sum was owing before the hearing date (because of the super profits). Although the Court of Appeal overturned the decision relating to super profits, it did not award interest.

Issues

[179] Mr Goddard submits that the approach to s 15 adopted to date does not reflect the wording of the section, the policy rationale for enacting that provision or the purposes and principles of the PRA. He submits that the starting point should be what he calls an expectation measure of compensation. Accordingly, in his submission the matter should be returned to the Family Court to apply the correct methodology. I will deal with that issue first.

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256 CA decision, above n 30, at [112].

257 According to the High Court judgment this means that Mr Williams would then be 62, turning 63 in October 2017.

258 CA decision, above n 30, at [92]–[94]. This is approximately half of the accumulated disparity calculated as at 2017 when Ms Scott is 57: see the appendix to these reasons. It would appear that Mr Williams turned 63 in October 2017.

259 At [97].

[180] If that submission is rejected and the diminution methodology[260] is adopted, Mr Goddard submits that this should be calculated in a manner that genuinely reflects the loss of human capital and earning capacity resulting from the division of functions in the marriage. He also submits that the diminution measure should often be combined with an "unjust enrichment" approach, a development of the enhancement methodology. He submits that the Courts below erred in the application of the methodologies they used and that, at the least, the Family Court judgment should be reinstated. I will deal with these issues next.

[181] Finally, on the cross-appeal, Ms Robertson submits that Faire J was correct to take into account Ms Scott's share in super profits in coming to the appropriate order under s 15. I will deal with the cross-appeal last.

A different methodology?

Ms Scott's submissions

[182] Mr Goddard submits that the purpose of s 15 is to deal with the common scenario of one partner in a relationship undertaking the majority of the unpaid roles to the detriment of his or her career or earning capacity, leaving the other partner to gain experience, knowledge, seniority, networks and reputation leading to increased earning capacity (human capital). Where the threshold criteria for s 15 are met, the partner who has undertaken the unpaid roles will have made an irreversible investment in the relationship in the expectation that he or she would share in the ongoing financial benefits of freeing up the other partner to concentrate on paid work. The division of roles is a joint decision of the partners and it would be unjust for the other partner to retain the whole of the financial benefits that flow from that joint decision. It is submitted that the just response is to make an order that gives effect to the disadvantaged partner's expectation.[261]

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260 Mr Goddard calls this a reliance measure.

261 Mr Goddard notes that such an approach is consistent with what he calls "analogous fields" such as business joint ventures and the law of promissory estoppel. Mr Goddard also points to *Reid v Reid* [1979] 1 NZLR 572 (CA) at 582–583 where Woodhouse J refers to "commitment on both sides to a common future that is quite uncertain", which involves "not only the pooling of resources but the sharing of risks"; and the Canadian case of *Kerr v Baranow* 2010 SCC 10, [2011] 1 SCR 269.

[183] Mr Goddard draws support for this approach from the principles of the PRA. In particular, he points to one of the purposes of the PRA as being to recognise the equal contribution of both parties to the relationship[262] and the principle in s 1N(c) that any just division of relationship property must have regard to the economic advantages or disadvantages to the spouses or partners arising from the relationship or the ending of that relationship. Mr Goddard submits that s 18[263] also provides guidance on the concept of contribution to a partnership and forms part of a "suite of provisions" in the PRA designed to emphasise the equal weight given to monetary and non-monetary contributions in the relationship. Mr Goddard also points to the cross-heading for ss 15 and 15A and the content of the latter section, which deals with contributions to separate property in circumstances analogous to s 15.[264] In his submission, the legislative history also backs up his suggested approach. He submits that s 15 was introduced after *Z v Z (No 2)* as a response to the "serious deficiency in the legislation" identified in that case whereby human capital is not treated as relationship property and to address the significant disadvantages arising to women in particular from that approach.[265]

[184] In Mr Goddard's submission, his suggested approach reduces uncertainties in calculations and further avoids invidious, intrusive, complex and time consuming comparisons and inquiries, such as whether the disadvantaged partner could have achieved a certain level of income or whether the other partner would have achieved the same levels of income without the assistance of the disadvantaged partner.[266]

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262 PRA, s 1M(b).

263 Set out above at [144].

264 See above at [142].

265 Relying on *Z v Z (No 2)*, above n 100, at 268; Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 (109–3) (select committee report); Claire Green "The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity" (Doctoral Thesis, University of Otago, 2013) at 33–35; *Report of the Working Group*, above n 190; and Sian Elias "Separate Property – *Rose v Rose*" (Address to the Family Court Conference 2011, Wellington, 5 August 2011).

266 I accept Mr Goddard's submission that there can be legitimate criticisms of both the diminution and enhancement methods used to date. Both invite evidence about capacity, which in turn invites disagreement on matters that could increase the tension between the parties. This can be particularly damaging if there are children involved. See also Arnold J's comments at [309]–[310] on this issue. The diminution and enhancement methods also involve to some degree hypothetical earning figures. Mr Goddard's methodology does involve some uncertainties as to future earnings but it works from known figures (current earnings of both parties). In this regard, it is better than the methodologies currently used.

[185] Mr Goddard's suggested methodology requires an equal sharing of the expected future earnings of both partners up to the time it would take for the disadvantaged partner to be restored to a position that does not involve ongoing disadvantage. The time value of money is taken into account with "future earnings discounted back to the Family Court hearing date (as the default date for valuation), and pre-hearing earnings attracting interest up to that date". Some account would also need to be taken of contingencies that may affect the ongoing income differential.

[186] Mr Goddard accepts that on this analysis the resulting amount should be halved as otherwise the disadvantaged party would receive the whole of the disparity when it was a joint decision (or deemed to be) as to the division of functions. Mr Goddard also accepts that sums already received would need to be deducted (in this case the share in the super profits up to the date of hearing and the amount Ms Scott received for her share of the business). In his submission an approximate calculation of the amount payable to Ms Scott if it had been assessed on an expectation measure would lead to an order of over $1 million. This calculation was provided by way of submission rather than by way of expert evidence.[267]

[187] Mr Goddard argues that this Court should refer this case back to the Family Court for the application of his suggested approach.

Mr Williams' submissions

[188] Ms Robertson, for Mr Williams, submits that Mr Goddard's suggested methodology is without evidential foundation. Further, such a methodology is contrary to the legislative history of s 15. In her submission, the 2002 reforms to the PRA were largely drawn from the recommendations of the 1988 Working Group, which decided against recommending that one spouse share in the other spouse's future income.[268]

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267 In his approximate calculations Mr Goddard uses a contingency rate of 10 per cent, which he says is conservative. He bases this rate on the Ogden Tables. For more on Ogden Tables, see above at n 156.

268 See above at [147].

[189] In Ms Robertson's submission the focus of s 15 is on the disadvantage suffered by the non-working partner and that interpretation is in line with New Zealand authority.[269] It formed the basis of the order in this case. New Zealand authorities have also consistently held that earning capacity and increases in earning capacity are not relationship property to which the PRA applies.[270] She also argues that a share in future earnings would cut across the spousal maintenance regime and go against the clean break principle which is a feature of New Zealand's matrimonial and property relationship regime.[271]

[190] In addition, Ms Robertson submits that the methodology is not supported by overseas authority. She relies on the rejection of the expectation approach by the House of Lords in *Miller v Miller*, where it was said "[c]laims for expectation losses do not fit altogether comfortably with the notion that each party is free to end the marriage".[272] It is also submitted that the reliance on other areas of law by Mr Goddard, including estoppel, is misplaced given that the PRA is a code that applies instead of the rules and presumptions of common law and equity.

Wording of s 15

[191] I start my assessment of Mr Goddard's submission about the proper basis for assessing an order under s 15 by examining the wording of the section.

[192] Section 15(1) does not provide the mechanism by which any order made under the section should be calculated. It is basically a threshold that must be passed before the section applies. Under that subsection there must be an assessment whether the income and living standards of one partner are likely to be significantly higher than those of the other partner.[273] This is a comparative assessment between the two

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269 Relying on *X v X*, above n 218, at [49]–[50], [114] and [117] per Robertson J.

270 Relying on *Z v Z (No 2)*, above n 100, prior to the 2002 reforms; and *M v B*, above n 98, after these reforms.

271 For more on this principle, see Arnold J below at n 364.

272 *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618 at [58].

273 In *X v X*, above n 218, at [78]–[82], it was said that income will often be a critical indicator of standard of living and may be the only basis from which any disparity can be inferred. In such cases, a finding of income disparity may lead automatically to a finding of disparity in living standards and therefore two separate analyses may not be required. Both elements must still be satisfied. The Court did comment, however, that how individuals choose to use their assets can impact enormously on their standard of living and it should not be assumed Parliament expected the courts to inquire into matters of personal choice. I agree with these comments.

partners. There is then an assessment of whether this disparity arose because of the division of functions within the marriage, civil union or de facto relationship. This would be a reasonably easy assessment to make if one of the partners took more responsibility than the other for household tasks or for the care of children at the expense of his or her career.

[193] If the partner who would otherwise be disadvantaged had separate property and therefore the post-relationship income and living standards of both partners would be relatively equal, then arguably the first limb of the test would not be met.[274] On the other hand, the section does not mention separate property. It could be that the separate property issue comes under s 15(2)(c) as a relevant consideration in deciding whether or not to make the order, rather than being a threshold question in s 15(1). We heard no argument on this point and it is not necessary to resolve it for the purposes of this appeal.

[194] Section 15(2) sets out the factors that may be taken into account in deciding whether or not to make an order under the section. Section 15(2)(a) does suggest that there should be a comparison between the likely earning capacity of each partner in the future in the circumstances they find themselves in at the date of the hearing. Under s 15(2)(b) the assessment can take into account whether one party will have a role for the ongoing daily care of children. Sections 15(2)(a) and (b) are clearly future looking. I accept that the reference in s 15(2)(c) to "any other relevant circumstances" could potentially include events during the relationship.

[195] Section 15(3) then provides that the court may, if it considers it just, order one partner to transfer relationship property or to pay a sum of money out of that partner's relationship property to the disadvantaged partner "for the purpose of compensating" that disadvantaged partner. The compensation being referred to must relate back to s 15(1) and therefore must be compensation for the disparity in income and living

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274 That this would be the position is suggested in *X v X*, above n 218, at [82] per Robertson J (O'Regan and Ellen France JJ agreeing: see [169]). It is also suggested there that a new partner's wealth might be taken into account. I would have thought that, at least in this part of the test, this should be irrelevant. It may be relevant in an assessment of what level of award would be just. There is, however, no guarantee that a new relationship will last. This issue does not arise in this case.

standards to the extent that the differential is caused by the division of functions within the marriage.

[196] I do not accept Mr Goddard's submission that s 15 is directed at fulfilling the expectation of one partner that, had the relationship not ended, he or she would have continued to share the income and living standards of the higher income earning partner. That would be contrary to the clean break principle and not within the wording of the section.[275]

[197] It seems to me, however, that the wording of s 15(2)(a) contemplates that compensation should relate to the differential between the future earning capacities of the partners to the extent that the differential results from the division of functions within the marriage.[276] Mr Goddard's methodology is designed to measure the disparity between the partners. It thus accords with the wording of the section, in application if not in conception.

Other sections of the PRA

[198] I accept Mr Goddard's submission that the purpose and principles provisions of the PRA, and in particular the principles that all forms of contribution to the relationship are treated as equal[277] and that a just division of relationship property must have regard to economic advantages and disadvantages arising from the relationship,[278] can be seen as supporting an approach that assumes, where the threshold in s 15(1) is met, that both partners have contributed equally to any enhanced earning capacity.[279]

[199] I would further accept that s 18 supports Mr Goddard's argument that the entire premise of the PRA is to treat all contributions within the relationship as equal. This premise must be seen as applying to property as defined in s 2 but also to human capital

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275 I agree with what is said by Arnold J on this issue at [303]–[306] of his reasons.
276 In this respect therefore I agree with Arnold J's comments at [294] and [307]–[308] of his reasons.
277 PRA, s 1N(b).
278 Section 1N(c).
279 See below at [204].

and earning capacity, to the extent that this is explicitly dealt with under s 15. The cross-heading to ss 15 and 15A also supports his approach.

[200] I do not accept Ms Robertson's submission that compensation calculated in accordance with Mr Goddard's methodology would cut across the spousal maintenance regime. It would sit alongside that regime and have the same relationship with it as compensation calculated on other methodologies. A s 15 order could be taken into account by a court when assessing a claim for maintenance, as it was in this case.[280] Further, an order under s 15 may be more conducive to the clean break principle than spousal maintenance as it is paid out of relationship property, whereas maintenance can be a regular payment for a period.

Support from legislative history?

[201] I do not accept the submission of Ms Robertson that the legislative history rules out Mr Goddard's methodology. It is true, as Ms Robertson points out, that the Working Group recommended against an approach that treated future earning capacity as an item of property.[281] It is also true that case law has confirmed that human capital is not property for the purposes of the PRA.[282] Section 15, however, does not purport to treat human capital as property. It provides for compensation for disparity to be paid from relationship property, incidentally an approach also rejected by the Working Group.[283] As long as Mr Goddard's methodology is understood as a means of calculating compensation for disparity caused by the division of roles in the relationship, it is consistent with the legislative history.

[202] As was made clear by Ms Wilson, the SOP was designed to institute fundamental changes to the Act, including its extension to de facto couples and the inclusion of provisions designed to deal with disparity. This was against the background of the comments made by the Court of Appeal in *Z v Z (No 2)*[284] and the extensive submissions that had earlier been received on the Bill as introduced.[285] The

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280 As summarised by the Court of Appeal: CA decision, above n 30, at [116]–[119].
281 See above at [147].
282 See above at [149].
283 See above at [147]. See also *M v B*, above n 218, at [217] per Hammond J.
284 See above at [148]–[149].
285 See above at [151].

fundamental nature of the changes was made even clearer by the Select Committee's introduction of s 1N and, in particular, the principle set out in s 1N(c) recognising disparity. It is also clear from the Select Committee's comments that it was leaving the detailed methodology for addressing disparity to be worked through in case law. The emphasis, however, was to be on an equality of outcome.[286] Ms Wilson also made it clear that the purpose of the provisions was to reverse the disparity caused by the division of functions in relationships and in so doing make sure that the PRA did properly reflect its purpose and principles.[287]

General approach

[203] As Arnold J outlines, there has been inconsistency in how s 15 has been applied by the courts to date.[288] In particular, this relates to the narrow view the courts have usually taken in assessing what the effects of the division of functions in the relationship have been, particularly in the context of the issue of enhancement to the working partner's income.[289] I agree with Arnold J that a broad approach should be taken.[290]

[204] I agree that the main focus should be on the disparity between the partners.[291] I also agree that, where there has been a relevant division of roles, any disparity will be assumed to have resulted from that division, at least in a long term relationship.[292] The assumption that the disparity results from the division of roles can be rebutted but I agree that this will not be easy where a relationship was a lengthy one.[293]

[205] The broad approach discussed by Arnold J is the only one that is consistent with the principle that all contributions to the relationship, whatever form they take, are treated equally. The purpose and principles sections in ss 1N and 1M, where this

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286 See above at [155].
287 See above at [153] and [156].
288 See at [290] and [294] of his reasons.
289 In this regard s 18(1)(g) and (h) seems of particular significance.
290 See at [293] and at [307]–[323] of Arnold J's reasons and the background he discusses at [279]–[292]. See also [356] of Elias CJ's reasons where she agrees with [323] of Arnold J's reasons.
291 See at [345] per Elias CJ and at [326] per Arnold J.
292 See at [345] per Elias CJ and at [293] and [323] per Arnold J.
293 I agree with Arnold J that, at least in relationships of long duration, the presumption could usually only be rebutted by factors independent of the division of functions within the relationship: see at [324]–[325].

is made clear, were introduced at the same time as s 15. It is inconceivable that they were not intended to apply to that section.[294] The legislative history reinforces the view that the section was designed (where it applies) to create a situation of substantive equality by reversing the disadvantage suffered through the division of roles in the relationship.

Available methods to calculate disparity

[206] Mr Goddard's methodology can be used to calculate compensation for disparity in income caused by the division in roles in the relationship.[295] Arnold J's methodology, to the extent it differs from that put forward by Mr Goddard, is another possible approach.[296]

[207] I do not rule out other methods being applied in suitable cases to assess disparity, including the diminution and enhancement methodologies used to date. The terms of s 15(3) are wide. Section 15(2)(a) is not the only consideration to be taken into account. It seems to me, therefore, that the method used to assess just compensation must depend on the particular circumstances of the particular parties.[297]

[208] The methodology to be used must also be assessed against the requirement that relationship property cases be decided as expeditiously and inexpensively as possible.[298] Calculation of compensation under s 15 must be achieved in as simple a manner as possible.

[209] In *X v X*, O'Regan and Ellen France JJ noted the use of the Ogden Tables in the United Kingdom and, while not suggesting that the degree of rigidity used in the English cases should be adopted in s 15 cases, said that "with some development of consensus over time on appropriate discount factors … the methodology used in this

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294 The principle has in any event been the philosophy of the PRA since inception. Section 18 was in the Act at inception (although the role of misconduct, now dealt with in s 18A, has been subject to amendment over the years).

295 Subject to my comments on how Mr Goddard applied the methodology in this case: see below at [221]–[223]. Further, it is evident I take issue with Mr Goddard's underlying premise (expectation) for the use of this methodology: see above at [196] and n 275.

296 See at [326]–[328] of his reasons. It will be apparent that I am in general agreement with the whole of Arnold J's reasons.

297 I discuss the issue of just compensation in more detail below.

298 PRA, s 1N(d).

case or something similar should be able to be used without the need for extensive and expensive expert evidence".[299] I agree that the development of such tables in New Zealand would assist in calculating the inputs used to measure disparity between the parties.

[210] Other approaches that attempt to eliminate complex calculations and costs of experts may be available, to the extent that the resulting compensation is just in the sense of correcting but not reversing disparity as discussed below.[300]

Just compensation

[211] The next stage of the s 15 inquiry is to assess the level of compensation. Any such compensation must be just. In light of the policy behind s 15, just compensation should remove disparity and create equality of outcome.[301] It seems to me that this means that compensation should be ordered up to the extent it does not reverse the disparity in earnings and living standards.[302] As William Young P (as he was then) said in *M v B* "[w]hat is 'just' for the wife must not, of course, be at the expense of what is unjust for the husband".[303]

[212] In most cases income is linked to living standards[304] but I do not rule out the possibility that reverse disparity in living standards could also result if the extent of the additional share in relationship property that is ordered to be transferred to a disadvantaged partner is so high that the disadvantaged partner would be left, if given

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299 *X v X*, above n 218, at [183]. William Young J also comments that it would be worthwhile for New Zealand to develop a set of tables similar to the Ogden tables: see at [459] of his reasons, as does Arnold J: see at n 421 below.

300 See for example the support for the use of the American Law Institute's *Principles of the Law of Family Dissolution: Analysis and Recommendations* (St Paul (Minn), 2002) of Mark Henaghan in his paper "Exceptions to 50/50 Sharing of Relationship Property" (paper presented at "A Colloquium on 40 Years of the PRA: Reflection and Reform", Auckland, 8–9 December 2016); and Miles, above n 218, at 557 and 565, who advocates for the use of actuarial tables. Miles also suggests, however, that s 15 requires legislative, rather than judicial, remedy. See also *X v X*, above n 218, at [143]–[145] per Robertson J, referring also to John Caldwell "The Various Disparities of Section 15" (speech to the Family Court Judges' Conference, Gisborne, 24 October 2008).

301 See above at [153]–[156].

302 This was one of the other reasons the majority in *X v X* halved the award: *X v X*, above n 218, at [234]–[235]. Mr Goddard recognises that half of the sum calculated under his expectation methodology should be a cap so that there is not reverse disparity created: see below at [230].

303 *M v B,* above n 98, at [179]. See also *Jack v Jack*, above n 219.

304 See for example *X v X*, above n 218, at [85]–[95] per Robertson J.

a full order of compensation, with higher living standards than those of the other partner.

[213] There may be other factors to be taken into account in assessing just compensation.[305] For example, the age of the parties or the length of the relationship may be relevant. Any ongoing care of children will also be relevant. Another factor may be that the relevant division of roles lasted only for part of the relationship or that the disparities existed at the start of the relationship.[306] Separate property, if not taken into account at the first stage under s 15(1), will also be relevant. I discuss later the factors that were taken into account by the Court of Appeal in this case and conclude that only one was relevant.[307]

[214] I do not, however, accept that there is a broad discretion under s 15 to provide what the particular judge considers is just.[308] The assessment of what is just is constrained in that it must relate to the evidence of the particular circumstances of the particular couple. A just order should be designed to compensate fully for the disparity but not past the point where it would risk creating a disparity the other way.

[215] As to halving, this will be appropriate in circumstances where this is required to ensure disparity is not created for the other party. However, halving is not necessarily the correct result in all cases to ensure that there is no reversal of disparity. This will depend on the circumstances of the couple and the methodology adopted. I note that, under Mr Goddard's methodology, the amount is halved to ensure disparity is not reversed. I agree this is appropriate.[309]

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305 In this regard I agree that the matters outlined by Arnold J's comments at [326](b) and [327] should be considered.

306 Subject to the caution expressed by Arnold J at [324]–[325].

307 See at [233]–[255] below.

308 As some of the comments in other s 15 cases might suggest and which may have the danger of encouraging litigation. Comments by the Court of Appeal in the current proceedings of a "broad brush" approach and a "matter of impression" may be concerning in this regard unless all that is meant is that a just award must be achieved as simply as possible: CA decision, above n 30, at [91], [93], [97] and [99]. Contrast *P v P* [2005] NZFLR 689 (HC) at [68] where it was said that "regardless of the absence of guidance in the section itself, judges are bound to follow a method of calculation which is both transparent and reasoned".

309 See also Arnold J's comments at [326](e) of his reasons.

Date compensation assessed

[216] In *X v X* it was held that the assessment of disparity is made as at the date of separation but that the calculation is made once the extent of relationship property and the relevant shares in the property are known.[310] This was the approach taken in the Courts below in this case and neither party challenged that approach in this Court.[311]

[217] I am inclined to consider the approach in *X v X* to be correct.[312] Section 15(1) sets out the circumstances in which the section applies. Although not altogether happily expressed, the wording of s 15(1) seems to me to support the *X v X* approach. The opening sentence of s 15(1) refers to the "division of relationship property". As Robertson J said in *X v X* this is because it would be artificial to make an assessment under s 15 "in a vacuum".[313] The assessment should be made once the shares in relationship property are ascertained.

[218] Section 15(1) goes on to say that the disparity must be "after the marriage, civil union, or de facto relationship ends". While the wording could suggest that this would occur sometime in the future, the ending of a de facto relationship will be at separation, there being no further step required to end the relationship. While the formal end to a marriage or civil union can only occur at a future date, it is unlikely that a distinction as to the calculation of disparity between de facto relationships and marriages or civil unions was intended. This is particularly the case because the time (if ever) when the formal steps to end a marriage or civil union would be taken would not normally be known at the time of the relationship property division.

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310 *X v X*, above n 218, at [75] and [76] per Robertson J and at [169] per O'Regan J and Ellen France JJ. It is apparent that I take a different view from that of the Chief Justice as to what was decided in *X v X*: see at [340]–[341] of her reasons. The Court in that case endorsed an approach of calculating diminution since separation: see *X v X* at [132] per Robertson J and [177], [184](b) and [226] per O'Regan and Ellen France JJ. I do agree that a maintenance order could be made for the period between separation and date of hearing but I do not agree that this is the only option. If a maintenance order is made, then it would of course need to be taken into account when considering any application made under s 15, as I set out at [200].

311 Mr Goddard does suggest a refinement of the calculation in that he takes the present value to date of hearing of both pre-hearing date and post-hearing date cash flows: see at [185], [231] and [233]. It may be that this approach is an available one but I make no definitive comment on it absent expert evidence.

312 This is in contrast to Elias CJ and William Young J who are of the view the disparity is assessed from the date of hearing: see at [339]–[342] per Elias CJ and at [454] per William Young J.

313 *X v X*, above n 218, at [76].

[219] That the interpretation in *X v X* may be correct might be reinforced by the final words of the section "while the parties are living together". These words seem to suggest (despite the different context) that a distinction may be being drawn between that period and the position after separation. Further, calculating disparity from a later date than separation would encourage delays in getting to a hearing and may discourage settlement.

[220] As the issue was not argued before us, however, I would not make a definitive finding on the issue of timing.

Comments on Mr Goddard's calculations

[221] This Court has not had the benefit of decisions below with regard to the mechanics of Mr Goddard's proposed methodology and no expert evidence about how the calculations should be done. All we have are Mr Goddard's submissions. It is not appropriate to make any definitive comments on his calculations.

[222] I do make some tentative comments. Mr Goddard took for his income figures the whole of Mr Williams' income from his practice, including future super profits. Ms Scott has already been "paid" for her interest in the business, both by way of a share in the super profits before the Family Court hearing and her share in the business.[314] The sum that should be used therefore would be Mr Williams' notional salary of $200,000 plus any projected post-retirement earnings.[315] Mr Goddard does later deduct the super profit share and the value of the business but there could be a mismatch between the value of the business (depending on valuation methodology) and the sum calculated as a result of Mr Goddard's approach.

[223] I have two other comments. First, Mr Goddard applied in his table a contingency rate of 10 per cent to the income differential between Ms Scott and Mr Williams. Whether this is the right approach would need to be the subject of expert evidence, as would the appropriate rate. Secondly, Mr Goddard's figures rely on

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314 As Ms Robertson pointed out.

315 As noted earlier, if personal goodwill did exist in this case (as William Young J would hold), it would have to be treated as earning capacity and need to be taken into account for the purpose of these calculations: see above at [104].

Mr Williams working as a partner until aged 70. This may be a reasonable assumption but it seems to me arguable that the same assumption should be made about Ms Scott when performing the calculations. Once Mr Williams has retired, the differential could reverse. Again, expert evidence would be needed on what is appropriate in such circumstances.

Remission to the Family Court?

[224] I would not remit the case to the Family Court to apply Mr Goddard's suggested method in this case. It would be unfair to do so, given the methodology was argued for the first time in this Court. Ms Scott could have put this methodology forward in the Family Court, accompanied by suitable expert evidence.

[225] I do accept that there may have been some difficulty in persuading the Courts below to accept this methodology. For example, the Court of Appeal in this case said that s 15 did not exist to "simply split the parties' future earning capacities" or to "equivalise the income streams of two persons".[316] Mr Goddard's methodology (and certainly his justification for it) could have been seen as advocating that. It may be unreasonable to expect a party to argue what could be perceived as a lost cause in the courts below but, at the least, an application to adduce expert evidence in this Court would have been appropriate.[317] Without such evidence, this Court is not able to decide definitively whether the method was appropriate in this case or have a clear idea of likely result if it had been. To send the matter back in such circumstances would be unfair.

[226] I also accept Ms Robertson's submission that, given Mr Williams' notional income has been assessed at $200,000 and Ms Scott's projected income assessed at $330,000, it is by no means obvious that applying Mr Goddard's methodology would have resulted in a higher order in this case.

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316 CA decision, above n 30, at [97]. An expectation style methodology was also rejected by Robertson J in *M v B*, above n 98, at [146]–[147].

317 I make no comment on whether such an application would have been accepted: see above at n 185.

Was the Court of Appeal approach correct?

[227] For the purposes of answering this question, I must necessarily deal with the case on the basis that the diminution and enhancement methods were available to be used to assess the quantum of any s 15 order in this case.

Ms Scott's submissions

[228] Mr Goddard submits that the diminution method, as applied in this and other cases, has led to parsimonious and unjust orders. One of the main reasons for this has been the contingency rate applied. Mr Goddard argues that it has become common for a flat rate of around 35 per cent to be applied for contingencies.

[229] In his submission, if the disadvantaged partner's estimated income is a reasonable estimate, it should already have struck a balance between high and low possibilities and it is wrong in principle to apply a further contingency to reflect the risk of a failure to achieve that income. This leaves the risk of not earning the income due to sickness, death or redundancy and the like. In this regard a rate of 35 per cent is not reconcilable with the cost of income protection insurance. Nor is it consistent with the Ogden Tables.[318] Further, in his submission no contingency should be applied from the years from separation to hearing if the disadvantaged party did not experience any of the contingencies at which the discount is directed.

[230] In Mr Goddard's submission it is also wrong to halve a s 15 order based on the diminution method. He argues that, if the approach is to restore the party to the position they would have been in had the division of functions not occurred, an order of the entire loss of income is required. Halving means that the impact of the division of functions in the past on the disadvantaged partner is halved but the advantaged partner will receive his or her total future income. Mr Goddard does, however, accept that the disadvantaged partner should not be better off than he or she would have been had the relationship continued. Thus, in his submission the expectation measure should operate as a cap.

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318 For more on the Ogden Tables, see above at n 156.

[231] Mr Goddard submits further that the s 15 order should be calculated with the present value of all cash flows to the date of hearing and interest awarded on the resulting sum.[319]

[232] Mr Goddard submits that none of the reasons given in the High Court or the Court of Appeal for reducing the diminution calculation were warranted. In particular:

(a) taking into account the gross amount and the proportion of relationship property represented by that amount, as well as referring to relativity with other cases, will inevitably mean that cases of substantial disparity and substantial loss of earning capacity will attract inadequate s 15 compensation orders that do not address the disparity that actually exists;

(b) factors such as the total asset pool available to each party after the relationship property division and the ability to generate income from it are neutral as between the parties and do not diminish the gap between actual and projected income; and

(c) there was no basis in the evidence for the view expressed by the Court of Appeal that Mr Williams was only likely to work for another 10 years or so, and that is in any event irrelevant to an assessment of Ms Scott's reliance loss.

[233] Mr Goddard also argues that often an order calculated based on the diminution of income of one partner should be combined with an "unjust enrichment" calculation on the basis that there was a "joint investment in the acquisition by one partner of human capital". This includes not only formal qualifications, but also experience, knowledge, seniority, networks and reputation. He submits that an "unjust enrichment" methodology would fully recognise the equality of contributions.[320] This methodology would require an assessment of the difference between the advantaged partner's income when the relationship began, an adjustment for inflation through to

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319 The Family Court awarded interest from the date of the decision until the date of payment, while the High Court awarded no interest: FC decision, above n 6, at [367] and see above [172]. The Court of Appeal did not address interest: see above at [178].

320 As recognised as a purpose of the PRA: s 1M(b).

the end of the relationship and a comparison to the income of the partner at the end of the relationship. The difference would be treated as income "attributable to enhanced human capital". That human capital could be valued as the net present value of the difference at hearing date (adjusted for contingencies). Mr Goddard submits that the result of this methodology would not be less than the enhancement calculation of "approximately $105,000" that is implicit in the Family Court order.

[234] Mr Goddard rejects any argument that Mr Williams' earning capacity would have been the same, even if there had been no division of roles within the relationship in terms of childcare, because a nanny could have been hired. Mr Goddard submits that this argument is inconsistent with the scheme of the PRA, which values all contributions equally. It also fails to respect the choices actually made by the parties, reduces the contribution of the partner tasked with child care to the economic value of a substitute service and overlooks the difference between a partner at home with children and a nanny (citing for example the fixed hours and entitlement to holiday and sick leave of the latter).

[235] Mr Goddard submits that, if the matter is not remitted to the Family Court to assess the proper basis of the order, the Family Court award should be restored on the basis that it is substantially less than the sum calculated under any diminution measure, and certainly less than any sum which takes enhancement into account.

Mr Williams' submissions

[236] Responding to Mr Goddard's criticisms of the diminution measure, Ms Robertson does not accept that a standard contingency of 35 per cent is applied in s 15 cases. She says that reviewing the cases in which compensation has been ordered the contingency rate applied can range from no discount to over 50 per cent, depending on the methodology used and the facts of the individual cases. In this case, the contingency was to allow not just for death or illness but also to cover the assumptions as to income being too optimistic. Further, both parties' experts accepted that 35 per cent was the appropriate contingency discount.

[237] Ms Robertson classifies Mr Goddard's date of calculation argument[321] as a claim to interest on the s 15 calculation. In any event, she argues that, even on the quantum of compensation assessed by the Family Court (now less in light of the decisions of the High Court and the Court of Appeal), the s 15 order is money that has been controlled by Ms Scott throughout the proceedings by her occupation of the Remuera properties. No new payment is required to be made to her. Therefore, there is no need for interest to be awarded.

[238] As to halving, Ms Robertson accepts that this is a question of fact in each case. Although there is no rule, she argues that normally a s 15 calculation should be halved as otherwise paying the total amount would reverse the disparity, a result which is contrary to the comments of the majority in *X v X*.[322]

[239] Ms Robertson submits that Mr Goddard's suggested unjust enrichment approach is a claim to enhanced earning capacity which was rejected by *Z v Z (No 2)*.[323] This rejection was not affected by the introduction of the current form of s 15 in the 2002 reforms. As to the enhancement calculation made by the Family Court in the s 15 order, the difficulties with Mr Lyne's evidence on this were identified by the High Court[324] and upheld by the Court of Appeal.[325] Further, Ms Scott was enriched during the marriage as she was supported by Mr Williams in obtaining her law degree. Finally, the value of any assistance given to Mr Williams' law firm by Ms Scott was taken into account when valuing the firm for the division of relationship property.

Diminution method

[240] The first step under a s 15 exercise using the diminution method is to calculate the difference between the disadvantaged partner's actual income and his or her projected income. The period over which this is calculated should end on the earlier of retirement or when the disparity will cease.

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321 See above at [231].
322 *X v X*, above n 218, at [234]–[235].
323 *Z v Z (No 2)*, above n 98.
324 HC decision, above n 6, at [167].
325 CA decision, above n 30, at [109].

[241] With regard to actual income after separation, in this case the Family Court Judge held that Ms Scott should not have been required to return to highly stressful work for the purposes of this calculation. He thus rejected the income projections Mr Goodall used in his evidence.[326] The actual income figure used in the Family Court of $84,000 is no longer challenged in this Court.

[242] While not suggesting the use of the $84,000 figure was inappropriate in this case, I do comment that calculating an actual income figure that is not based on a return to the type of work for which a disadvantaged partner is qualified should not be taken too far. Purely lifestyle choices (as against rational choices based on, for example, age, health or uncertainty as to advancement) should not be accepted as diminishing the actual income figure used in the calculations.[327] The future actual income figure should reflect the aptitudes, abilities, qualifications and circumstances of the disadvantaged partner at the time the s 15 order is calculated.[328]

[243] Moving to Mr Goddard's criticisms of the way the first stage calculations were done in this case, I am inclined to accept his submission that the projected income should be set at a realistic level and that therefore a contingency rate that takes into account the possibility of not achieving that level of income should not be necessary.[329] It follows that I would be inclined to accept that any contingency discount should largely be designed to take into account the risk of matters such as sickness, death, redundancy and should usually be significantly less than the 35 per cent used in this case. I would also be inclined to accept Mr Goddard's submission that no contingency for illness, death or redundancy should be applied from separation to hearing date as none of these events have occurred. I am not prepared to be definitive on these points, however, given the lack of expert evidence.

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326 See above at [166].

327 I agree with Arnold J that the same considerations do not apply to "choices" made during the relationship: see in particular at [317]–[318] and n 407 of his reasons.

328 For example in *X v X*, above n 218, O'Regan and Ellen France JJ noted that it was appropriate to deal with the case on the basis of "projections of income capacity after full re-entry into the workforce, rather than actual income" for both parties. However, to resolve inconsistencies in the particular case, Mr X's income capacity at separation and Mrs X's actual future income was used: at [200]–[202].

329 This is consistent with the views of the majority in *X v X* that an appropriate income figure should be taken so that a further discount to that income amount is not required: at [220]–[221].

[244] Turning to the issue of halving, it would have been possible for s 15 to treat the disparity between the actual and projected income of the disadvantaged party as a type of negative asset of the relationship.[330] If that had been the case, it would have been clear the amount should be halved.[331] However, that is not the way the section is drafted – it speaks rather of "compensation". I accept Mr Goddard's submission that this term would normally be referring to full compensation, subject to the issue (discussed below) of whether that would be just compensation for the disparity in the particular case.[332]

Enhancement method

[245] I accept Mr Goddard's submission that s 15 orders can recognise both the diminution of earnings of one party and the enhanced earnings of the other, to the extent required to provide just compensation for the disadvantaged party. The two methods are not mutually exclusive.[333] This means that an order under the diminution methodology might be combined with that using the enhancement method. Indeed, in many cases, as Arnold J outlines, that may well be the proper approach.

[246] Mr Goddard's suggested "unjust enrichment" methodology may also be appropriate in some cases.[334] It could be seen as consistent with the philosophy behind the PRA (as set out in the purposes, principles and s 18) that all contributions to the relationship should be valued equally. However, expert evidence would be necessary to assess whether this is an appropriate methodology in a particular case. No such evidence is available in this case.

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330 I note that in *X v X* it was held that a s 15 award is not an item of relationship property: at [141] per Robertson J and at [230] per O'Regan and Ellen France JJ. If the disadvantage were treated as a negative item of relationship property, to be even handed the enhanced future earnings of the advantaged party would need to be treated as an asset.

331 The majority in *X v X* recognised that the disadvantaged party loses the ability to share the ongoing consequences resulting from the division of roles. The majority thus considered it correct in principle that the income shortfall be halved to require the advantaged party to pay their share of the loss: at [233] and [235]. It will be clear that I do not agree with this reasoning.

332 See above at [211]–[215].

333 Ms Robertson does not suggest otherwise, but submits that an amount based on enhancement was inappropriate in this case.

334 I agree, however, for the reasons given by Arnold J at [303]–[306] that the rationale given by Mr Goddard for the use of this method does not accord with the PRA.

Diminution method in this case

[247] I first examine Mr Goddard's criticism of the contingency rate used. I accept his submission that the experts do appear to have taken the figure of 35 per cent in *X v X* as the figure to be used, without considering its applicability in the very different factual setting of this case. The contingency figure in *X v X* reflected the evidence given in that case and should not be used as a benchmark, as it seems to have been here.

[248] The Family Court Judge had accepted Mr Peebles' evidence of a likely income of $450,000 but reduced it to $330,000 for the purposes of the calculation.[335] Ms Scott's projected income had therefore already been reduced by some 27 per cent from the figure accepted by the Judge. A further contingency figure at such a high level as 35 per cent was not necessary.

[249] The Family Court was justified in accepting Mr Peebles' evidence on Ms Scott's projected salary and in rejecting Mr Jaine's evidence on that topic.[336] In particular, the Judge accepted Ms Scott's submission that the evidence that Ms Scott would have earned between $80,000 to $100,000 was "lacking any basis whatsoever" and Mr Jaine failed to take into account Ms Scott's ability and the fact that Ms Scott's actual salary on separation was $84,000.[337] Further, as noted in the Family Court, even if inflation alone is added to Ms Scott's 1984 income (bringing it to approximately $212,000), it would have exceeded the figures put forward by the experts called by Mr Williams.[338]

[250] The difficulty is that there is no evidence before us as to a suitable contingency rate. The 35 per cent rate was also used by Mr Lyne, who was called by Ms Scott.

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335 See above at [163] and [167].

336 FC decision, above n 6, at [332]–[342]. Mr Goodall's figures for Ms Scott's projected income in his second affidavit were based on Mr Jaine's figures: see above at [165] and n 231.

337 FC decision, above n 6, at [334] and [336].

338 At [336].

Enhancement method in this case

[251] I consider that the High Court and the Court of Appeal were correct to reject the enhancement amount ordered by the Family Court Judge in this case. While on the broad view that is required Ms Scott could be seen as having contributed to Mr Williams' enhanced earning capacity over the course of the marriage, her projected income was higher than Mr Williams' notional $200,000 income. This projected income was taken into account under the diminution method and this would in this case sufficiently compensate for any disparity that has arisen.

[252] In addition, I accept Ms Robertson's submission that Ms Scott's contributions must be seen primarily as having enhanced the business rather than enhancing Mr Williams' (notional) $200,000 income. She has already shared in this through the award of super profits and the value of the business. I do not, however, accept the submission that Ms Scott's earning potential was enhanced by the law degree. There was little or no evidence to suggest this was the case. I also do not accept any suggestion that Ms Scott's role could have been performed by a nanny and must be valued accordingly for the reasons given by Mr Goddard outlined above.

Factors taken into account by the Court of Appeal

[253] The factors to be taken into account when deciding on a just order should be directed at the aim of ensuring that disparity is removed but not transferred to the other partner. While some of the factors taken into account by the Court of Appeal were related to this, others were not.

[254] I accept Mr Goddard's submission that the share in and amount of relationship property and any income from it is neutral in considering what is a just order as both parties share in relationship property equally.[339] The only relevance of the relationship property pool is that it is a cap to any order. The investment income from a s 15 order is also irrelevant, in the same way as any post-hearing gains from relationship property are irrelevant. As Mr Goddard submits, the advantaged partner keeps all his or her future income and any gains from investing it. Comparison with the amounts of orders

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339 I thus reject the approach to this issue discussed by William Young J at [460]–[462] of his reasons.

in other cases is also irrelevant. While consistency of methodology and aim is important, the compensation that is just will depend on the individual circumstances of the particular couple.

[255] The only factor referred to by the Court of Appeal that was relevant to ensuring the disparity was not reversed was the fact Ms Scott is likely to have a longer working life than Mr Williams, given the age differential.[340]

Just compensation in this case

[256] The Court of Appeal took as its starting point the disparity up to Ms Scott turning 60.[341] The amount was halved (in accordance with the approach taken by Mr Lyne).[342] This has already shared the disadvantage. The Court of Appeal then reduced the period to ten years on a broad-brush approach taking into account the various factors it identified.[343]

[257] As is apparent from what is said above I do not accept Mr Goddard's submission that the differential retirement dates of the parties is irrelevant. Taking the calculations up to the time Ms Scott turns 65, as the Family Court did, risks reversing the disparity, assuming Mr Williams retires at 65. I accept that it is possible that Mr Williams will work past 65 but this was the date of retirement assumed by Mr Lyne (Ms Scott's witness) in evidence. In any event, whatever age Mr Williams retires, it is likely, because of the age differential, that Ms Scott will work for five (or so) more years than he will. A just order would take this into account.

[258] The other factors taken into account by the Court of Appeal in deciding on 10 years were not, however, relevant. The Court of Appeal took a broad-brush approach without identifying the weight given to the various factors it took into account. In the circumstances it seems fair to both parties to take the middle ground between the Court of Appeal's starting point of $570,000 and the order of $470,000. This recognises that

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340 The exact age differential of the parties is unknown. It is apparent from the High Court judgment that Mr Williams was born in October. There is mention in one of the affidavits of Ms Scott celebrating her birthday at the beach house one January but there is no evidence of Ms Scott's birth month apart from this: see above at n 6.

341 As noted above at n 254, that was reasonable as a starting point in this case.

342 For discussion on whether halving is appropriate, see above at [215] and [244].

343 See above at [175]–[177].

irrelevant factors were taken into account and is preferable to the time, expense and stress of remitting the case to the Family Court.

[259] Subject to the cross-appeal, this means an order of $520,000.

The cross-appeal

Mr Williams' submissions

[260] On behalf of Mr Williams it is submitted that a just order for compensation under s 15 should recognise not only the diminution in income suffered by Ms Scott as a result of the division of functions but also the economic advantages she received from that division: in this case the super profits from the legal practice between separation and hearing date. It is submitted that these super profits are not akin to investment income on relationship property.

Ms Scott's submissions

[261] On behalf of Ms Scott, it is submitted that there is no difference between the super profits received as a return on the ownership interest in the law practice and returns on any other item of relationship property. All such returns are neutral when assessing s 15 compensation and should not be deducted from the sum arrived at when calculating the order.

My analysis

[262] I agree with the Court of Appeal that Faire J erred in his super profit "credit" as such profits are not relevant to the s 15 inquiry or order. Super profits are relationship property and as such are divided equally. As a result, super profits impact each party (and each party's income) by the same amount and are thus irrelevant to a s 15 order.[344]

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344 CA decision, above n 30, at [85].

Summary of the proper approach to s 15

[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.[345] 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.[346]

Name suppression

[266] Ms Scott and Mr Williams are not the parties' real names. False names were used in the Courts below[347] because of some sensitive personal and financial

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345 PRA, ss 1M(b), 1N(b) and 18.

346 Elias CJ and Arnold J are in agreement with this summary: see at [331] per Elias CJ and [329] per Arnold J.

347 FC decision, above n 6, at [484]; HC decision, above n 6, at [2]; and CA decision, above n 30, at [2].

information contained in the judgments. I continue the false names because it is now too late to revert to the parties' real names.

[267] Name suppression should, however, be the last resort. Sensitive material should not be put in judgments where it is unnecessary to the decision.[348] Where information is necessary for the decision but the test for suppression is made out, this could be handled by summarising the evidence in an anodyne fashion in the judgment, with schedules where (for example) detailed confidential business financial figures are needed. This would mean that the judgment could be published with excisions (that is leaving out the schedules) but still be understandable.

Result

Vesting

[268] The Court holds unanimously that the order of the Family Court that the Remuera properties vest in Ms Scott should not have been overturned.

Valuation of Mr Williams' law firm

[269] The Court holds by majority (Elias CJ, Glazebrook and Arnold JJ) that the appropriate multiple was three and therefore that the valuation reached by the Family Court should be restored. This means that the value of Ms Scott's share is $225,000.

Section 15

[270] The Court decides by majority (William Young, Glazebrook, Arnold and O'Regan JJ) that the case will not be remitted to the Family Court for reconsideration of the s 15 compensation.

[271] The Court holds by majority (Glazebrook, Arnold and O'Regan JJ) that, apart from the differential retirement dates of the parties, the factors relied on by the Court

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348 Indeed, sensitive personal information should only be put before the Court if it is relevant. As noted above at [63] in this case much of the material in the affidavits should never have been placed in evidence.

of Appeal for reducing the s 15 order should not have been taken into account. To recognise this, an order of $520,000 is substituted for the order of $470,000 made by the Court of Appeal.

[272] If not agreed, submissions on interest may be filed on or before 1 February 2018.

Cross-appeal

[273] The cross-appeal is dismissed by majority (Glazebrook, Arnold and O'Regan JJ).

Costs

[274] As Ms Scott has been largely successful in her appeal costs of $25,000 are awarded to her, plus usual disbursements to be set, in the absence of agreement, by the Registrar. The Court allows for two counsel. The costs award is $10,000 less than the normal costs for a two-day appeal to reflect the lack of complete success on the s 15 issue and the fact that many of the arguments were not made in the Courts below.

[275] Costs in the Courts below (if not agreed between the parties) should be determined by those Courts in light of this judgment.

APPENDIX

Respondent's Section 15 Claim

Diminution of respondent's income

General assumptions

Discount rate – Based on CPI	3.0%
Gross But for Earnings	$330,000
Annual allowance for other contingencies	35.0%

Calculation of economic disparity arising from the division of functions pursuant to section 15 of the Property (Relationships) Act

Year to March	Period	Respondent's age will be	Estimated Actual gross earnings	Gross annual earnings, but for actions of enhancement	Variance between "but for" and estimated actual future earnings ("Earnings Variance")	Allowance for non collection	Annual difference in income		Annual difference in income (after tax)	Discount factor for time value of money	Present value of Earnings Variance, after contingencies	
		Years	($)	($)	(pre-tax $)	35%	(before tax)	Tax Rate	($)	($)	($)	Accumulated
			a	b	c = a - b	d	e = c * (1 - d)	t	f = e * (1 - t)	g	h = f * g	
2008	1	48	61,149	330,000	(268,851)	35.0%	(123,783)	39%	(75,508)	0.9853	(75,500)	**74,400**
2009	2	49	102,783	330,000	(227,217)	35.0%	(147,691)	39%	(90,092)	0.9566	(86,184)	**160,584**
2010	3	50	81,734	330,000	(248,266)	35.0%	(161,373)	38%	(100,051)	0.9288	(2,924)	**253,509**
2011	4	51	66,783	330,000	(263,217)	35.0%	(171,091)	35.5%	(110,354)	0.9017	(99,508)	**353,016**
2012	5	52	12,183	330,000	(317,817)	35.0%	(206,581)	33%	(138,409)	0.8755	(121,171)	**474,187**
2013	6	53	9,300	330,000	(320,700)	35.0%	(208,455)	33%	(139,665)	0.8500	(118,709)	**592,896**
2014	7	54	84,000	330,000	(246,000)	35.0%	(159,900)	33%	(107,133)	0.8252	(88,406)	**681,302**
2015	8	55	84,000	330,000	(246,000)	35.0%	(159,900)	33%	(107,133)	0.8012	(85,831)	**767,133**
2016	9	56	84,000	330,000	(246,000)	35.0%	(159,900)	33%	(107,133)	0.7778	(83,331)	**850,464**
2017	10	57	84,000	330,000	(246,000)	35.0%	(159,900)	33%	(107,133)	0.7552	(80,904)	**931,368**
2018	11	58	84,000	330,000	(246,000)	35.0%	(159,900)	33%	(107,133)	0.7332	(78,548)	**1,009,915**
2019	12	59	84,000	330,000	(246,000)	35.0%	(159,900)	33%	(107,133)	0.7118	(76,260)	**1,086,175**
2020	13	60	84,000	330,000	(246,000)	35.0%	(159,900)	33%	(107,133)	0.6911	(74,039)	**1,160,214**
2021	14	61	84,000	330,000	(246,000)	35.0%	(159,900)	33%	(107,133)	0.6710	(71,882)	**1,232,096**
2022	15	62	84,000	330,000	(246,000)	35.0%	(159,900)	33%	(107,133)	0.6514	(69,788)	**1,301,884**
2023	16	63	84,000	330,000	(246,000)	35.0%	(159,900)	33%	(107,133)	0.6324	(67,756)	**1,369,640**
2024	17	64	84,000	330,000	(246,000)	35.0%	(159,900)	33%	(107,133)	0.6140	(65,782)	**1,435,422**
2025	18	65	84,000	330,000	(246,000)	35.0%	(159,900)	33%	(107,133)	0.5961	(63,866)	**1,499,288**
									(1,939,675)			(1,499,288)
							Divided by 2		**-$969,837**			**(-$749,644)**

Notes

1 Calculated as 1 / [1 + discount rate) ^ (period - 0.5)]

ARNOLD J

[276] I agree that Judge McHardy's order vesting the Remuera properties in Ms Scott in this case should not have been set aside, and have nothing to add to the reasons of the other members of the Court on that aspect on the case, other than to emphasise my agreement with Glazebrook J's observations at [63] of her reasons.

[277] In relation to the valuation of the legal practice, I have some sympathy in a case such as this for the fair value approach which Mr Goddard QC urged on us, but consider that we cannot properly determine whether or not such an approach should be adopted, and, if so, how it would apply, given that it is not an approach which featured to any significant extent in the evidence and arguments in the Courts below.[349] I also consider that it would be wrong to remit the matter to the Family Court for determination of this point – it is important that this litigation be concluded. In any event, like Glazebrook J, I consider that if the husband is treated as a potential purchaser for the purposes of a market value approach, there may not be much difference between the two approaches.[350] As to outcome, I agree with Glazebrook J that the decision of the Family Court as to the multiple to be applied should not have been overturned, for the reasons she gives.[351] In particular, Judge McHardy appears to have accepted the evidence of Mr Lyne that there was little or no personal goodwill in the practice, which he was entitled to do. Given that we did not receive detailed argument on the point, I would leave for a future occasion whether the approach adopted to personal goodwill in *Briggs v Briggs* should continue to be followed.[352]

[278] The issue on which I do wish to write separately is s 15.

[279] There is a widespread view amongst family law commentators that, as interpreted and applied by the courts to date, s 15 of the Property (Relationships)

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349 Ms Scott's accounting expert, Mr Lyne, did mention fair value as a possible approach in his evidence in the Family Court, but that approach was not developed either in evidence or in argument.

350 See Glazebrook J above at [133].

351 See Glazebrook J above at [139]–[140].

352 *Briggs v Briggs* (1996) 14 FRNZ 404 (HC).

Act 1976 (PRA) has not lived up to expectations. For example, *Brookers Family Law – Family Property* states:[353]

> … difficulties in establishing jurisdiction and uncertainty about assessing quantum have robbed this provision of much of its usefulness. Awards have also been fairly small. The noticeable decline in the number of applications under s 15 in recent years suggests that for many spouses and partners who might come within the scope of this provision, the costs of pursuing the claim far outweighs the potential benefit.

Similarly, in its recently published Issues Paper, *Dividing relationship property – time for change? Te mātatoha rawa tokorau – Kua eke te wā?*, the Law Commission reached the preliminary view that s 15 has failed to achieve its objectives, having considered approximately 100 cases in which there have been applications under s 15.[354]

[280] It is accepted that Ms Scott in this case qualifies for an award under s 15. The issue is quantum. Despite that limited issue, it is necessary to consider what appears to have become the orthodox wisdom on how s 15 is to be interpreted and applied in order to determine the correct approach to quantum.

[281] I begin with s 15 itself. It provides:[355]

> **15 Court may award lump sum payments or order transfer of property**
>
> (1) This section applies if, on the division of relationship property, the court is satisfied that, after the marriage, civil union, or de facto relationship ends, the income and living standards of one spouse or partner (***party B***) are likely to be significantly higher than the other spouse or partner (***party A***) because of the effects of the division of

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353 Nicola Peart (ed) *Brookers Family Law – Family Property* (looseleaf ed, Thomson Reuters) at [PR15.01].

354 Law Commission *Dividing relationship property – time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [18.1] and [19.1]. The Commission identified approximately 100 cases where s 15 applications had been made, about 40 per cent of which were successful: see [18.82]. See also Fae Garland "Section 15 Property (Relationships) Act 1976: Compensation, Substantive Equality and Empirical Realities" [2014] NZ L Rev 355 at 379–381. Having reviewed 60 s 15 cases and interviewed a number of family law practitioners, Dr Garland concluded that s 15 is not working effectively and seems to have failed in its objective.

355 Section 15 of the Property (Relationships) Act 1976 gives effect to the principle in s 1N(c) "that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners arising from their marriage, civil union, or de facto relationship or from the ending of their marriage, civil union, or de facto relationship". Section 15 was one of a number of amendments which were designed to strengthen the concept of equality in relationships.

functions within the marriage, civil union, or de facto relationship while the parties were living together.

(2) In determining whether or not to make an order under this section, the court may have regard to—

(a) the likely earning capacity of each spouse or partner:

(b) the responsibilities of each spouse or partner for the ongoing daily care of any minor or dependent children of the marriage, civil union, or de facto relationship:

(c) any other relevant circumstances.

(3) If this section applies, the court, if it considers it just, may, for the purpose of compensating party A,—

(a) order party B to pay party A a sum of money out of party B's relationship property:

(b) order party B to transfer to party A any other property out of party B's relationship property.

(4) This section overrides sections 11 to 14A.

[282] Section 15 was a legislative response to what had been recognised as a deficiency in the way that, what was then called the Matrimonial Property Act 1976 (now the PRA), addressed the position of non-career partners in relationships that operated on "traditional lines", with one party (usually female) assuming the primary responsibility for home-making and child-care (the non-career partner), and the other assuming responsibility for income-earning (the career partner). The 1988 *Report of the Royal Commission on Social Policy* noted that although the Matrimonial Property Act was a major step forward towards recognising the equality of men and women in marriage relationships, in its presumption of equal contribution and equal sharing of relationship property on separation, it did not necessarily produce true equality on marriage break-up. This was because, despite equal sharing of relationship property, the non-career partner was often left in an economically disadvantaged position when compared to the career partner.[356] The non-career partner was unlikely to have the same income-earning ability as the career partner, because the non-career partner:[357]

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356 See the discussion in *Report of the Royal Commission on Social Policy/Te Kōmihana A Te Karauna Mō Ngā Āhuatanga-Ā-Iwi* (Government Printer, April 1988) vol 4 at 217–227.

357 At 218–221.

(a) would have foregone opportunities for career development in order to undertake the primary responsibility for home-making and child-rearing activities, which would likely mean that they were ill-equipped to return to the workforce following the end of the relationship; and

(b) was likely to continue to have primary responsibility after separation for the day-to-day care of any non-adult children of the relationship.

[283] In its report later in 1988, the Working Group on Matrimonial Property and Family Protection also emphasised this problem, noting that:[358]

> … women's living standards tend to drop after dissolution while those of their former husbands tend to rise. The decline in living standards is often quite dramatic where women have the custody of children and occurs even though there has been an equal division of matrimonial property. This phenomenon is described as 'equality in law but inequality in fact', and 'equality but not equity'.
>
> United States studies indicate that matrimonial property is by and large divided equally but men's incomes after marriage breakdown rose by 20–90% (depending on the area studied) while women's dropped by 33–73%. In the typical situation, the husband was living alone while the wife was supporting two children. Studies in Australia and England have reached similar conclusions.

The report also identified the two primary causes of this decline in the non-career partner's living standards as being a reduction in earning capacity as a result of focussing on home-making and child-rearing during marriage and childcare obligations after separation.[359]

[284] In *Z v Z (No 2)*, the Full Court of the Court of Appeal considered whether the enhanced earning of capacity of a career partner, developed during the course of a marriage as a result of the division of responsibilities and ordering of priorities within the marriage, could be classified as "relationship property" for the purposes of the matrimonial property regime.[360] The parties were married for 28 years. At the time of separation, the husband was a partner in a major accounting firm. At the outset of

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358 *Report of the Working Group on Matrimonial Property and Family Protection* (October 1988) at 4 (footnotes omitted).

359 At 5.

360 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA).

their marriage, the wife earned more than her husband but gave up work to have a family. Throughout their marriage the wife supported her husband in advancing his career, as well as managing their home and caring for their children. She did some part-time work later during their marriage, but was unlikely to be able to return to work because of illness. On separation, both parties received (roughly) half of the assets of the marriage; but the husband would continue to receive a substantial annual income of at least $300,000 for the remainder of his working life (at least six years), while his wife's annual income would be a benefit of approximately $7,000 (their children were financially independent adults by this stage).

[285] The Court of Appeal was sympathetic to the underlying concerns. It said:[361]

> There is growing recognition that the division of matrimonial property under the Matrimonial Property Act [1976] is operating harshly on those women who have forgone their own participation in the workforce, other possibly than on a part-time or temporary basis, and who have supported the advancement of their husbands' careers by managing the household and caring for the children of the marriage. At the same time their husbands who have remained in employment, have acquired experience, skills or qualifications which have increased their earning capacity. At the time of the dissolution of the marriage they are then in the advantageous position of being able to recover from the effect of the division of the matrimonial assets and earn, sometimes in a relatively short time, a substantial income. By comparison, because of the role which she has assumed in the marriage, the wife is ill-equipped to rejoin the workforce and earn an income. Further, where the efforts of the couple during the marriage have been directed at building up the husband's income-earning potential, the wife's share of the matrimonial home and other matrimonial assets may not be significant. Many such wives, as in this case, become beneficiaries while their husbands continue to earn a substantial income.
>
> Hence, the essence of the criticism directed at the Matrimonial Property Act is that, while it achieves formal equality between the spouses in that the conventional items of property are divided equally, it does not achieve actual equality when the husband is left with the ability to earn a significant income and the wife is left with little or no ability to earn a living and possibly little or nothing in the way of material assets from the marriage to assist her. The relative hardship is likely to be exacerbated when the wife, as is likely, obtains custody of the children or is left to look after them by default. Such an outcome cannot be easily reconciled with the objectives of equality and justice underlying the Act.

Despite this, the Court considered that it could not legitimately interpret "property" to include earning capacity, so that the enhanced human capital acquired by the husband during the marriage was not "relationship property". This was even though, from an

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361 At 275–276.

economic perspective, the husband's enhanced human capital performed the same function within the marriage as a business enterprise (such as a farm or retail business) or an asset such as fishing quota performed in other marriages, which were undoubtedly capable of constituting "relationship property".[362]

[286] Ultimately in 2002, as Glazebrook J details in her reasons, the Matrimonial Property Act was renamed and amended to make a number of changes designed to strengthen the concept of equality as it applied to marriage and similar relationships.[363] As part of these changes, the courts were empowered to address economic disparity between partners after separation. The way in which Parliament sought to address the post-separation disparity problem was through a new s 15. This provision attempts to deal with future economic disparity issues by permitting adjustments to the result produced by the application of the primary relationship property provisions based on equal sharing, in the form of "compensation" to the disadvantaged partner from the advantaged partner's share of relationship property. As s 15(4) puts it, s 15 "overrides" ss 11 to 14A of the PRA, which are the core provisions dealing with the division of relationship property on an equal sharing basis. Significantly, Parliament chose this response rather than directly treating enhanced earning capacity as relationship property. The requirement that any disparity be compensated from relationship property (as opposed to future income) was presumably intended to give effect to what has been called the "clean break" principle.[364]

[287] There are two immediate difficulties with the s 15 solution. First, s 15 is not a ready fit with the PRA's primary relationship property provisions, which are

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362 At 280–281.

363 By the Property (Relationships) Amendment Act 2001.

364 The clean break principle is not identified in the Property (Relationships) Act 1976 (PRA), but is nevertheless seen to be an important underlying premise of the Act: see RL Fisher *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [18.47]; Bill Atkin and Wendy Parker *Relationship Property in New Zealand* (2nd ed, LexisNexis, Wellington, 2009) at [1.2]; Bill Atkin "Economic disparity – how did we end up with it? Has it been worth it?" (2007) 5 NZFLJ 299 at 302; and Law Commission, above n 354, at [4.10]. The principle has also been recognised by the courts. See, for example, *Z v Z (No 2)* where it was noted by the Court of Appeal that "[t]he Act proceeds on the premise that on the breakdown of marriage the matrimonial property should be divided and adjustments made between the spouses and that they should then be free to go their separate ways without any competing continuing demands on the property of each other": *Z v Z (No 2),* above n 360, at 269. In *X v X [Economic disparity]* [2009] NZCA 399, [2010] 1 NZLR 601 Robertson J made the point, rightly in my view, that it should not be assumed that compensation will reflect the potential working life of either party: at [51].

essentially rules-based. Section 15 is not a rules-based provision, but rather confers a broad discretion, whereby the rules-based outcome can be varied, with little guidance as to how it is to be exercised.[365] Second, it is not at all clear that adjusting shares in relationship property is a remedy which will provide relief from post-dissolution disparity in a significant number of cases. As the Court of Appeal noted in the extract from *Z v Z (No 2)* quoted above,[366] in many cases (even ones involving long-term relationships) there will be a modest amount of relationship property for division once account is taken of indebtedness;[367] in reality, the primary asset of such relationships will be the career partner's earning capacity. Moreover, where there is relationship property to be divided, a court is unlikely to order the career partner to hand over his or her entire share of relationship property to compensate for economic disparity as both parties to a relationship must be left in a position that allows them to move on with their lives. As a result, the amount of compensation that can be awarded will often be comparatively modest.[368]

[288] As I have said, there was no dispute in this case that there was economic disparity resulting from the division of functions within the marriage. The issue is how should the award be calculated. In addressing that issue it is, I think, helpful to emphasise several other features of s 15.

[289] First, a court may make an order adjusting relationship property interests under s 15 where satisfied that the income and living standards of one partner are likely to be significantly higher than those of the other partner because of the division of functions within the relationship. The disparity analysis is forward-looking and requires forecasting by the court as to the partners' likely future earnings. The reference to "income and living standards" identifies the limits of the concept of economic disparity; it is not future income alone that is important – both future income and living standards must be considered. Generally, of course, there will be a

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365 See for example, Sian Elias, Chief Justice of New Zealand "Separate Property – *Rose v Rose*" (Address to the Family Court Conference 2011, Wellington, 5 August 2011) at 14–15; Mark Henaghan and others *Family Law in New Zealand* (18th ed, LexisNexis, Wellington, 2017) at [7.383]; Atkin and Parker, above n 364, at [5.6] and [5.8.1]; Atkin, above n 364; and Vivienne Crawshaw "Section 15 – a satellite overview" (2009) 6 NZFLJ 155 at 155.

366 Above at [285].

367 This problem may have been exacerbated by the widespread use of trusts: see Law Commission, above n 354, at [18.113].

368 Law Commission, above n 354, at [18.82] and [18.84]. See also Garland, above n 354, at 377.

correlation between the two, but that may not always be so.[369] For example, the parties may have similar incomes but one may have a lower standard of living as a result of obligations for the care of minor children or dependants. This focus on future income and lifestyle disparity highlights the conceptual inconsistency in s 15 just mentioned: what triggers the power to make an order is likely economic disparity in terms of future income and lifestyle; but the compensation for the disparity must come from relationship property, which, in accordance with *Z v Z (No 2)*, does not include the career partner's enhanced earning capacity or future income stream.

[290] Second, in terms of the jurisdictional threshold, the disparity in income and living standards must arise from the division of functions within the relationship, which is commonly referred to as the causation requirement. Claims under s 15 are commonly based on one or both of: (a) the non-career partner's reduced income-earning ability as a result of the division of functions in the relationship (a diminution claim); and (b) the enhancement of the career partner's income-earning capacity as a result of the division of functions (an enhancement claim).[370] In its Issues Paper, the Law Commission concludes, on the basis of its examination of the authorities, that establishing causation in enhancement claims is comparatively difficult.[371] The Commission also reaches a more wide-ranging conclusion in relation to s 15 claims generally, namely that courts have taken varying approaches to causation:

> 18.60 There is inconsistency in the way causation is dealt with by the courts. In a few cases, the courts will assume causation where there is economic disparity and the division of functions is clear, particularly where children are involved. More often, however, the courts require evidence of loss of earning ability by [the non-career partner] or enhancement of [the career partner's] earning capacity. This might include evidence about the career [the non-career partner] would have pursued, evidence of an abandoned career or other additional factors.
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> (footnote omitted)

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369 See *X v X*, above n 364, at [78]–[94] per Robertson J.

370 In *M v B* [2006] 3 NZLR 660 (CA), William Young P described an award for the non-career partner's loss of income-earning ability as "compensatory" and an award for the career partner's enhancement of income-earning ability as "redistributive": at [199].

371 Law Commission, above n 354, at [18.55]–[18.59].

Having discussed a number of authorities, including the decisions of the Family Court and the High Court (on appeal) in *Douglas v Douglas*,[372] the Commission concludes:

> 18.66 The two decisions in *Douglas* reflect the two approaches taken by the courts. One is to view the purpose of the "division of functions" requirement as being to ensure awards are made if there is a division of functions and resulting economic disparity. Questions of loss of earning ability by [the non-career partner] in diminished earnings claims, or earning enhancement by [the career partner] in enhancement claims, are not important. The alternative approach emphasises the causal relationship between the division of functions and lost earning potential or earning enhancement. This approach requires more of [the non-career partner] in presenting evidence, and invites argument on whether work options were available, how choices were made within the relationship and whether there is evidence of an alternative career the applicant would have pursued. A higher evidential burden (and the costs involved in presenting that evidence) can render section 15 an unattractive option in seeking a departure from equal sharing.
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> (footnote omitted)

My own (less extensive) reading of the authorities supports the Commission's conclusion that some courts have taken what might be called a broad approach to causation, while others have taken a narrower or stricter approach.

[291] The Commission's conclusions as to causation are, I think, relevant to what is at issue in the present case, namely quantification. If courts are prepared to adopt the broad approach to causation, proceeding on the basis of an assumption of causation in cases where there is economic disparity and the division of functions in the relationship is clear, the approach to quantification may differ from the approach taken where a stricter view of causation is adopted. Where the broad approach is taken, the amount of any award by way of compensation is likely to be based on an overall assessment as to what is "just" to address the disparity, reached after consideration and weighing of the particular circumstances of the case. On this approach, there does not appear to be any detailed formula which could assist, although it is possible to identify the process that a court should follow.[373] Consequently, there may be some uncertainty in terms of forecasting particular outcomes in individual cases. Obviously, if there is

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372 *Douglas v Douglas* [2013] NZHC 3022, [2014] NZFLR 235; and *JMA v SCA* [2012] NZFC 10192.
373 See below at [326].

a lack of predictability, that may impede the ability of parties to reach their own settlements.

[292] By contrast, where the strict approach to causation is adopted, evidence of the non-career partner's loss of earning ability (or of the enhancement of the career partner's earning ability) as a result of the division of responsibilities in the relationship will have to be led (although there is no onus of proof on the non-career partner in this respect).[374] Quantification will follow this pattern. One or both of two counterfactuals will be considered depending on the basis for the claim – what was the non-career partner's likely career path in the absence of the division of responsibilities within the relationship? How would the career partner's career have progressed absent the division of responsibilities in the relationship? In a diminution claim, the quantification approach adopted by the majority of the Court of Appeal in *X v X [Economic disparity]* is likely to be utilised, as occurred in the present case. This will be based on contrasting the non-career partner's "but for" income with likely future income after separation, calculating a net present value in respect of the (probably time limited) difference, taking account of tax and contingencies and then halving the resulting sum, an exercise which requires expert evidence and is likely to be costly and contentious, to the point that many claims will not be worth pursuing.[375]

[293] In considering the correct approach to the causation requirement, it is helpful to ask what exactly it is that is being compensated under s 15. Is the focus on the disparity in income and living standards, or is it on the non-career partner's lost opportunity to develop a career (and/or the career partner's enhanced opportunities for career development)? For reasons which I develop more fully later in these reasons, I consider that the focus should in the first instance be on the disparity in income and living standards. If there has been a division of functions in a relationship along traditional lines and there is likely to be economic disparity after separation, the working assumption should be that the division in functions caused the disparity, and that is what should be compensated to the extent "just". Only strong evidence of some

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374 See *M v B*, above n 370, at [38]–[50] per Robertson J; and *X v X*, above n 364, at [95]–[96] per Robertson J.

375 Law Commission, above n 354, at [18.104]–[18.107].

other causative factor would be sufficient to negative or limit this working assumption.[376]

[294] Most of the s 15 cases to date seem to discuss disparity in terms of the lost or reduced earning power of the non-career partner, although some also address the enhanced earning power of the career partner.[377] The reason for the focus in the authorities on how the division of responsibilities in the relationship affected the non-career partner's income-earning capacity may be that it does, on occasion, provide a reasonably structured means of identifying the extent to which economic disparity is demonstrably referable to the division of responsibilities within the relationship. But I do not see that as a pre-requisite for the application of s 15. Section 15(1) sets out when the court's compensatory jurisdiction may be invoked; assuming the jurisdictional threshold is met, I think it likely that the proper scope of s 15 will be reduced if the section is interpreted as limiting the court to compensating that portion of the disparity, reflected in reduced income-earning ability, that is demonstrably referable to the division of responsibilities in the relationship. Section 15(2)(b) provides that a court considering whether or not to make an award may have regard to the responsibilities of each partner for the ongoing daily care of any minor or dependent children, which to date have fallen principally to women. That suggests that the compensation is not directed simply at the extent of the non-career partner's loss (or the career partner's gain) in terms of income-earning capacity but rather at the extent of the disparity in income and living standards. This supports the view that in a relationship organised along traditional lines, there should be an assumption that the division of responsibilities has resulted in any likely economic disparity, unless compelling evidence is presented to support some other explanation.[378]

[295] Against this background, I consider the parties' submissions in relation to s 15.

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376 See below at [323]–[325].

377 See *X v X*, above n 364, at [117] and following per Robertson J. Henaghan and others, above n 365, note that it is hard to find a s 15 case where enhancement was the central feature: at [7.383]. See also Law Commission, above n 354, at [18.55]–[18.59].

378 See below at [323]–[325].

Submissions

[296] As noted, it was agreed that the appellant qualified for an award under s 15, in that there was likely to be a significant disparity in income and living standards between her and her husband as a result of the division of functions in the marriage. What was in contention was how much the award should be; and that depended on how the award was calculated. The Family Court's award for the effect of the division of functions within the marriage comprised two elements – a diminution award in relation to the wife's foregone career opportunities and a much smaller enhancement award in respect of the enhancement of the husband's earning ability.[379] On appeal, the High Court held that there was a proper basis for a diminution award, but there was no proper evidential foundation for an enhancement award,[380] an assessment upheld by the Court of Appeal, albeit that there were differences in reasoning.[381]

[297] Mr Goddard argued that the courts' approach to s 15 awards to date has been parsimonious and has not sufficiently compensated non-career partners whose income and lifestyle has fallen significantly below that of their career partners after separation. He identified three approaches to awarding compensation under s 15, which he described as the expectation measure of compensation, the unjust enrichment measure and the reliance measure.

[298] Mr Goddard explained the expectation measure by analogy with equitable estoppel. It required:

(a) an expectation that the parties would share jointly in the benefits that the roles of each of them in the marriage bring, including the career partner's income-earning ability, as enhanced throughout the relationship;

(b) reasonable reliance on this expectation by the non-career partner, to his or her detriment; and

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379 *Williams v Scott* [2014] NZFC 7616 (Judge McHardy) at [312]–[367].
380 *Williams v Scott* [2014] NZHC 2547, [2015] NZFLR 355 (Faire J) at [167] and [169].
381 *Scott v Williams* [2016] NZCA 356, [2016] NZFLR 499 (Ellen France P, Harrison and Kós JJ) at [103]–[111].

(c) unconscionability, that is, in the circumstances it would be unconscionable for the career partner to resile from the expectation.

[299] In a marriage organised along traditional lines, as this one largely was, Mr Goddard argued that the wife had made an irreversible investment in the relationship, in the expectation that she would share in the on-going financial benefits that flowed from enabling the career partner to focus on income-earning activities, thus enhancing his human capital. As the wife had acted to her detriment on the basis of a reasonable belief or expectation as to how the relationship would be conducted, it would be unconscionable to allow the husband to take sole benefit of his enhanced human capital after separation and defeat the wife's belief or expectation.

[300] The second measure is based on unjust enrichment and again is premised upon a marriage organised along traditional lines. The fact that the wife has taken responsibility for running the household and caring for the children of the relationship has allowed the husband to gain knowledge, develop skills, acquire experience, establish contacts, attain status and establish a reputation, thereby enhancing his human capital. Generally, these attributes will increase the husband's income-earning ability. This increase in human capital, which results from the efforts of both parties to the relationship,[382] should be treated as an asset of the relationship like any other income-earning asset and both parties should share equally in it.

[301] The third measure is the reliance measure of compensation, again premised upon a marriage organised along traditional lines. Mr Goddard submitted that this measure proceeds on the basis that, if the wife is restored by way of compensation to the position she would have been in but for the division of roles in the marriage, there is no continuing injustice arising from it. This was, he submitted, the approach most commonly adopted by the courts to compensation under s 15, and was utilised by the Court of Appeal in *X v X*.[383] He noted that it had inherent difficulties, in particular because it required an assessment of what the wife would have earned but for the division of roles within the marriage. As he put it, "this is a complex, expensive,

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382 In some cases, the wife's contribution to the enhancement of her husband's human capital will be very obvious, as where she supports him while he completes his education or training; in other cases, it will be less direct but no less real for that.

383 *X v X*, above n 364.

time-consuming and speculative inquiry that involves an undignified and intrusive inquiry into the woman's abilities and her (forgone) earning potential". The wife's expected income after separation is then deducted from the "but for" income to identify the impact of the organisation of roles within the marriage. Then, the period for which the disparity is likely to continue must be assessed, a present value must be calculated and allowance made for contingencies such as early death and ill-health. The result is then halved to identify the amount of compensation. Mr Goddard was critical of what he identified as rules of thumb that the courts have adopted in this context, in particular the application of a contingency rate of 35 per cent and the halving of the resulting figure.

[302] Ms Robertson QC for Mr Williams submitted that it was not the purpose of s 15 to restore the non-career partner to the position that he or she would have been in were it not for the division of functions within the relationship or to remove any disparity entirely. She argued that calculations based on the expectation and unjust enrichment measures of compensation were not supported by the expert evidence, which proceeded on the basis set out in *X v X*. Further, she submitted that the expectation measure was simply the non-career partner seeking to share the career partner's future income, which was contrary to the legislative history and to the authorities, including in particular *Z v Z (No 2)*.[384] Moreover, there were good policy reasons for not giving a non-career partner an interest in the career partner's income, either generally or to the extent of any enhancement. These included considerations such as the clean break principle and the need to recognise the career partner's "personal autonomy".[385] Ms Robertson argued that the unjust enrichment measure suffers from similar defects.

Evaluation

[303] In an unlimited form, both the expectation and unjust enrichment measures are, in my view, inconsistent with important premises of the PRA. Taking the expectation measure, for example, it is based on the view that the partners organised their relationship so that the non-career partner focussed on home-making and child-rearing

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384 *Z v Z (No 2)*, above n 360.

385 See *M v B*, above n 370, at [202] per William Young P.

while the career partner focussed on income-earning activities; the non-career partner made an irreversible investment in the development and enhancement of the career partner's income-earning ability, in the expectation that it would support them and their family for the future; and as the career partner's income-earning ability was a central feature of the way the relationship was organised, justice requires that the non-career partner's reasonable expectation in that regard be met.

[304] However, this approach is inconsistent with the premises on which the PRA is based. The PRA recognises that relationships end; that fault is largely irrelevant; and that once relationships end, former partners are entitled, in principle, to have matters resolved between them relatively quickly and simply, and to get on with their lives. The expectation measure is inconsistent with this because it is based on a belief that there will be a life-long relationship, and so life-long commitments.

[305] Second, the expectation and unjust enrichment measures focus on the non-career partner's interest in the career partner's earning capacity. But the Court of Appeal's decision in *Z v Z (No 2)* squarely addressed the question whether earning capacity should be considered to be "property", and enhanced earning capacity "relationship property", for the purposes of the PRA.[386] When enacting s 15, Parliament did not reverse the Court of Appeal's decision in this respect. Rather, Parliament adopted a more limited response in s 15, one that focusses on income and living standards rather than economic disparity more generally and on "compensating" the non-career partner from the career partner's share of relationship property rather than from the career partner's future earnings or earnings potential. In focussing on the career partner's share of relationship property in this way, s 15 seems to reflect a desire on Parliament's part to adhere to the clean break principle and to allow the career partner some degree of personal autonomy post-separation.

[306] Accordingly, to the extent that the expectation and unjust enrichment approaches are inconsistent with these features of s 15, and of the PRA more generally, they must be rejected.[387]

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386 *Z v Z (No 2)*, above n 360.

387 The unjust enrichment approach also has practical problems, as Mr Goddard acknowledged. For example, there are real practical difficulties in calculating gains in human capital.

[307] Nevertheless, I consider that these two approaches offer pointers as to how s 15 should operate. As I noted earlier, interpreted strictly, the causation requirement involves consideration of either or both of two counterfactuals. In respect of a diminution claim, the non-career partner must lead evidence as to his or her earning capacity absent the division of responsibilities in the relationship. That may well work unfairly in the case of a non-career partner who entered the relationship at a comparatively young age, without any real opportunity to begin or develop an occupation or career. Say, for example, that a woman marries at a young age – 19 or 20 – and immediately starts having a family. Her husband is a tradesperson, in his early 20s. Over a period of 20 years he builds up a reasonably successful business. In the early years, the wife assists her husband by doing clerical work – paying invoices, chasing up overdue accounts and so on. The couple separate in their 40s, just as the youngest of their three children is beginning her secondary schooling. Post-separation, the couple's two youngest children live with their mother; the husband has the capacity to continue to earn a good income; but the wife has never been in paid employment and has no formal training or developed skill-set. Assuming economic disparity, there is no obvious career path to provide a basis for an assessment of "but for" income. Yet surely there can be no dispute that the wife qualifies for an award under s 15 and should not be deprived of one by an unrealistically narrow or over-engineered approach to causation.[388]

[308] Moreover, even in cases where the non-career partner did have an obvious career path at the outset of the relationship, the assessment of "but for" income can be difficult and contentious. The present case in an example. The wife qualified as an accountant. Before she left work to start a family, the wife was a group accountant for three companies. Had she pursued this career, she might have expected to become a chief financial officer in a reasonably large commercial entity. As Glazebrook J

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[388] See, for example, the discussion in Law Commission, above n 354, at [18.61]–[18.63] of two cases, *CRH v GDH* DC Auckland FAM-2007-004-1129, 24 December 2008 and *H v H [Economic disparity]* [2007] NZFLR 711 (HC), which highlight the inconsistency in the courts' approach to causation in cases with facts similar to the scenario set out here. The wife in this scenario would at least receive a half interest in the business. She might be in an even worse position if her husband was a salaried employee who had worked, for example, in a bank, undertaken some extramural study and had worked his way up over a period of years to a significant managerial position attracting a substantial salary.

details, the experts adopted widely varying figures for her "but for" salary – one adopted $450,000, another $300,000 and the third $180,000.[389]

[309] As I see it, the strict approach to the causation requirement inevitably involves a good deal of speculation about the counterfactuals and is likely to lead to a conservative or narrow application of s 15, creating the risk that no compensation will be awarded in what are, in fact, deserving cases.[390] It incentivises the career partner to lead evidence that minimises:

(a) matters such as the non-career partner's income-earning capacity absent the division of functions, and the need for the non-career partner to give up work to focus on their home and family life; and

(b) the extent of any enhancement to his or her own income-earning ability as a result of the division of responsibilities in the relationship.

For example, the career partner may argue that his or her higher post-separation income is simply a reflection of his or her innate ability or talent, and the non-career partner's lower income accurately reflects his or her of lack of innate ability or talent, rather than the division of functions in the marriage, so that the causation requirement is not met.

[310] Overall, the strict approach encourages parties to make arguments that are at best unedifying and at worst very damaging to all concerned, especially as they occur in the context of a relationship break-up. Such arguments are likely to generate ill-feeling and, to the extent that they are supported by expert and other evidence, to increase costs and delay. These consequences are antithetical to important values reflected in the PRA, in particular the desirability of processes that are simple, inexpensive and speedy[391] and minimise the opportunities for personal animosity, blaming and belittling behaviours to emerge. They may also undermine the bedrock

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389 See Glazebrook J above at [160]–[164].

390 Law Commission, above n 354, at [18.69]–[18.70]; and Garland, above n 354, at 363–367.

391 PRA, s 1N(d): "[T]he principle that questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice."

principle of equality of contribution by, in effect, devaluing the non-career partner's contribution to the relationship.[392]

[311] Accordingly, s 15's causation requirement seems to me to be a broad one, in the sense that where a relationship has been conducted along traditional lines and there is a disparity of income and living standards post-separation, it should generally be assumed that the division of responsibilities in the relationship:

(a) was for the benefit of both parties;

(b) restricted the non-career partner's income-earning ability; and

(c) enhanced the career partner's earning ability.

As I see it, these working assumptions are supported by research; they are consistent with the Justice and Electoral Committee's report to the House on the Matrimonial Property Amendment Bill and Supplementary Order Paper No 25;[393] and they will, in my view, generally reflect the parties' expectations in long-term relationships of the type at issue in this case.

[312] As to the research, international studies show that the division of paid and unpaid work between men and women during a relationship can result in different

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392 See further below at [324].

393 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 (109–3) (select committee report) [select committee report].

rates of economic recovery after separation, with women taking longer to recover financially than men.[394] Moreover, research also indicates that marriage makes men more successful in terms of their earning capacity.[395] In an extract cited by Dr Claire Green in her doctoral thesis on s 15,[396] Linda Waite and Maggie Gallagher say:[397]

> Marriage itself makes men more successful. In fact, … getting and keeping a wife may be as important as getting an education.
>
> … The wage premium married men receive is one of the most well-documented phenomena in social science. Husbands earn at least 10 percent more than single men do and perhaps as high as 40 percent more.

The authors go on to say that when a marriage breaks down, the wage premium that married men receive begins to erode:[398]

> The same man who begins to earn more when he moves toward marriage earns less as he moves away from it. This pattern strongly suggests that something about the working partnership with a wife (rather than selection or discrimination) is responsible for a husband's higher earning capacity.

The authors then discuss what it is about marriage that enables married men to earn more than they would if single.

[313] I consider that these research findings are relevant to the way s 15 is applied.[399]

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394 See, for example, Hans-Jürgen Andreβ and others "The Economic Consequences of Partnership Dissolution – A Comparative Analysis of Panel Studies from Belgium, Germany, Great Britain, Italy, and Sweden" (2006) 22 Eur Sociol Rev 533; and David de Vaus and others *The economic consequences of divorce in six OECD countries* (Research Report No 31, Australian Institute of Family Studies, 2015). Recent New Zealand research using the Working for Families dataset held by Statistics New Zealand provides empirical evidence of the economic consequences of separation and also finds a gender difference in post-separation outcomes that persists over the medium term: Law Commission *Relationships and Families in Contemporary New Zealand He Hononga Tangata, He Hononga Whānau I Aotearoa O Nāianei* (NZLC SP22, 2017) at 60, citing MJ Fletcher *An investigation into aspects of the economic consequences of marital separation among New Zealand parents* (Doctoral Thesis, Auckland University of Technology, 2017) at 182–188.

395 Claire Green *The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity* (Doctoral Thesis, University of Otago, 2013) at 298 and following. See also 75–77 and the references at n 247.

396 At 298–299.

397 Linda Waite and Maggie Gallagher *The Case for Marriage – Why married people are happier, healthier, and better off financially* (Broadway Books, New York, 2000) at 99 .

398 At 100 (footnote omitted).

399 See below at [323]–[325].

[314] Turning to the Justice and Electoral Committee's report on the 2002 amendments, it seems to suggest that a broad approach to causation was intended.[400] The Committee said:[401]

> **Difficulties in showing that economic disadvantage results from the division of functions**
>
> The Law Commission predicts that proposed new section 15 will apply only in relatively rare circumstances because it will be difficult to show that the disparity in income and living standards is due to the division of functions during the marriage.
>
> We are advised that, although the ability to earn an income at a particular level is undoubtedly dependent on the personal attributes, training and skills of the person in question, the ability to devote time to cultivating those skills and attributes is likely to be affected by the division of functions during the relationship. A partner who is not in the workforce cannot take advantage of further training at work, and so his or her earning capacity will devalue over time. Even in childless relationships, decisions taken within the relationship could impact on earning capacity. For example, one partner might decline a transfer or leave a job to enable the other to advance his or her career.

Accordingly, although the Committee acknowledged that personal qualities, training and skills are important to a person's ability to earn an income, it also recognised that these features could be both enhanced and diminished over time by the division of functions within a relationship. To me, this extract indicates that the Committee thought it likely that there would generally be an effect on both partners' earning capacity from the division of responsibilities along traditional lines in a relationship.

[315] There is some support for the broad approach in the judgments of the Court of Appeal in *X v X*.[402] In that case, Robertson J said that where one party to a marriage undertook full-time employment and the other undertook unpaid work in the home, there did not need to be inquiry into the merits of the arrangement (for example, whether it was really necessary for the wife not to pursue her career for domestic reasons) for a causal relationship under s 15 to be established.[403] Rather, there was a presumption that the arrangement was pursued by both parties in their collective interest, at least in the absence of clear evidence to the contrary.[404] The other members

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400 Select committee report, above n 393.
401 At 18–19.
402 *X v X*, above n 364.
403 At [104].
404 At [104].

of the Court, O'Regan and Ellen France JJ, did not disagree with Robertson J on this point.[405]

[316] Robertson J went on to say, however, that:[406]

> Evidence that a party did not return to the workforce when they could have, or chose to pursue a domestic life instead of a professional career, may … be relevant to the Court's exercise of its discretion under s 15(3).

[317] Some caution is needed in this context as it is important that the principles set out in s 1N to guide the achievement of the PRA's purpose not be undermined. Two of those principles are:

> (a) the principle that men and women have equal status, and their equality should be maintained and enhanced:
>
> (b) the principle that all forms of contribution to the marriage partnership, civil union, or the de facto relationship partnership, are treated as equal:

If, for example, a married woman is in a position to develop her career but nevertheless choses to focus on family life, it may well be inconsistent with the principles upon which the PRA is based to reduce the award to which she might otherwise have been entitled on account of disparity in income and living standards, on the basis that she could (or should) have made a different choice.[407] The effect of that approach in some situations may be to de-value the choice the wife made or, more pointedly, her contribution to the marriage. In such a case, the fact is that the wife has made a particular form of contribution to the marriage, which is to be treated as equal to that of the husband; if making that contribution has had the likely effect of diminishing her income-earning ability and living standards post-separation, it may well undermine

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405 In Henaghan and others, above n 365, the authors conclude that, in respect of cases such as the present where one partner has been working and the other has been out of the paid workforce, the Court of Appeal in *X v X* "has created what might be labelled a presumption of causation": at [7.382]. They go on to say, however, that "strictly speaking" the presumption is that the division of functions within the marriage was a matter of mutual choice that could only be displaced by compelling evidence to the contrary. See also Atkin and Parker, above n 364, at [5.5].

406 *X v X,* above n 364, at [104].

407 As noted above at [311], the working assumption should be that the division of responsibilities within a relationship was for the benefit of both partners, reflecting their joint decision. But even if the choice was primarily that of the non-career partner rather than the couple, that does not seem to me sufficient to justify a reduction in the amount that might otherwise be awarded, for the reasons given in the text.

the principles underlying the PRA to reduce a disparity award on the basis that there were other choices open to her.

[318] On the other hand, I accept that a court considering a s 15 award will generally be entitled to expect that a non-career partner will take steps post-separation to become financially independent over time. This is a necessary component of the clean break principle and recognises the importance of personal autonomy for both partners.

[319] I should note that the Court of Appeal's earlier decision of *M v B* appears to take a stricter approach to causation, certainly in relation to enhancement awards.[408] In that case, the wife established in the High Court that there was likely, following separation, to be disparity between her income and living standards and those of her husband, a successful lawyer.[409] She sought both an enhancement award and a diminution award. She argued that there was a nexus between the disparity and the division of functions in the marriage because she had assisted her husband's career in three particular ways – by resigning her position in a major city and moving to a provincial centre several years after they had married, which furthered his career; by enabling him to work overseas to the benefit of his career (this included supporting him financially during his pupillage and initial period at the English Bar); and by being the primary caregiver for their children on their return to New Zealand, thus allowing him to put his energies into furthering his career while foregoing the opportunity to develop her career.[410]

[320] The High Court Judge did not accept the wife's submission that her efforts had assisted her husband's career, which the Judge said "involves the making of a number of assumptions and is ultimately speculative".[411] The Judge did, however, accept that the division of functions within the marriage had detrimentally affected the wife's

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408 *M v B,* above n 370, at [137]–[150] per Robertson J, at [199]–[205] per William Young P and at [266]–[274] per Hammond J. Mark Henaghan and Nicola Peart criticise the decision on this basis: see their essay "Relationship Property Appeals in the New Zealand Court of Appeal 1958–2008: The Elusiveness of Equality" in Rick Bigwood (ed) *The Permanent New Zealand Court of Appeal: Essays on the first 50 Years* (Hart Publishing, Oxford, 2009) 99 at 126–128.

409 *B v M* [2005] NZFLR 730 (HC) at [119].

410 At [121].

411 At [123].

ability to earn a significant income,[412] and he made a s 15 diminution award on that basis. His decision in these respects was upheld in the Court of Appeal.[413]

[321] In relation to an enhancement award, William Young P said in his judgment:[414]

> A woman who stays at home and looks after children frees up her partner's time and energy, and, in this way, may facilitate an enhancement of his earning capacity. Thinking along these lines is reflected in s 15 and in some circumstances such an enhancement of earning capacity will properly be redistributable under s 15. But, as this case illustrates, it is not always easy to move from the general to the specific.

In addition, the President noted that it is more difficult to make a case for an enhancement award than it is for a diminution award.[415] He accepted that the division of functions in the relationship did not need to be the sole or principal cause of the husband's enhanced earning ability to justify an enhancement award,[416] but ruled out any contribution from the wife to her husband's earning ability in this instance. William Young P said:[417]

> The "principal cause" of the husband's present earning capacity is his skill as a lawyer. But that consideration alone does not preclude a redistributive award. For instance, if the division of functions between the husband and the wife resulted in the husband having opportunities to develop his earning capacity without which he would not have been able to fulfil his potential, the case would be within s 15. Nonetheless, the language of s 15 (and in particular the words "because of") suggests that the jurisdiction to make an order requires a "but for" causal relationship between division of functions and economic disparity. The husband's position in this case, broadly, is that if the wife had worked throughout the marriage (that is, pursued her career) he would not personally have assumed any resulting shortfall in child-rearing and domestic responsibilities but that, instead, nannies and the like would have been employed. In a case where the relevant income is sufficiently high to warrant a redistributive s 15 claim, such an argument will often be able to be plausibly deployed. Indeed, I see no obvious answer to this argument on the facts of this case.

The President went on to identify several other considerations supporting this outcome.[418]

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412 At [126].
413 *M v B,* above n 370.
414 At [200].
415 At [199].
416 At [201].
417 At [201].
418 At [202]–[203].

[322] Thus, while accepting that a wife who is a full-time homemaker and caregiver to their children may enhance her husband's career, William Young P considered that it was still necessary to show in any particular case that a stay-at-home wife did in fact enhance her husband's income-earning ability. Given the facts of the case, this requirement appears to be a high one.

[323] On the approach I favour, the assumption would be that the wife in a case such as *M v B* did enhance her husband's income-earning ability, which reflects what the research indicates. This, and the assumption that the division of roles in the relationship has diminished the wife's income-earning capacity, could be displaced if the evidence was sufficiently compelling, but that would be unusual, at least in relationships of long duration entered into at the outset of a career partner's career. Examples of cases where the assumption could be displaced are where a career partner receives a large inheritance, and this is the reason that there is likely to be an income and lifestyle disparity with the non-career partner, or the non-career partner develops a debilitating illness during the relationship and this is the real reason for the economic disparity after separation. On the broad approach, it would not be more difficult to establish an enhancement award than a diminution award – indeed, the distinction would become largely irrelevant.

[324] The factors which negate the working assumptions in the examples just given are matters which are clearly independent of the division of functions within the relationship. While generalisation is impossible given the range of factual situations that can arise, I think that negating factors are likely to be of this type, at least in relationships of the sort at issue in this case – long duration relationships entered into early in adult life. In such relationships, I see attempts to use what are claimed to be the inherent qualities of one or other partner – the career partner's high-level of talent, skill and ability or the non-career partner's lack thereof – to negative causation or to explain post-separation economic disparity as misdirected and largely irrelevant.[419] Not only are such arguments unedifying and damaging to the former partners and their families, they are also incapable of rational resolution. For example, given that

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[419] Given the multiplicity of factual situations even within relationships of long duration, I accept that there may be instances of such relationships where this type of argument could properly be advanced.

research indicates that stable relationships enhance the income-earning ability of married men, it seems to me difficult to the point of impossibility to distinguish that part of a particular married man's income-earning activity that is attributable solely to his intrinsic abilities and that part which is attributable to the beneficial effect of the relationship. More importantly, assuming that there are differences between partners of the type identified, they will not generally undermine the validity of the working assumptions because those working assumptions largely reflect the "equality of contribution" principle that underlies the PRA. To illustrate, Mr Goddard submitted that it was inconsistent with the principles underlying the PRA to argue that the income-earning capacity of, say, a husband in full-time paid employment would have been the same if there had been no division of roles within the relationship because (for example) a nanny could have been hired to look after the children. He argued that not only did such an argument fail to respect the choice which the parties had made, it also wrongly reduced the contribution of (in this example) the wife to the economic value of a substitute service. I agree with this submission.

[325] Nevertheless, I accept that it will be legitimate to point to personal characteristics as a complete or partial explanation of post-separation disparity in some situations, as where, for example, a career partner enters a relationship as a well-established and successful business or professional person. In that type of case, it may be that only part of the disparity can fairly be said to result from the division of responsibilities in the relationship. In relationships of relatively short duration, this may be a complete explanation for post-separation disparity. Again, however, care must be taken in these situations not to undermine the equality of contribution principle that underpins the PRA.

[326] This brings me to the question of quantum. The Court of Appeal approached the quantum of the award through the *X v X* formula, the central feature of which is the difference between what the wife was likely to have earned "but for" the division of functions in the marriage and what she was in fact likely to earn after separation. The logic of my approach to s 15 is that, where the assumptions identified above apply, the central feature of the calculation should be the disparity itself, as it is that disparity to which the compensation is directed. On this basis, the quantification methodology will involve:

(a) Identifying the extent of the disparity resulting from the division of functions within the relationship[420] (presumably most easily done by reference to likely annual income over a period of years, given the close link between income and living standards).

(b) Considering for how long the disparity should be compensated. It should not be assumed that this period will be the same as the potential working life of either partner. This is because:

(i) in the ordinary course, the non-career partner will be expected to undertake income-earning activities; and

(ii) the career partner's personal autonomy must be recognised – he or she must be left with the ability to move on with his or her life.

It will be relevant in this context to consider how long it might take the non-career partner to re-train or up-skill, which will be affected by matters such as whether or not he or she has responsibility for the daily care of minor or dependent children of the relationship.

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[420] To be clear, where the working assumptions are not displaced, the whole of the disparity should be attributable to the division of functions within the relationship. As to the time at which disparity should be assessed, I agree with what Glazebrook J says at [216]–[220] of her reasons.

(c) Applying the necessary discounts to cover the contingencies of life (perhaps by reference to a New Zealand version of the Ogden Tables)[421] and taxation.

(d) Calculating a present value for the annual figures thus derived to identify a particular sum.

(e) Halving that sum, which is necessary to avoid simply transferring the full disparity on to the career partner.

[327] The court must then consider the source of the compensation, namely, the career partner's share of relationship property. That sets the upper limit of the amount available, although it is most unlikely (but not inconceivable) that an award would be for the full amount of the career partner's share. Ultimately, the court is required under s 15 to do what is "just". This requires a consideration of the position of both parties. The career partner must be left in a position where he or she is able to move on with his or her life, which will mean in most cases that an award will be for only part of the share of relationship property. As noted, an award should not create disparity the other way.

[328] The methodology which I have outlined in general terms is essentially the methodology that Mr Goddard used to calculate an award based on his expectation measure. While I do not agree that s 15 is properly explained in terms of expectation, I largely agree with the structure of Mr Goddard's expectation methodology.

[329] Beyond confirming that I agree with Glazebrook J's summary of the proper approach to s 15,[422] I will not discuss quantification in any greater detail as I agree with the result reached by Glazebrook J in the particular circumstances of this appeal, for the reasons she gives. I agree with Glazebrook J that the cross-appeal should be

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421 The Ogden Tables are actuarial tables published by the United Kingdom Government's Actuary's Department to allow lawyers and judges to assess loss of earnings in personal injury and fatal accident cases without the need for expert evidence: Government Actuary's Department *Actuarial Tables with explanatory notes for use in Personal Injury and Fatal Accident Cases* (7th ed, The Stationery Office, London, 2011). I agree with Glazebrook and William Young JJ's view that there would be value in developing a New Zealand version of the tables: see Glazebrook J above at [209] and William Young J below at [459] .

422 Glazebrook J above at [263]–[265].

dismissed and concur in the results set out at the end of her reasons. I also agree with Glazebrook J's observations about name suppression.[423]

ELIAS CJ

[330] I have had the advantage of reading in draft the reasons given by the other members of the Court. I am grateful to Glazebrook J for carrying the burden of explaining the appeal and its background. I agree with her reasons for concluding that the vesting order made in the Family Court in respect of the Remuera properties should not have been set aside.[424] I agree with Glazebrook J too for the reasons she gives that the valuation of the legal practice made in the Family Court should be restored,[425] although I (like Arnold and O'Regan JJ) would reserve for a case where it was fully argued the question of treatment of personal goodwill.[426]

[331] I write separately only in respect of the appeal against the order made in favour of Ms Scott under s 15 of the Property (Relationships) Act 1976. I agree with the summary provided by Glazebrook J at [263]–[265] as to the proper approach to s 15. But because I conclude that the approach taken to s 15 in the lower Courts was incorrect and that its application requires further consideration of the economic position of both parties on the correct basis, I would remit the question of the appropriate order to the Family Court.

[332] Section 15 was enacted in its present form in 2002[427] to address the perception that equal sharing of relationship property under the Act did not achieve fairness where one party was disadvantaged in the standard of living and income available post-separation because of division of responsibilities during the relationship.[428] Such result was thought to be inconsistent with the policies of the legislation, as reinforced by the more elaborate purpose and principles provisions under ss 1M and 1N, also

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423 Glazebrook J above at [266]–[267].
424 Above at [17]–[66].
425 Above at [67]–[140].
426 Above at [277] per Arnold J and below at [370] per O'Regan J.
427 By s 17 of the Property (Relationships) Amendment Act 2001.
428 See Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 (109–3) (select committee report) at 33. The section was subsequently amended also in 2005 to include civil unions: Property (Relationships) Amendment Act 2005.

enacted in 2002.[429] The solution provided by s 15 was to confer power on the court to "award lump sum payments or … transfer of property", if it considers it just to do so.

[333] The "purpose and principles" introduced into the Act in 2002 which bear on exercise of the discretion to make orders under s 15 include:

- the purpose of providing for "a just division of the relationship property between the spouses or partners when their relationship ends by separation or death";[430]

- the principle that "all forms of contribution to the marriage partnership, civil union, or the de facto relationship partnership, are treated as equal";[431] and

- the principle that "a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners" arising *both* from their relationship *and* from "the ending" of the relationship.[432]

[334] Aspects of the meaning of "contribution to the marriage, civil union, or de facto relationship" contained in s 18 of the Act also bear on the s 15 assessment, including:

- recognition that "contribution" to the relationship includes a wide range of matters, "whether or not of a material kind" (including care of children, management of the household, support provided for relationship and separate property or support for the other partner in an occupation or business or in obtaining qualifications and "the forgoing of a higher standard of living than would otherwise have been available");[433] and

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429 Property (Relationships) Amendment Act 2001, s 7.
430 Property (Relationships) Act 1976, s 1M(c).
431 Section 1N(b).
432 Section 1N(c).
433 Section 18(1).

- recognition that contributions of a non-monetary nature are not presumed to be less valuable than contributions of a monetary nature.[434]

[335] Sections 15 and 15A are found under the subheading "Court may make orders to redress economic disparities".[435] As is consistent with the principle contained in s 1N(c), such disparities may arise from advantages or disadvantages arising from the relationship or from its ending.

[336] The jurisdiction to make orders under s 15 arises where the court is satisfied "on the division of relationship property" that, after the relationship ends, "the income and living standards of one spouse or partner (party B) are likely to be significantly higher than the other spouse or partner (party A) because of the effects of the division of functions within the marriage, civil union, or de facto relationship while the parties were living together".[436] If the conditions on which the jurisdiction arises are made out (significant disparity in income and living standards because of the effects of the division of functions within the relationship while the parties lived together), then the court may, "if it considers it just", make an order for payment or transfer out of the relationship property of party B "for the purpose of compensating party A".[437]

[337] Section 15 specifically "overrides" the provisions of the Act in ss 11–14A dealing with the division of relationship property.[438] Since the authority to make the order arises "on the division of relationship property" in accordance with the Act and is capped by the share in relationship property of party B, the jurisdiction is properly seen as one of additional discretionary adjustment outside the rules for relationship property division required by the Act. It attempts a more just outcome than may be achieved in a particular case by equal division of relationship property.

[338] Such outcome looks to the living standards and income available after the end of the relationship. The specific circumstances identified under s 15(2)(a) and (b) to which the court may have regard in determining whether or not to make an order under

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434 Section 18(2).
435 By amendment which came into effect on 1 February 2002: Property (Relationships) Amendment Act 2001, ss 2 and 17.
436 Property (Relationships) Act 1976, s 15(1).
437 Section 15(3).
438 Section 15(4).

s 15 bear closely on disparity in income and living standards. The "compensation" to which orders under s 15 are directed is for the disparity in income and living standards between the partners "after the marriage, civil union, or de facto relationship ends" but the cause of the disparity is "the effects of the division of functions within the marriage, civil union, or de facto relationship while the parties were living together".

[339] The assessment is made by the court "on the division of relationship property". That language seems to me to require the assessment of disparity in likely income and living standards to be made at the date of hearing, as was explicitly envisaged in the commentary to the Matrimonial Property Amendment Bill 1998 in the report back to the House of the Justice and Electoral Committee.[439] Date of hearing determination is consistent with the general approach to the valuation of property, as the Select Committee report acknowledged, and permits changes since the date of separation to be taken into account where appropriate, as the report makes clear was the understanding.

[340] In *X v X* Robertson J, with whose approach on the point O'Regan and Ellen France JJ expressed agreement, rejected an argument that assessment of economic disparity should be made before the division of relationship property. He accepted that the clear thrust of the provision was that s 15 was available to address "remaining economic disparities" after the relationship property has been divided:[440]

> That is, the date of assessment is the date of separation, but the calculation is made once it is known what each party is going to take from the relationship property pool under the Act's other provisions.
>
> … It would be artificial to make an assessment under s 15 in a vacuum, ignoring the economic position of each party after the division of relationship

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439 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 (109–3) (select committee report) at 19 where the Committee said (under the heading "At what date is the economic disparity assessed?"): "The [Family Law Section of the New Zealand Law Society] asks whether economic disparity under the proposed new sections is to be determined on the date of separation or the date of the hearing. We intend that the disparity in income and living standards should be determined as at the date of the hearing. We are advised that the provision implements this intention. This is consistent with the current approach under the principal Act, which generally provides that property be valued at the date of the hearing. It would be inappropriate for a lump sum to be awarded on the basis of the position of the partners as at the date of separation. This would take no account of changes since the date of separation. For example, the applicant partner may have become employed, so removing or reducing any differences in income and living standards."

440 *X v X [Economic disparity]* [2009] NZCA 399, [2010] 1 NZLR 601 at [75]–[76]. See also at [169] per O'Regan and Ellen France JJ.

> property. The final s 15 assessment cannot realistically take place until the relationship property position of each party is clear.

In context, this does not seem to me to be a determination that disparity in income and living standards is assessed at the date of separation. Rather the reverse, the assessment of disparity is to be made "once it is known what each party is going to take" under the Act. That is to say, it is made at the date of the hearing.

[341] The division of functions which gives rise to the disparity is necessarily spent when the parties stop living together (as s 15(1) makes clear). Eligibility for an order under s 15(3) is therefore limited by the date of separation. But it seems to me that the "remaining economic disparities" between the parties must be assessed at the date of hearing, as Robertson J seems to me to have accepted. The matter was not developed in argument in this Court (although raised by the bench at the hearing). The parties proceeded on the basis of assessment at date of separation. My provisional views are however that the Courts below were mistaken as to the date of assessment of disparity. I accordingly also differ from the approach taken by Glazebrook, Arnold and O'Regan JJ in this Court, which takes the date of separation as the date of assessment of disparity and the date of hearing as the date on which calculation of the order that is just is made.[441]

[342] I incline also to the view taken by William Young J that any failure in support between separation and date of hearing is more properly addressed by maintenance orders (whether interim or made at the hearing).[442] I doubt whether the Family Court was correct to decline the wife's application for maintenance orders in relation to the period between separation and the determination of the relationship property application on the basis that the s 15 order compensated for any maintenance properly payable to her.[443] The matter is not however live before us on the basis on which the case has been argued and it is inappropriate to express a concluded view.

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441 See the reasons of Glazebrook J above at [216]–[220], Arnold J above at n 420, and O'Regan J below at [388].

442 Below at [454].

443 See *Williams v Scott* [2014] NZFC 7616 (Judge McHardy) at [475]–[476], invoking *JES v JBC* [2007] NZFLR 472 (HC). Judge McHardy did however award maintenance in respect of the payment of rates.

[343] Full compensation for disparity may not be achieved within the cap provided by the relationship property share of party B. Except where relationship property is extensive or the earning capacity of the parties is comparable, the amount available for an order under s 15 is likely to fall short of redressing disparity in income and living standards following the ending of the relationship.

[344] By contrast, orders under s 15A (although also available only where there is significant disparity in income and living standards after separation) can be made out of separate property as well as relationship property. Such orders aim to compensate however not for disparity in living standards and income after separation but for enhancement in the value of separate property by the disadvantaged partner. The scheme of ss 15 and 15A is, therefore, that compensation for income and standard of living disparity is obtained under s 15 and is limited to provision from party B's relationship property. Compensation for increase in the value of separate property may be obtained under s 15A from both party B's separate and relationship property but the jurisdiction to make such orders depends not only on contribution to separate property but also on significant disparity in post-separation living standards and income. In some cases orders under both s 15 and s 15A may be necessary to achieve an outcome that is just.

[345] The fact of significant disparity in income and standards of living caused by the division of functions within the marriage is the sole basis on which the jurisdiction to make orders arises under s 15 and is the basis on which compensation to achieve an outcome the court considers "just" is made. Compensation for disparity at the end of the relationship in likely income and living standards is the focus of s 15. Because it is the policy of the Act that all contributions to the relationship, material and non-material, are equal, the fact of significant disparity at the end of a relationship may generally be assumed to be a result of the way in which the parties have chosen to structure their contributions to the relationship, including by enhancing or restricting their income earning capacity during the relationship. Although that assumption may be excluded on the facts, it seems likely that in most relationships of any length significant disparity at the end of the relationship will be "because of the effects of the division of functions" within the relationship.

[346] Once such attribution to the relationship choices is shown, compensation for the resulting disparity is available wherever the court thinks it is just. As already indicated, I consider that compensation under s 15 is for the disparity, not for detriment or advantage to each partner in the ability to provide for themselves. That disparity is addressed by an order made at the date of hearing (when the court has the necessary information) in order to do what is just between the parties, including in achieving the clean break which is also a policy of the legislation and which enables the partners to move on with their lives.[444] The limitation of the compensation that may be ordered to be paid from the advantaged partner to his or her share of the relationship property is consistent with the clean break policy.

[347] I do not agree that the assessment required of the judge is comparable to the actuarial calculation appropriate for damages claims for personal injury. In such cases the policy of the law is to put the injured person in the position he or she would have been in without the injury. Because the focus under s 15 is on relative disparity between the partners at the end of the relationship, I consider that it is misconceived in assessing the order that is just in the circumstances to look to advantage or disadvantage of each party attributable to the division of effort in the relationship. Cases like *X v X*[445] and *M v B*[446] seem to me to have steered the law in the wrong direction. Although the Courts in those cases emphasised that the methodology applied was one method only and did not require either or both of the diminution or enhancement valuations applied, I am of the view that the use of such methodology, directed at the effect of the division of responsibilities in the relationship on each party's earning capacity, obscured the legislative emphasis on disparity in income and living standards between the parties.

[348] Section 15 is directed at the different end of disparity in living standards and incomes between the partners to the relationship. Once there is significant disparity because of the effects of the division of functions during the marriage, orders under s 15 are concerned with relative justice between both parties to the relationship. That

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444 I agree with William Young J below at [452] that factors such as "parental support, separate property resources, re-partnering, and … other responsibilities in respect of children" may be relevant in the particular case in assessing what is just.

445 *X v X [Economic disparity]* [2009] NZCA 399, [2010] 1 NZLR 601.

446 *M v B* [2006] 3 NZLR 660 (CA).

is assessed not by measuring the economic benefits and detriments to each in the marriage (an assessment which is invidious and highly speculative for reasons discussed by Glazebrook and Arnold JJ[447]) but by looking to their relative positions at the end of the relationship. Such assessment in my view necessarily takes into account all resources available to the parties, including but not limited to those obtained on the division of the relationship property in accordance with the Act. Where the resources available are substantial they may obliterate any substantial disparity in income and living standards. The relative justice the court is empowered to provide by adjustment to the relationship property regime is capped by the relationship property share of party B. And it is available to address the disparity where the court is satisfied that the income and living standards of that party are likely to be "significantly" higher.

[349] It is unfortunate that in the application of s 15 there has been concentration on what the disadvantaged partner might have been able to achieve if it were not for the division of responsibilities adopted in the relationship and what enhancement to income-earning has been obtained by the advantaged partner. Such inquiries may in some cases be useful cross-checks where the effect of the division of responsibilities on income and living standards after the end of the relationship is disputed (as is not the case here). But, even so, that is as a matter of evidence only. The legislation does not impose or prompt any particular approach, test or methodology. Although strict rules are provided for equal sharing of relationship property, s 15 is designed to depart from those rules in order to achieve broader notions of justice. Likely earning capacity of the partners after the end of the relationship is simply a factor to which the court "may have regard" under s 15(2). It is not the determining factor in the making of an order under s 15(3). In cases where the disadvantaged party nevertheless has access to significant wealth, justice may not require an award at all.

[350] Although the courts in cases such as *X v X* have emphasised that inquiries into economic detriment and advantage during the marriage are not the only approaches that might be adopted,[448] the case-law is dominated by these inquiries and by elaborate and often expensive measurement, as the present case illustrates. That may have resulted from conscientious attempts by judges to provide some certainty and

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447 See the reasons of Glazebrook J above at n 266 and Arnold J above at [309]–[310] and [324].
448 *X v X [Economic disparity]* [2009] NZCA 399, [2010] 1 NZLR 601 at [175].

predictability. But any such certainty or predictability is likely to be largely illusory in application of a power to make adjustments to meet the justice of the particular case. Indeed, in enacting s 15, Parliament was well aware that the adjustment permitted would increase uncertainty and unpredictability. The Select Committee in its report on the Bill acknowledged as much. It considered, however, that the development of a body of case-law would over time reduce uncertainty and permit greater predictability.[449] The need to address what was perceived to be injustice was considered to justify a wide power to make adjustments to relationship property through lump sum payments on the division of relationship property.

[351] Section 15 cannot be accounted to have been successful in meeting its purpose. That is demonstrated by the modest and infrequent orders made. In reaction, there have been suggestions that the courts might adopt rules of thumb, such as that suggested by Professor Henaghan that, in cases of disparity, awards of up to 15 per cent of the relationship property of the advantaged partner might be conventional.[450] I do not consider that such an approach is available under s 15, which seems to me to require an evaluation of all the circumstances in arriving at an order the court considers to be just. Where Parliament has not limited a broad power to achieve what is just I do not think the courts, by the adoption of rules of thumb, should limit its attainment.

[352] In summary, the jurisdiction under s 15 arises when the court is satisfied there is likely to be significant disparity between the income and living standards of the parties at the end of the relationship because of the division of functions in the relationship while they lived together. The disparity must be significant and must be able to be attributed to the division of functions in the relationship. When that impact is established or accepted as a matter of fact (as it was accepted in the present case), then I am of the view that the question for the court is not principally one of measurement of the detriment or advantage obtained by each party during the relationship in order to compensate for it, but the extent to which it is just in all the circumstances to compensate the disadvantaged partner for the relative disparity. In

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449 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 (109–3) (select committee report) at 17.

450 Mark Henaghan "Dealing to Disparity" (2008) 6 NZFLJ 51.

cases where there are substantial relationship assets there may be justification for more elaborate measurement, although focussed on the disparity at the end of the relationship. But in very many cases where the relationship property is modest, the relative disadvantage to the significant level required is likely to mean that the judge will readily be able to conclude that a substantial adjustment of the relationship property otherwise available to the advantaged partner (perhaps comprising the whole of the relationship property share) is appropriate. The matter is one of evaluative judgment in which many of the relevant considerations are not susceptible to precise measurement.

[353] In determining whether it is just to make an award, a broad assessment commensurate with the purposes of the legislation is called for. In some cases that may include consideration of the needs arising out of new relationships or investment income available from non-relationship property, as well as the age of the parties. Section 15 is not a relationship property provision but rather provides a power to achieve better justice through compensatory adjustment of relationship property entitlements. The terms of s 15 indicate that the compensation is concerned with economic disparity at the end of the relationship and the section attempts to meet that disparity through orders that are just in all the circumstances.

[354] I do not therefore accept the submission on behalf of the appellant that s 15 requires an "expectation" measure based on the expectation of continuation of the marriage. Expectations that the marriage will continue do not sit well with modern realities, as the House of Lords pointed out in *Miller v Miller* in rejecting a similar argument.[451] But more importantly, I think it fails to recognise that s 15 is directed not to what the parties expected or obtained in the marriage but disparity in economic position at its end if the disparity is a result of the division of functions during the marriage. Nor do I think understanding of s 15 is improved by borrowing the language of "unjust enrichment" or "unconscionability", concepts that seem well removed from this no-fault, social legislation and are apt to confuse.

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[451] *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618 at [58] per Lord Nicholls and at [164] per Lord Mance.

[355] Here it is accepted that the division of responsibilities in the marriage caused significant disparity. There was accordingly jurisdiction to make an order under s 15 to compensate for the disparity. No further causative inquiry was called for.

[356] As will be apparent, I am in substantial agreement with the views of Glazebrook and Arnold JJ. I would rely on the text of the legislation, rather than the wider legislative background and commentary. I consider that the methodology applied by the courts following *X v X* and *M v B* was a wrong direction in application of s 15. I agree with Arnold J at [323] that the causative inquiry is a broad one and that the fact of disparity will often be sufficient to justify the inference that it arose from the division of functions in the relationship while the parties lived together. In some cases diminution or enhancement may provide evidence that disparity has or has not resulted from the effect of the division of responsibilities in the relationship, where the cause of disparity is in dispute. In other cases it may be legitimate, as Arnold J notes at [325], to adjust any disparity to reflect the position of the parties at the beginning of the relationship, although the scope for such adjustment given the meaning of contribution under the Act and the recognition of equality between the partners is likely to be limited.

[357] In deciding what orders should be made once disparity attributable to the division of functions in the relationship is shown, I consider that there is no occasion to look to diminution in income or enhancement of it in the relationship as a measure of what is just. I consider the causative inquiry is complete once the judge is satisfied there is disparity in likely living standards and income attributable to the division of functions in the relationship. The orders made under s 15 should then redress the disparity to the extent just in the circumstances of the parties and to the extent permitted by the relationship property share of party B. I do not think it unlikely that an award could be made for the entire share (differing in this respect from Arnold J at [327]). It seems to me entirely likely in the case of a relationship which has generated little in the way of relationship property but in which there is significant disparity between the likely income and living standards of the parties (perhaps because of earning capacity or because of other separate wealth or income available to party B) that the disadvantaged party should receive the full amount of the relationship property of party B. I agree with Glazebrook J that there is no single

formula to be applied in application of s 15 and that the assessment depends "on the individual circumstances of each relationship and each partner".[452]

[358] I consider that the approach taken in the Courts below, although understandable in application of the "but for" assessment undertaken in *X v X*, was wrong. The correct inquiry in considering the quantum of the order (disparity having been acknowledged to result from the division of functions in the relationship) was as to the actual disparity between the husband and wife as to income and living standards and the extent to which it was just to redress it by an award to the wife out of the relationship property of the husband. That inquiry was not undertaken. I do not think it can be attempted by this Court. Had the correct approach been appreciated, it may well be that further evidence would have been called. I agree with William Young J that the capital and income positions of the parties are not clear.[453] Nor do I think that it is appropriate for this Court to adapt the assessments made in the Courts below on a different basis than I consider to be appropriate. I would return the matter to the Family Court for consideration on the correct basis.

O'REGAN J

[359] This is an unusual case. In relation to two out of the three issues before us, the valuation of the respondent's law practice and the amount awarded under s 15 of the Property (Relationships) Act 1976 (PRA), the appellant's position is inconsistent with the arguments advanced by her in the Court of Appeal or on her behalf in the Family Court and High Court. It is also inconsistent with the evidence called on her behalf in the Family Court.

[360] That means that we are dealing with the issues without the benefit of the views of the Courts below on the arguments now advanced and the benefit of expert evidence on the practical impact of an acceptance of the arguments now advanced for the appellant.

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452 Above at [265].

453 Below at [461]. I do not however share his impression that Ms Scott had a superior capital position to Mr Williams.

[361] In effect, this means we are dealing with those issues as both first and last Court. I see that as undesirable. Indeed, one of the reasons this Court has been reluctant to accept "leap frog" appeals from High Court decisions has been the importance of this Court having the benefit of the views of the Court of Appeal when it comes to address issues as a final Court.

[362] I do not make these points to criticise the appellant's counsel, Mr Goddard QC. He was not counsel in the Courts below. Rather, I make them to set out what I see as important background against which I approach my consideration of those two issues.

[363] Perhaps acknowledging the difficulty in which the situation just described placed the Court, Mr Goddard made it clear that the most significant issue from the appellant's point of view was the issue in respect of which the arguments advanced on her behalf had been advanced in the Courts below, namely the issue as to whether the Remuera properties should be vested in her.

Vesting of Remuera properties

[364] The first issue relates to the order made by the Family Court Judge vesting the Remuera properties in the appellant,[454] which was overturned by the High Court.[455] The background to this issue is set out in the reasons of Glazebrook J[456] and William Young J.[457] I agree with them that the vesting order should not have been overturned in the High Court and I agree with them that we should reinstate it. My principal concern is the argument that the Family Court Judge wrongly took into account the respondent's conduct when determining that a vesting order should be made. However, I agree with Glazebrook J and William Young J that the Family Court Judge did not improperly take into account the respondent's conduct in making the vesting decision, except in the limited way described by William Young J.[458]

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454 *Williams v Scott* [2014] NZFC 7616 (Judge McHardy) [FC decision] at [480]–[481].

455 *Williams v Scott* [2014] NZHC 2547, [2015] NZFLR 355 (Faire J) [HC decision] at [190]–[195].

456 Glazebrook J above at [17]–[38].

457 William Young J below at [391]–[401].

458 Glazebrook J above at [60]–[62]; and William Young J below at [398]–[404]. I agree with the comment of Glazebrook J above at [63] about the inappropriateness of adducing irrelevant evidence and the need for vigilance to ensure it is not admitted.

Valuation of law practice

[365] The background to this issue is set out in full in the reasons of Glazebrook J[459] and William Young J.[460]

[366] The essence of the argument advanced on behalf of the appellant in this Court was that the valuation of the practice should have been undertaken using a fair value methodology, rather than the fair market value methodology that was actually used by all of the expert witnesses. The appellant sought an order from this Court remitting the valuation of the practice to the Family Court for reconsideration on that basis or, at the least, restoring the Family Court valuation.

[367] I agree with Glazebrook J that the submission that the case should be referred back to the Family Court should be rejected.[461] I also agree with her that we do not have an evidential basis for determining whether the fair value methodology was required to be applied to the valuation of the practice in this case,[462] and like her, I would leave that question open for consideration in a future case in which the Court is able to determine the matter with the benefit of expert evidence as to the nature of the valuation methodologies and their likely impact on the assessment of value.[463]

[368] That raises the question of what we do now. Mr Goddard urged us to revert to the Family Court valuation of the appellant's half share in the practice ($225,000) as a minimum.[464] That valuation was reduced by the High Court to $150,000[465] and the High Court valuation was upheld by the Court of Appeal.[466] I am uneasy about making the assumption that Mr Goddard urged us to make, namely that a fair value valuation of the law practice would be at least $225,000, in the absence of evidence as to fair value.

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459 Glazebrook J above at [67]–[94].
460 William Young J below at [409]–[438].
461 Glazebrook J above at [132]–[136].
462 Glazebrook J above at [137].
463 Glazebrook J above at [99].
464 FC decision, above n 454, at [232].
465 HC decision, above n 455, at [101]–[105].
466 *Scott v Williams* [2016] NZCA 356, [2016] NZFLR 499 (Ellen France P, Harrison and Kós JJ) [CA decision] at [52]–[59].

[369] Ms Robertson argued that the case she had to answer in this Court was whether fair value or fair market value was the required valuation methodology and whether the case should be remitted to the Family Court. As she put it, there would be no logic in reinstating the Family Court valuation if we were to determine fair value was the proper valuation standard. I agree. That is because it, like the High Court and Court of Appeal valuations, is a valuation determined by the fair market value standard. The only difference between them is the multiple employed but, if they are based on the same (allegedly) "wrong" methodology, they must be equally flawed. There is also an issue of fairness for the respondent in having to meet a completely different case in this Court from that advanced below, meeting it (by persuading the Court that the fair value argument should not be accepted) but then losing the appeal on the basis of an adjustment to fair market value.

[370] Glazebrook J has undertaken an extensive survey of the fair market value valuations that were in evidence in the Family Court and concluded that a multiple of three is better than a multiple of two if a fair market value approach is taken.[467] That, in turn, has been contested by William Young J, principally on the issue of personal goodwill.[468] I do not consider we should engage with the correctness or otherwise of the fair market value valuations in the context of a case where the focus of the argument was on the proposition that the fair value methodology was right and the case needed to start again so fair value could be assessed. The personal goodwill issue was not argued and I would leave it for resolution in a case in which it is.

[371] I would not disturb the Court of Appeal's conclusion on this issue.

Section 15

[372] The case for the appellant was that the whole approach to the s 15 award in this case was wrong and the process needed to start again.[469]

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467 Glazebrook J above at [71]–[82] and [109]–[140].

468 William Young J below at [439]–[440].

469 She made a similar argument in the Court of Appeal when conducting her own appeal (though on a different basis from that advanced in this Court). The Court of Appeal rightly rejected it: CA decision, above n 466, at [78].

[373] The legislative history, the expert evidence in the present case, the decisions in the Courts below and the submissions made in this Court are set out in the reasons of Glazebrook J and I will not traverse that ground again.[470] I agree with the rejection by the Chief Justice, Glazebrook and Arnold JJ of the premises underlying the expectation measure approach suggested by Mr Goddard.[471] I also agree with Arnold J's rejection of the unjust enrichment approach suggested by Mr Goddard.[472]

[374] Arnold J highlights the difficulties with s 15 in his judgment and I will not traverse them again. I agree with him that the career partner should not be allowed to relitigate the merits of the way the partners divided the functions during the relationship.[473] And, like Glazebrook and Arnold JJ, I would reject an argument that the career partner's earning capacity would have been the same if there had been no division of functions because, to give one example, a nanny could have been engaged.[474] If, in the example just given, the partners chose direct parental care of the children during the relationship it is not open to the career partner to reopen that decision.

[375] As is made clear in the majority reasons in *X v X [Economic disparity]*, there was no argument advanced on behalf of the wife in that case that the award under s 15 should include an amount reflecting an enhancement of the income or living standards of the husband.[475] The methodology applied in that case was directed at assessing the diminution aspect only. There was no alternative methodology proposed by either party. As the majority observed:[476]

> In those circumstances, we do not say the methodology is the only appropriate one for cases of this kind. Rather, we endorse its use in this case and cases like it. The methodology is unlikely to provide a complete answer for every case of this type: the statutory requirement is that the award be just, and that is the overriding consideration.

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470 Glazebrook J above at [141]–[190].
471 Glazebrook J above at [196]; Arnold J above at [303]–[306]; and Elias CJ above at [354].
472 Arnold J above at [303] and [305]–[306].
473 Arnold J above at [317].
474 Glazebrook J above at [252]; and Arnold J above at [324].
475 *X v X [Economic disparity]* [2009] NZCA 399, [2010] 1 NZLR 601 at [171].
476 At [175].

[376] As the recent Law Commission Issues Paper makes clear, there have been obvious difficulties for the Courts in dealing with s 15 claims, and these have compromised its effectiveness.[477] The number of cases that have reached the appellate courts is small and they have not been a representative sample in that (perhaps not surprisingly) they have involved cases where the relationship property pool was large and the claims under s 15 were also large. This has meant there is not a body of appellate case law that has allowed incremental development of the approach to s 15. The approach adopted by the Court of Appeal in *X v X*, for example, has, despite the passage just cited, been seen by some as being of general application.

[377] There is now a reform process underway. Given the difficulties that have been encountered with s 15 so far, it would seem that the best solution to these problems is to learn from them and for Parliament to settle on clear objectives and legislate for a regime that offers more likelihood of resolution of claims without the difficulties and expense that have occasioned s 15 claims up until now.

[378] Mr Goddard criticised aspects of the *X v X* methodology, and some of those criticisms may well be justified. But the difficulty for the Court in dealing with them in this case is that the methodology adopted in *X v X* reflected the expert evidence before the Court in that case. In my view, the most important message about the *X v X* methodology is that it was not a pronouncement by the Court but rather the adoption of the expert evidence in that case, applied to the facts of that case. Its applicability to other cases will depend on those cases, as will the detail to be applied, such as the contingency rates used in the calculations in *X v X*. I agree with Glazebrook J that the contingency rates used in *X v X* should not be seen as a benchmark.[478]

[379] Although he rejects Mr Goddard's expectation methodology, Arnold J adopts a variant of it in order to provide a simple methodology for future cases that combines both enhancement and shortfall aspects of s 15 claims.[479] Glazebrook J also accepts (with some caveats) that the expectation methodology is an available method for calculating disparity and is in line with her conclusion that the assessment must be a

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477 Law Commission *Dividing relationship property – time for change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at chs 18 and 19.

478 Glazebrook J above at [247].

479 Arnold J above at [326]–[328].

broad one.[480] That methodology is principally aimed at the situation that arises in a traditional relationship, which Arnold J describes as one where one party assumes primary responsibility for home making and child care and the other assumes responsibility for income earning.[481] It calls for certain working assumptions in such cases, which are able to be rebutted by evidence adduced by the career partner.[482]

[380] The approach suggested by Arnold J is similar to one of the options for reform put forward by the Law Commission in its recent Issues Paper.[483] But that is an option for *legislative* reform, which would involve removing the "because of" wording in s 15 and replacing it with a new statutory presumption. I think there is a good case for reform of this kind though, as the Commission acknowledges, there would still be disputes about quantum that would need to be resolved in court.[484]

[381] There may also be a case for a new regime that is designed to reflect contributions made by each partner to the relationship. I do not think s 15 as currently worded does this.

[382] In general, my concern about assumptions is that they seem to me to be contrary to the current wording of s 15, which refers to the disparity arising "because of the effects of the division of functions within the … relationship while the parties were living together".[485] I also query whether this approach will reduce the extent to which evidence is adduced by the career partner: if an assumption is able to be rebutted it can be expected that attempts will be made to do this. And it can be expected that there will be disputes about what is, and is not, a traditional relationship.

[383] Having said that, an assumption that none of the identified disparity is because of the effects of the division of functions is equally inappropriate, and that is the effective position if the Court starts from a position that, in the absence of proof of cause, with expert evidence to support it, no award under s 15 should be made even if there is a clear disparity.

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480 Glazebrook J above at [206] and [264].
481 Arnold J above at [282].
482 Glazebrook J above at [204]; and Arnold J above at [293]–[294].
483 Law Commission, above n 477, at [19.5] and [19.23]–[19.31].
484 At [19.24].
485 Property (Relationships) Act 1976, s 15(1).

[384] As Dr Claire Green notes in her doctoral thesis, the dilemma with s 15 is that taking an approach to causation that requires hard evidence of a causal link between the division of functions and the likely future disparity is unduly restrictive, while a broad approach has the potential to make the causation test meaningless.[486] She points out that compensation under s 15 is awarded for economic disparity caused by the division of functions in the relationship, not economic disparity per se.[487]

[385] I agree that the quantification methodology proposed by Arnold J provides a structured way to approach the assessment of just compensation under s 15.[488] I see his step (a) (identifying the extent of the disparity resulting from the division of functions within the relationship) as requiring an exercise to determine, at least in broad terms, that extent (which I will call the caused disparity). The *X v X* methodology incorporates this aspect but there may be simpler ways to do it. I think Arnold J and I would agree that, where the relationship was not a traditional relationship of the kind he describes, the Judge has to make a decision about the extent of the caused disparity without assumptions. Where Arnold J differs from me is that his methodology requires, in the case of a traditional relationship, a working assumption that the extent of the caused disparity is 100 per cent of the total disparity, subject to rebuttal. I do not see an assumption that the caused disparity is 100 per cent (or, for that matter, zero per cent) of the total disparity as consistent with the "because of" wording of s 15.

[386] I accept that a broad approach to the exercise of determining the extent of the caused disparity is appropriate. I would not see it as necessary, for example, to adduce expert evidence of the extent to which the non-career partner's role in taking responsibility for home-making and childcare over an extended period enhanced the career partner's future income and living standards. The Judge would need to make a broad assessment taking into account the qualifications and career stage of the partners when the relationship began and when the relationship ended, the period for which the functions were divided, what, in broad terms, the respective functions were and any

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486 Claire Green *The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity* (Doctoral Thesis, University of Otago, 2013) at 55, cited by the Law Commission, above n 477, at [18.67].

487 At 54.

488 Arnold J above at [326]–[327] .

other relevant matters.[489] I am not sure it is helpful to go further than this, given that relationships will have different features. As Glazebrook J notes in her reasons, ultimately the assessment of just compensation depends on the particular circumstances of the particular parties.[490] Those circumstances will include any relevant matters affecting the likely income and living standards of the respective partners after the end of the relationship. I accept that this means a court decision is usually required, which may put the s 15 remedy out of reach for some. That is obviously undesirable, but it reflects the fact that s 15 confers a broad discretion, in contrast to other provisions in the PRA, which are rules-based.[491] The hope expressed in *X v X* that the methodology used in that case could provide a framework for settlements appears to have been misplaced.[492]

[387] I agree with Glazebrook J that the case should not be remitted to the Family Court, for the reasons she gives.[493]

[388] I also agree with Glazebrook J's remarks about the date at which compensation should be assessed.[494]

[389] I agree with Glazebrook J that the factors taken into account by the Court of Appeal in determining the amount of the s 15 award, other than age disparity, were irrelevant.[495] I agree with her that making an award of $520,000 is appropriate in the circumstances for the reasons she gives.[496]

[390] I also agree with Glazebrook J that the cross-appeal should be dismissed for the reasons she gives and with her comments on name suppression.[497]

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489 There may need to be an adjustment if the effect of the division of functions was to enhance the career partner's business, if the non-career partner has shared in the value of the business as relationship property. See Glazebrook J above at [252].

490 Glazebrook J above at [207].

491 Arnold J above at [287].

492 *X v X*, above n 475, at [174]. I agree with William Young J below at [459] that the development of a set of tables would be helpful.

493 Glazebrook J above at [224].

494 Glazebrook J above at [216]–[220].

495 Glazebrook J above at [254]–[255].

496 Glazebrook J above at [256]–[259].

497 Glazebrook J above at [260]–[262] and [266]–[267].

WILLIAM YOUNG J

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The vesting of the Remuera properties

[391] Judge McHardy's decision[498] to vest the Remuera properties in Ms Scott was pursuant to ss 25(1), 33(1) and (3) of the Property (Relationships) Act 1976 (the PRA) which provide:

> **25 When court may make orders**
>
> (1) On an application under section 23, the court may—
>
> (a) make any order it considers just—
>
> (i) determining the respective shares of each spouse or partner in the relationship property or any part of that property; or
>
> (ii) dividing the relationship property or any part of that property between the spouses or partners:
>
> (b) make any other order that it is empowered to make by any provision of this Act.
>
> …

[498] *Williams v Scott* [2014] NZFC 7616 [FC decision].

33 Ancillary powers of court

(1) The court may make all such other 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.

…

(3) In particular, but without limiting the generality of subsections (1) and (2), the court may make any 1 or more of the following orders:

(a) an order for the sale of the relationship property or any part of the relationship property, and for the division, vesting, or settlement of the proceeds:

(b) in the case of property owned by both spouses or partners jointly, an order vesting the property in both spouses or partners in common in such shares as the court considers just:

(c) an order vesting the relationship property, or any part of the relationship property, in either spouse or partner:

…

(i) an order for the payment of a sum of money by one spouse or partner to the other:

…

[392] The primary function of Judge McHardy was to divide the property of the parties in the manner provided for by the PRA. Section 33 provides mechanisms by which such division can be justly effected which include orders for sale, vesting and the payment of money.

[393] I regard the s 33 powers as discretionary in nature because:

(a) this accords with the statutory language;

(b) their exercise should not affect the substantive rights of the parties to division in accordance with the PRA but rather merely the way in which such division is effected; and

(c) the legislature has not specified criteria for the exercise of the powers.

I also note that s 34 (which plainly includes reference to s 33) is in these terms:

> **34 Discretion of court as to orders**
>
> Where application is made to the court for any order under any provision of this Act, the court may, subject to the provisions of the Act, make any other order under this Act which could have been made if application for that other order had been made when the first-mentioned application was made.

The heading is suggestive of a legislative understanding that the s 33 powers are discretionary.

[394] Providing Judge McHardy's conclusion as to the value of the properties was sound, the decision whether to vest or direct a sale would have had little or no impact on the ultimate division of relationship property. For reasons given by Glazebrook J, I am of the view that the conclusion was sound.[499] It follows that I see this aspect of the case as involving a discretionary determination.

[395] Judge McHardy's reasons for making the vesting order were not spelt out with great precision. At [285] of his judgment, he observed that Ms Scott:[500]

> … has placed before the Court compelling reasons for being given the option to retain these two properties as part of any division. This can only happen though if the clean break principle can still be met. In other words, if it is financially possible it should be allowed.

He then went on:

> [286] This ultimately will be determined by the net value of the pool which relies to a large extent on the value of these properties. If there remains a sum of money due to [Mr Williams] which [Ms Scott] cannot pay then the answer has to be that the properties will need to be sold.
>
> [287] It is primarily for this reason that values have to be attributed to these properties. I do not accept that each party taking one property would be a fair result given the history of the dispute. [Ms Scott], in my view, has been genuine in her desire to get to a resolution and this has been frustrated by [Mr Williams] seemingly because of his, at times, woolly thinking which has clouded his judgment and his apparent adoption of a siege mentality which I find was not justified on the evidence. He himself accepted that there had been "flip flops" on his part as to how he saw resolution from time to time but says he did not have that on his own.

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499 See above at [53]–[66].
500 FC decision, above n 498.

> [288] This is highlighted by the misrepresentations that have been identified in his application for sale. He represented his position to be something that it simply was not – re purchase of a home for himself.

[396] The "compelling reasons" mentioned by the Judge seem to be a reference back to an earlier passage in his judgment:

> [264] For [Ms Scott] I am again referred to s 1M(c) of the PRA to "provide for a just division of the relationship property between the spouses or partners when their relationship ends by separation." Those purposes and principles are particularly relevant because it is submitted it would be unjust and significantly disadvantageous to [Ms Scott] if Remuera Property 1 was sold at this point in time. She is currently running her own business from the properties (to try and meet some of her own reasonable needs) and "every room in the house is now used in producing income for her and this includes her own bedroom." It is argued that it would be unjust to require her to sell it in these circumstances.
>
> [265] [Ms Scott] says she was willing to sell in 2007, with sale in March 2008 on condition that relationship property was made available to put the property in good order for sale and on condition of maintenance. [Mr Williams], it is said, unreasonably refused. From that point on [Ms Scott] has had no option but to remain in the house. She has had no option but to operate her business from the house. She has established a need for the property brought about by the deliberate conduct of [Mr Williams] in obstructing her ability to have available capital to start up her own business.

[397] Because I am of the view that the Judge's conclusions as to valuation were sound, I consider that comparatively little turned on whether the Remuera properties were to be sold (as Mr Williams contended) or vested in Ms Scott. If the properties were to be sold, the price achieved may have been more or less than the valuation; marketing and other costs would have been incurred; and Ms Scott would have suffered appreciable personal and business inconvenience. On this basis, there was not much economic significance to the vesting decision. Given the hostility between the parties, it would not have been sensible to create a situation in which the parties might have become neighbours. Against this background, the decision to vest the properties in Ms Scott was not particularly surprising.

[398] The only aspect of the approach adopted by Judge McHardy which troubles me is the extensive criticism which he made of Mr Williams' conduct. Such criticism appears in the passages from the judgment which I have cited – that is, the reference to Mr Williams misrepresenting his house ownership position in his application for sale and Judge McHardy's apparent adoption of Ms Scott's complaint that

Mr Williams had deliberately obstructed her access to capital for her business. There are also other passages in the judgment in which the Judge, either expressly or by implication, commented adversely on the way in which Mr Williams had behaved. By way of example, the Judge identified instances of what can be viewed as down-right dishonesty,[501] concealment[502] and, in respect of banking arrangements, manipulation.[503] More generally, the Judge accepted that Ms Scott had identified a number of actions taken by Mr Williams that "can only be interpreted as being obstructive".[504]

[399] As will be apparent, I am not so much concerned with the accuracy or indeed fairness of the criticisms.[505] My concern, rather, is with their relevance. This is because of s 18A of the PRA which provides:

> **18A Effect of misconduct of spouses or partners**
>
> (1) Except as permitted by subsections (2) and (3), a court may not take any misconduct of a spouse or partner into account in proceedings under this Act, whether to diminish or detract from the positive contribution of that spouse or partner or otherwise.
>
> (2) Subject to subsection (3), the court may take into account any misconduct of a spouse or partner—
>
> (a) in determining the contribution of a spouse to the marriage, or of a civil union partner to the civil union, or of a de facto partner to the de facto relationship; or
>
> (b) in determining what order it should make under any of sections 26, 26A, 27, 28, 28B, 28C, and 33.
>
> (3) For conduct to be taken into account under subsection (2), the conduct must have been gross and palpable and must have significantly affected the extent or value of the relationship property.

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501 By way of examples misrepresenting his income assets and expenditure in an affidavit in November 2009 as interim maintenance and providing in respect of child support what purported to be an affidavit which he had earlier sworn but which in fact had been altered: see FC decision, above n 498, at [46] and [95]–[96].

502 The purchase in the name of another person of a house property and associated non-discovery by both Mr Williams and the other person of relevant material: see FC decision, above n 498, at [96]–[97].

503 Arranging with his bank for Property Law Act 2007 notices to be issued despite having made arrangements with the bank which covered the amounts apparently outstanding: see FC decision, above n 498, at [95]–[97].

504 FC decision, above n 498, at [107].

505 At least in some respects, I think that the criticisms were unanswerable. In any event, the Judge was better placed than I am to assess the detail of what happened between separation and the hearing.

[400] Judge McHardy recorded the submissions of counsel for Ms Scott as to relevance in these terms:[506]

> [89] … [Ms Scott's counsel] submits the conduct is always relevant. [Ms Scott] is not seeking to have the Court address [Mr Williams'] conduct with a view to any unequal sharing of property. She is however asking the Court to take into account the conduct in the marriage i.e. the conduct that led to the division of functions and which continued through the marriage by [Mr Williams] asserting that he should be the one with the business and [Ms Scott] should have the role of supporting his business. Conduct is submitted to be relevant to the following:
>
> (a) s 15 claim;
>
> (b) the orders to be made – s 33 PRA; clean break required – applicant not to be in adjoining section;
>
> (c) costs;
>
> (d) credibility.
>
> [90] The conduct that it is submitted is relevant is [Mr Williams'] controlling conduct pre-separation and post-separation in that pre-separation he obstructed [Ms Scott] resuming her career. He is alleged to have obstructed her attempts to resume her career and his control of the finances are part of the divisions of functions of the marriage which have caused the economic disparity.
>
> [91] As to the orders to be made, [Ms Scott] says that [Mr Williams] claims no connection with Remuera Property 1 and Remuera Property 2. He wants to have Remuera Property 2 vest in him so that he can sell it. The evidence establishes [Ms Scott's] connection and the need for both properties. A clean break requires that the parties are not neighbours.

[401] The Judge later expressed his conclusions in respect of those submissions in this way:

> [108] I agree with [Ms Scott's counsel] that conduct is always relevant. The evidence that is before the Court paints a picture which is far more conflicted than what most couples experience post-separation. The time delay in getting to this point has only served to accentuate those difficulties. I have to say that the evidence I have before me does not reflect well on [Mr Williams]. He has demonstrated a reactive attitude to anything [Ms Scott] has proposed – whether it be a sensible proposal or not.
>
> [109] I have already indicated that the sensibleness or otherwise of [Ms Scott's] first proposal is a crucial factor in addressing what is ultimately a fair outcome. In the total scheme of things (as will be shown in respect of my decisions on each specific issue) the initial proposal deserved much more serious consideration than it was given by [Mr Williams].

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506 FC decision, above n 498.

> [110] His response and subsequent actions are in my view the singular most important factor in why this dispute has not been capable of a sensible resolution. I accept [Ms Scott's] evidence as to the difficulties that she has experienced and accept that they have relevance to the issues identified by [Ms Scott's counsel] in her submissions. [Mr Williams'] actions at times can only be interpreted as provocative and certainly not focused on a fair resolution. … I reject the implications that have been made that [Mr Williams] was being persecuted by the way [Ms Scott] went about things – rather, it seems that it was her reaction to the way she was being treated.

[402] Despite the breadth of the language of s 18A, I have some reservations as to the universality of its application. As I have said, on the basis of the Judge's findings, Mr Williams' conduct in relation to the litigation included dishonesty, concealment and manipulation. I find it hard to accept that such conduct could not be reflected in an order for costs. The hostility between the parties (which, given the tenor of the judgment, Judge McHardy saw as having been exacerbated by the conduct of Mr Williams) was relevant to whether the Remuera properties should be dealt with in such a way as might result in Ms Scott and Mr Williams being neighbours. And, coming more closely to the point, the extent to which Ms Scott had refocused her personal and business life around the Remuera properties was material to the vesting decision. It would be odd if Mr Williams could insist on her connection with the properties being taken out of consideration on the basis that it had been caused by his unreasonable conduct of the litigation. On the other hand, I accept that this factor – that is, her connection with the properties – should not have been accorded enhanced significance by reason of Mr Williams' unreasonable conduct.

[403] All of that said, I confess to considerable discomfort about the extent of Judge McHardy's references to conduct both generally and in respect of the vesting decision. In particular, I suspect that Mr Williams may feel that the Judge's distaste for his conduct during the dispute may have contributed to the vesting decision. I would, however, also be very reluctant to accept that Judge McHardy would have made a vesting order with a view to punishing Mr Williams for his conduct. And, in light of the passages from his judgment which I have set out, I am not persuaded that he did so.

[404] In the end, I do not consider that the exercise of Judge McHardy's discretion miscarried. He was entitled to take into account Ms Scott's personal and business

attachment to the properties which in part was associated with the lengthy delay between separation and hearing and the consequential negative effects for her of being required to move out of the house. In a situation in which there was a binary choice between vesting or sale, both of which would result in division in accordance with the PRA, such negative effects would be sufficient reason to opt for vesting. My reading of his judgment is that this is essentially the approach which he adopted.

[405] It follows that I am of the view that Faire J ought not to have allowed the appeal on this point.[507] I do, however, have some other comments to make about his judgment; this in terms of the reasons he gave for directing a sale.

[406] Although Faire J was critical of the references by the Judge to conduct, this did not feature substantially in his reasons for directing a sale of the property. Those reasons were:[508]

(a) the valuation evidence of the expert witnesses to the effect that a sale was the best method for determining the value of the properties;

(b) the assumed increase in the value of the properties since the Family Court judgment;

(c) that the reasons given by Judge McHardy for the vesting order did not amount to "compelling reasons why these two properties should not be auctioned";

(d) the allied consideration that he did "not consider that one party's association with the property outweighs the other"; and

(e) Judge McHardy not having reconsidered this aspect of his judgment when he recalculated the financial details of his substantive decisions.

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507 See *Williams v Scott* [2014] NZHC 2547, [2015] NZFLR 355 [HC decision] at [190]–[195].
508 At [192]–[195].

[407] I am broadly in agreement with the approach adopted by Glazebrook J above at [41]–[59] in relation to the reasons given by Faire J. In particular I agree with her that the order for sale would have the practical effect of producing a further timing asymmetry in relation to valuation which I do not regard as appropriate, a point about which I have some additional comments.[509]

[408] The effect of the order for sale made by Faire J and upheld by the Court of Appeal[510] is to result in the anticipated post-hearing date increase in the values of the Remuera properties being shared. In terms of whether this is appropriate, I think it sensible to consider what would have happened if Judge McHardy had a directed a sale. I see no reason to think that such a sale would have produced a price significantly different from the valuation figure adopted by the Judge. On this basis, I do not think it likely that Mr Williams would have been much better off with a sale at that time than he is in terms of the vesting. In substance, this comes back to my view that the valuation assessment of Judge McHardy has not been shown to be wrong.

The valuation of the practice

The definition of "property" in the PRA

[409] "Property" is defined in this way:[511]

> ***property*** includes—
>
> (a) real property:
>
> (b) personal property:
>
> (c) any estate or interest in any real property or personal property:
>
> (d) any debt or any thing in action:
>
> (e) any other right or interest

Although the definition is non-exhaustive and it falls to be applied in the particular context of the PRA, it generally reflects a "conventional understanding of

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509 See above at [51].
510 See *Scott v Williams* [2016] NZCA 356, [2016] NZFLR 499 (Ellen France P, Harrison and Kós JJ) [CA decision] at [21]–[34].
511 Property (Relationships) Act 1976, s 2.

'property'".[512] Essentially for this reason, the Court of Appeal in *Z v Z (No 2)* held that the definition did not encompass earning capacity.[513] On the other hand, the Court in that case recognised that its conclusion that the non-transferable interest of the husband in a professional partnership was property was tantamount to treating at least a portion of the husband's earning capacity as property:[514]

> It is to be acknowledged that construing the definition in s 2 to include a right or interest of this kind[515] is, in effect, to recognise the husband's enhanced earning capacity once that capacity is harnessed through an external mechanism such as the partnership deed; all agree that the husband's interest in that partnership is property. His career advanced to the point where he became a partner in his accounting firm and the income to which he is now entitled reflects his earning capacity. The key point, however, is that this earning capacity is manifested in a right or interest which falls within the definition and on which a money value can be placed. It is the right or interest which is property and not the underlying economic concept of earning capacity which gives rise to or is the product of that right or interest.

[410] The Court briefly discussed the possibility of the husband leaving his firm:[516]

> Should the husband leave the partnership and enter another firm it would be his earning capacity, or something approximating it, which he would take to the new partnership. Should he leave his partnership and establish himself in business on his own account he will, of course, cease to have any rights or interest of a contractual nature, but he will nevertheless enjoy substantially the same earning capacity. While it does not call for decision in this case, the question for a Court would then be whether an interest in a sole practice, as distinct from a partnership, comes within the definition of "property" in s 2. So too employment contracts. The fact that such interests would not be transferable or have an exchange value would not preclude them from consideration. Rather, the issue will be whether the interest can be brought within the definition and given a money value. But those questions can be left open.

[411] I will discuss shortly what the Court had to say about the valuation of the husband's interest in the partnership.

[412] *Z v Z (No 2)* was decided in 1996. It provided a significant part of the background to the amendments to the relationship property regime which were enacted in 2001 and which are discussed in the reasons of Glazebrook J.[517] Section 15

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512 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA) at 279 and see generally at 278–280.
513 The PRA was at that time entitled the Matrimonial Property Act 1976.
514 *Z v Z (No 2),* above n 512, at 282.
515 That is, the non-transferable partnership interest.
516 At 282–283.
517 See above at [145]–[156]. As mentioned above the Act was then called the Matrimonial Property

of the PRA was replaced in the associated process and ss 1M and 1N emerged also. What did not emerge was any amendment to the definition of property or any provision suggesting that earning capacity was property.

Valuation of professional practices and analogous businesses: the principles

[413] There are a number of cases in which the courts have been required to address the value of professional practices and other more or less analogous businesses. Cases which come to mind are the first (and unrelated) *Z v Z* (to which I will refer as *Z v Z (No 1)*),[518] *Briggs v Briggs*,[519] *Z v Z (No 2)*,[520] *Brownie v Brownie*,[521] *M v B*[522] and *Thompson v Thompson*.[523] Other cases have dealt with the value, if any, to be placed on the professional practices of surgeons, businesses which are characterised by: (a) limited capital investment; (b) income derived solely or primarily from the personal skills and work of the proprietor; and (c) non-marketability.[524] Similar considerations would apply to the valuation of the practice of a barrister, albeit that I am not aware of any cases in which such practices have been valued.

[414] In the case of professional practices and comparable businesses, valuation for relationship property purposes is usually arrived at by applying a multiplier to a calculation of future maintainable earnings. This is consistent with the way in which sale prices in respect of such firms tend to be analysed and, on the basis of my now somewhat dated experience in practice, is also broadly consistent with the way in which market participants bargain.

[415] For relationship property purposes it is well established that value is to be ascertained on the assumption that an appropriate restraint of trade will be available. This was established in *Z v Z (No 1)*.[525] This may be material to both the calculation of future maintainable earnings and the multiplier. Thus, in calculating future

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Act before being changed to the PRA in 2002.

518 *Z v Z* [1989] 3 NZLR 413 (CA) [*Z v Z (No 1)*].

519 *Briggs v Briggs* (1996) 14 FRNZ 404 (HC).

520 *Z v Z (No 2)*, above n 512.

521 *Brownie v Brownie* HC Christchurch AP217/97, 4 April 1998.

522 *M v B* [2006] 3 NZLR 660 (CA).

523 *Thompson v Thompson* [2015] NZSC 26, [2015] 1 NZLR 593.

524 See for instance, *Newman v Newman* (1999) 18 FRNZ 413 (HC); and *D v C* [2000] NZFLR 514 (HC).

525 *Z v Z (No 1)*, above n 518, at 416 per Richardson J, at 417 per Casey J and at 418 per Bisson J.

maintainable earnings of a firm, the valuer can assume that the party whose interest is being valued will not be trading in direct competition to the firm. And in assessing what a prudent purchaser might pay, the valuer should assume that such a purchaser will have the comfort of a restraint of trade.

[416] The earnings of a firm may be heavily dependent on the personality, history, skills and contacts of the proprietor. In such a case, the firm, even with a full restraint of trade, will suffer a diminution in earnings should the proprietor leave the business. To put this simply, a firm may be worth more to its proprietor than to a purchaser. The difference in values is often referred to as personal goodwill. A prudent purchaser of such firm will allow for this – something which can be achieved either by:

(a) assessing future maintainable earnings on a basis which assumes that the proprietor is no longer involved with the firm; or

(b) reflecting the likely diminution of earnings on the departure of the proprietor in the multiplier.

[417] This was an issue which arose directly in *Briggs v Briggs* and somewhat tangentially in *Thompson v Thompson*. What I am about to say about the first of those cases involves some repetition of what was said in *Thompson v Thompson* but I think that it is warranted given that the point in issue can be a little elusive.

[418] *Briggs v Briggs* dealt with the value of the shares in a financial services company operated by the husband. The argument for the husband in the Family Court was that much of the apparent value of the business was "personal goodwill" and should not form part of the valuation assessment. This argument was rejected in the Family Court but accepted by Thorp J on appeal:[526]

> The situation will depend, of course, on the degree to which the particular business relies upon the personal qualifications of the vendor. But plainly the giving of a restraint of trade covenant would not ensure the retention by a purchaser of the whole of the clientele of a business in which trade is closely attached to the personal qualifications of the vendor of the business. The effect of *Z v Z* would be very slight in the case, for example, of a public

[526] *Briggs v Briggs*, above n 519, at 411 (citations omitted).

> relations business "depending for its viability almost exclusively on the ability and business connection" of its proprietor … .

Thorp J also adopted the following passage from the May 1995 edition of *Canada Valuation Service*:[527]

> Personal goodwill is related to the business skills of an entrepreneur, personal contacts built up by individuals in a certain environment, reputations of those engaged in business or in professional undertakings, and so on. Personal goodwill may give rise to so-called "excess profits" (or generate a rate of return in excess of that required on net tangible assets), but not be of a transferable nature or possess a market value. To have commercial value, goodwill must be transferable.

[419] In *Thompson v Thompson*, this Court dealt with *Briggs v Briggs* in this way:[528]

> [33] In *Briggs v Briggs*, the Family Court Judge had arrived at a value of the shares in the company of $1.4 million by applying a capitalisation rate to his assessment of the future maintainable profit of the company, based on the assumption that Mr Briggs was going to continue to run the business. The decision of Thorp J was to discount that arithmetically derived valuation figure of $1.4 million to $1.1 million to allow for what he called "the personal goodwill factor". That decision is not inconsistent with *Z v Z (No 1)*. Rather, the Judge's approach was based on his view that, without Mr Briggs but assuming a restraint of trade, the company's future maintainable profit was less than that assessed by the Family Court. In other words, the company with Mr Briggs on board was likely to be appreciably more profitable than it would be without him. Because the higher level of profitability (that is, with Mr Briggs still involved) could not be transferred to a purchaser, the value of the business should be assessed on the basis of the lower level of future maintainable profit than that adopted in the Family Court.

[420] The valuation approach to personal goodwill was not directly in issue in *Thompson v Thompson*. *Briggs v Briggs* was cited primarily because it provided a good example and explanation of the concept of personal goodwill. That said, the passage I have cited does not suggest any doubts as to the approach taken in *Briggs v Briggs*. Indeed, the reconciliation of *Briggs v Briggs* with *Z v Z (No 1)* implies some approbation. I note as well that the Court of Appeal in *Z v Z (No 2)* was careful not to cast doubt on *Briggs v Briggs*:[529]

> We do not see the valuation of the benefits as in any way blurring the distinction between business goodwill and personal goodwill (skill, reputation etc) as drawn in *Briggs v Briggs* (1996) 14 FRNZ 404.

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527 At 412.

528 *Thompson v Thompson*, above n 523 (footnotes omitted).

529 *Z v Z (No 2)*, above n 512, at 291.

[421] One of the principal arguments for the husband in *Z v Z (No 2)* was that because his partnership could not be sold no value could be attached to it. This was rejected as the Court held that the non-assignability of a bundle of rights does not mean that they have no value. In remitting the valuation issue to the High Court, the Court observed:[530]

> … valuation of the husband's entitlement may be seen as calling for an approach akin to that identifying super profits to measure the extent, if any, by which the husband's expected income as a partner will exceed the earnings appropriate as remuneration for his skills (which are his own) and future efforts.

This was followed by the reference to *Briggs v Briggs* which I have set out.[531]

[422] There are two cases in which it was unsuccessfully contended that the courts should attribute goodwill to the practice of orthopaedic surgeons.

[423] In the first, *Newman v Newman,* the Court (consisting of John Hansen and Chisholm JJ) observed:[532]

> The importance of the distinction between what have been broadly described as "personal goodwill" and "business goodwill" respectively was reinforced by *Z v Z (No 2)*. It was necessary for the Court of Appeal to address, inter alia, the broad issue whether the husband's earning capacity was "property" within the meaning of s 2 of the Matrimonial Property Act and, more specifically, whether the enhancement of that earning capacity during the marriage was "matrimonial property" for the purposes of the Act. The full Bench concluded … that:
>
> > essentially personal characteristics which are part of an individual's overall makeup such as the person's level of intelligence, memory, physical strength or sporting prowess are not to be seen as 'property' within the meaning of the Matrimonial Property Act.
>
> …
>
> The first question the Family Court Judge had to determine was whether there was any goodwill in the practice in excess of the respondent's personal goodwill. This was essentially a factual issue. The Judge carefully reviewed the evidence advanced by each chartered accountant. There is no suggestion that her review of that evidence was inaccurate in any way. The Judge concluded that the respondent's income was derived *solely* from his individual output which utilised his individual skills. Apart from the tangible

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530 At 290.
531 Above at [419].
532 *Newman v Newman*, above n 524, at 417–418.

> components of the practice, the value of which she fixed at $58,000, the Judge was unable to identify any goodwill in excess of the respondent's personal goodwill.
>
> There was an inevitability about the Judge's conclusion. The respondent had given evidence that conservatively 95 percent of his referrals came from GPs and that even if he moved elsewhere in Christchurch, whether by himself or with others, he would expect his income to remain at the same level.

[424] The second case, *D v C*, concerned an appeal from a judgment of the Family Court in which the Judge had attributed goodwill to another orthopaedic surgeon's practice. In doing so, the Family Court Judge had said:[533]

> It is undeniable in the present case that retention of the practice is of considerable value to this husband. He has elected to retain the practice and he is to that extent "a hypothetical purchaser" from the marriage partnership.

In allowing the appeal, Doogue J applied *Newman v Newman* which he rightly saw as indistinguishable.[534] Although he did not directly engage with the passage from the Family Court judgment which I have set out, it is clear that he did not accept the underlying logic.

[425] Although there are passages in *Z v Z (No 2)* which are potentially of wide import, in particular the passages cited above at [409]–[410], I see them as best read in light of the other aspects of the judgment to which I have referred. Read as a whole, *Z v Z (No 2)* proceeds on the basis that earning capacity is not property and that, accordingly, personal goodwill is likewise not property.

[426] I accept that, as a general principle, it is appropriate for valuation purposes to treat the proprietor of a firm as a potential purchaser but I do not see this as warranting an approach under which value is determined by reference to what that proprietor would be prepared to pay for the "right" to continue to engage in his or her profession. Such an approach treats earning capacity as property.

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533 Cited in *D v C*, above n 524, at [25].
534 At [28]–[30].

[427] I also accept that rights can have a value even if not legally or practically capable of being sold. The reasons why this is so are well-explained in *Z v Z (No 2)* and there is no need for me to repeat them. But in a situation where the rights are capable of sale, I am uneasy, to say the least, about adopting a valuation approach which attributes a value exceeding their market value.

[428] Obviously, there are difficulties where market evidence is limited. Solicitors in the situation of Mr Williams and his partner are likely to realise the value of their practices by degrees, introducing new partners and then, over time, withdrawing from the firm. The value they extract may be in the form of lump sum payments or perhaps just reflected in the allocation of profits. Because such arrangements are private, valuers will usually not be aware of them and would, in any event, find them very difficult to analyse.

[429] Despite the evidential difficulties just referred to, the fact remains that there is a market for the sale of the goodwill of a law firm. It may be that a potential purchaser of goodwill will place rather more weight on the risks associated with such transactions, including profit attrition, than expert witnesses or perhaps a Judge think is appropriate. It is, however, the role of the Judge to assess – and not second guess – the market. And despite the limited direct market evidence available, such assessment is practicable.

[430] Chartered accountants who advise on such transactions should have a reasonable understanding of the value which the market places on ownership interests in small businesses, including professional practices. And more generally, chartered accountants should be able to give additional assistance to the court by carrying out hypothetical exercises as to the advice which they would give Mr Williams and a prospective purchaser in respect of what should be paid. In the absence of more direct market evidence, I consider that a court would be entitled to determine value on the basis of such assessments and hypothetical exercises. I would see the value so determined as representing the fair market value of the business.

The approach of Judge McHardy

[431] Although Judge McHardy reviewed extensively the evidence and submissions addressed to the valuation of Mr Williams partnership interest, the precise route by which he arrived at the ultimate figure is not spelt out explicitly but is rather to be inferred. It would appear to have been based on future maintainable earnings of $850,000 for the firm, of which half ($425,000) should be attributed to Mr Williams, from which deduction of a notional salary of $200,000 produces a super profit of $225,000. Allowing for tax at 33 per cent and a multiplier of three produced a capital value of Mr Williams' interest of $450,000.[535]

[432] All that is material for the purposes of this appeal is the multiplier which Mr Williams maintains should have been two and not three.

[433] The Judge concluded the sustainability of the assessed future maintainable earnings was not dependent upon both Mr Williams and his partner continuing to run the firm. This conclusion was based on the fact that over a period of some eight months when Mr Williams was unable to work because of ill-health, there was no diminution in the earnings of the firm. It is important to recognise, however, that during this period of eight months, Mr Williams remained a partner and in this sense there was continuity.[536] So I do not think that it could be assumed that profitability would not be affected if he left the firm completely. And if both Mr Williams and the other partner sold the firm, a purchaser could not be confident that there would no earnings attrition. The Judge did not explicitly find that there was no personal goodwill and, if that was his conclusion, I consider that it was not justified on the evidence. This is because I would have thought it obvious that a purchaser of the firm would allow for risk of profit attrition if ownership of the firm changed, which necessarily implies personal goodwill in Mr Williams and his business partner collectively.

[434] My understanding of the judgment is that Judge McHardy considered that there was no requirement, as a matter of law, for personal goodwill to be taken into account

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535 See Glazebrook J's reasons above at [83]–[84].
536 FC decision, above n 498, at [196].

(that is, by allowing for the risk of profit attrition on the departure of the other partner and Mr Williams from the firm). He regarded Mr Williams as a potential purchaser of the firm and noted that outside the firm he could not expect to receive an income anywhere near what he derived as a partner. He also saw the other partner as a potential purchaser. He noted that if one purchased the interest of the other, there would be "almost nil risk of attrition".[537] In the course of his judgment, he asked himself the following questions, as a "reality check":[538]

> (a) in real life what is the material risk to ongoing performance of the legal practice with profits to each partner of not less than $400,000 to $450,000 per annum?
>
> (b) Having assessed that risk, what would another solicitor pay to get access to this level of income stream?
>
> (c) *Given the prospect of sale, what would [the other partner] pay to keep it all for himself?*
>
> (d) *What would [Mr Williams] pay to keep his share?*
>
> (e) What would [Ms Scott] pay for this business opportunity and sustained income stream?
>
> (f) What do other professional practices sell for with the risk profile associated with this legal practice?

[435] He then went on to say:

> [221] A fair value has to be assessed in terms of the concept of "notional sale". The difference that exists in the respective positions of the parties arises from a difference in approach to this particular concept. *[Mr Williams'] approach tends to reflect more an approach that the market place is largely determinant i.e. that his half share in the legal practice is a business "for which there is no market."*
>
> [222] [Ms Scott], on the other hand, demonstrates a better understanding of the actual concept that the Court must assess. Her expert has tailored his evidence accordingly. *[Mr Williams'] experts can be accused of falling into the trap of somewhat limiting their assessment by being influenced by what might happen in the marketplace.*
>
> [223] The exercise has to be firstly what, in the absence of a market, a person desiring to buy the legal practice would pay [Mr Williams] who is willing to sell it at a fair price but not desiring to sell. Methods of valuation are only an aid to this. This exercise is to assess the notional market value – not the book value.

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537 At [178].
538 At [216] (emphasis added).

> [224] I accept that the parties must be included among the hypothetical potential buyer and sellers. The enquiry must be as to what is the realistic commercial value. *The basic flaw in [Mr Williams'] position is that it seems to ignore the fact that the market does include himself, his partner … and* [Ms Scott].
>
> [225] I find myself in agreement with [counsel for Ms Scott's] submission where she argues that [Mr Williams'] position reflects a failure to understand the approach to valuation in the relationship property context – in that this is not based on Partnership Act 1908 principles – it is based on valuation under the PRA.
>
> (emphasis added)

[436] I think that it is implicit in all of this that the Judge fixed the multiplier without regard to the collective personal goodwill of Mr Williams and his partner. I say this given particularly the passages from his judgment which I have italicised, including the question addressed what Mr Williams might pay to continue to be able to derive his income from the firm and the discounting of the relevance of "what might happen in the marketplace".

The approach of Faire J

[437] In his judgment Faire J adopted same future maintainable earnings[539] and salaries figures as Judge McHardy.[540] He identified what he saw a relevant aspects of the firm which included:

> [102] The important features and nature of this practice I identify as follows:
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> ….
>
> (d) The practice has been built up as a result of the efforts of its two principals namely [Mr Williams] since 1982 and [Mr Williams'] legal partner since 1987. Particularly in the earlier days of his practice [Ms Scott] played a significant role in the promotion of the practice with related professionals e.g. real estate agents who no doubt were a source of referral work.
>
> (e) The partners see clients identifying with the partner who had previously completed instructions for the particular client. This reinforces the importance of the personal connection in the solicitor client relationship in this practice.
>
> (f) The current partners work well together. …

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539 HC decision, above n 507, at [68].
540 At [93].

(g) There is no partnership development plan. … The practice will face an issue in 5 to 8 years as the current partners seek ways to exit legal practice.

(h) The partners have seen an advantage in moving from sole practice to partnership. The inference can be drawn that having cover from an experienced practitioner when the need for cover arises is important for the retention of the practice's goodwill.

(i) The practice's returns are considerably better than the majority of other similar type practices. Outside of the personalities of the partners there are no known identifiable reasons for this such as special expertise resulting in referrals from other professionals or from the nature of the work undertaken. Property values in the area of Auckland where the practice is situated will have assisted but this does not account for the fact that other lawyers have apparently not been able to set up in competition with this practice successfully in the area.

[438] Faire J then went on:

> [103] When I consider the above features it is difficult not to take notice of the fact that the partners themselves have found their own way of making this practice as successful as it is. Although in theory a restraint of trade as part of the conditions of sale should go some distance towards preserving the value of the practice for the party acquiring it there is a much greater risk to the purchaser than would exist in the case of entry into a large partnership where the firm's very existence is the real source of security of future income. …
>
> [104] When I look at the other possibility, that is retention by [Mr Williams] or a purchase by his legal partner, a major consideration is their length of practising life and the need to factor in a cost of acquisition for future income over a 5 to 8 year period. At the end of that period they must face the problem of how to dispose of the practice. …
>
> [105] When I weigh all these considerations, I conclude that there is a greater risk associated with the cost of acquiring this practice. Therefore a multiple of 3 is too high … . I adopt a multiple of 2.

My assessment

[439] The ability of Mr Williams and his partner to derive income along the lines of the future maintainable earnings assessment is contingent on factors which are not within their personal control. If the partnership were to be dissolved, perhaps because of a breakdown in the health of one or the other, much of its value would dissipate. Both have had health issues. Further, given their ages, their ability to realise value is time bound. Realisation of the value of their business will require arrangements with

third parties, most probably in terms of the staged introduction of new partners. The success of this will depend on how the resulting personal and business relationships pan out. In determining the terms on which they are prepared to enter the firm, prospective new partners will be influenced by their perception as to its likely continuing profitability once Mr Williams and his partner retire. The risks of a diminution in earnings associated with their departure seems to me to be material to a rational assessment of the value of the firm.

[440] It follows that I consider Judge McHardy was wrong to leave out of consideration the personal goodwill of the partners, or, to put it another way, the risk, as it would be perceived by a purchaser, that the future profitability of the firm would be diminished if one or both of the partners left. I see no error in the approach adopted by Faire J and would accordingly uphold his assessment of the value of the practice.[541]

Section 15

The section

[441] Section 15 provides:

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

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541 HC decision, above n 507, at [108].

(3) If this section applies, the court, if it considers it just, may, for the purpose of compensating party A,—

(a) order party B to pay party A a sum of money out of party B's relationship property:

(b) order party B to transfer to party A any other property out of party B's relationship property.

Causation and apportionment

[442] The principal problem with the current application of s 15 which the majority identify is the causation approach usually taken by the courts and particularly as explained and applied by me in *M v B*.[542]

[443] The *M v B* approach proceeds on the basis that, where the division of functions has resulted in a party A being a non-career partner and party B a career partner, s 15(1) disparity results from either or both: (a) enhancement of the career partner's standard of living and income because of the division of functions; and (b) diminution of the non-career partner's standard of living and income resulting from that division. The jurisdiction under s 15(3) is confined to compensation limited to the extent to which the disparity is "because of" the division of functions. Diminution claims are easier to advance than enhancement claims. This is because the earning capacity of the career partner is likely to be seen as mainly a reflection of that partner's natural ability and attributes.

[444] I see the result of the approach proposed by Elias CJ, Glazebrook and Arnold JJ in the case of a long-term relationship in which there has been a traditional division of functions between a career partner and a non-career partner as being:

(a) It is to be assumed, in the absence of strong evidence to the contrary, that any disparity between income and standards of living is "because of" the division of functions.

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542 *M v B*, above n 522.

(b) In such a case the courts should strongly discourage attempts by the career partner to explain the disparity by reference to his or her personal skills or attributes.

(c) If there is a linkage between division of functions and disparity, there is no need to form an assessment of the extent to which the disparity is because of the division of functions in the marriage. Instead, the focus of the exercise will be in compensating the non-career partner in respect of the entire disparity, albeit subject to the relationship property cap and the requirement for the order made to be just.

(d) For the reasons just given, there will, at least normally, be no need to lead evidence as to the likely career trajectory of the non-career partner and, in any event, the career partner is to be discouraged from leading negative evidence in respect of that career trajectory.

[445] The approach of the majority is similar to one of the law reform recommendations recently postulated by the Law Commission.[543] More generally it responds to the disquiet summarised – and indeed reflected – in the Law Commission's Issues Paper as to the application in practice of the causation requirement.[544] It is nonetheless one which I do not support.

[446] It seems to me the words "because of" in s 15(1) require a causative link between division of functions and disparity. I do not regard as open to a court (as opposed to the legislature) to lay it down that in certain (albeit indeterminately defined) circumstances, causation is to be assumed. Further, I see the disparity which is relevant for s 15 as being the disparity to the extent to which it is caused by (or to use the statutory language, "because of") the division of functions. I see this as apparent from the wording of s 15(1). As well, it is at least implicit in the concept of compensation which is the purpose of s 15(3). The expression "for the purpose of compensating" contemplates an order addressed to the consequences of the division

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543 See aspects of the Law Commissions' "Option 1" for reform: Law Commission *Dividing Relationship Property – Time for Change? Te mātatoha rawa tokorau – Kua eke te wā?* (NZLC IP41, 2017) at [19.22]–[19.26] [Law Commission report].

544 See at [18.44]–[18.70].

of functions in the marriage. If the established disparity is due in equal measure to that division of functions and the innate skills of the career partner, I would see the compensation function as addressed to half the disparity.

[447] In its report on the then-proposed s 15, the Justice and Electoral Committee said:[545]

> **Difficulties in showing that economic disadvantage results from the division of functions**
>
> The Law Commission predicts that the proposed new section 15 will apply only in relatively rare circumstances because it will be difficult to show that disparity in income and living standards is due to the division of functions during the marriage.
>
> We are advised that, although the ability to earn an income at a particular level is undoubtedly dependent on the personal attributes, training and skills of the person in question, the ability to devote time to cultivating those skills and attributes is likely to be affected by the division of responsibilities in the relationship. A partner who is not in the workforce cannot take advantage of further training at work, and so his or her earning capacity will devalue over time. Even in childless relationships, decisions taken within the relationship could impact on earning capacity. For example, one partner may decline a transfer or leave a job to enable the other to advance his or her career.

What I do not see in the report is any indication that:

(a) in a case in which the division of functions in a marriage has been a contributing factor to disparity, the entire disparity is to be assumed to be as a result of such division; or

(b) an assumption that the "personal attributes, training and skills" of the career partner and the contributions they make to earning capacity are irrelevant or should, as a matter of policy, be ignored.

[448] I do not see the result proposed by the majority as required by ss 1M or 1N and, in particular principles (b) and (c) of the latter section:

> (b) the principle that all forms of contribution to the marriage partnership, civil union, or the de facto relationship partnership, are treated as equal:

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[545] Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 (109-3) (select committee report) at 18–19.

> (c) the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners arising from their marriage, civil union, or de facto relationship or from the ending of their marriage, civil union, or de facto relationship:

I do not see principle (b) as implying that the human capital of the career partner should be seen as attributable equally to both partners. And likewise, I do not see principle (c) as entitling the court to have regard to "economic advantages" which do not arise from the relationship but rather are associated with the natural attributes of the career partner.

[449] Arnold J suggests that where the division of functions in a long term relationship has contributed to disparity, an argument that the disparity has also been contributed to by the career partner's personal attributes is "incapable of rational resolution".[546] On his approach if it can be assumed or is established that the division of functions had *a* causative role in the earning capacity of the career partner, the disparity assessment and resulting order for compensation should proceed on the basis that the entire disparity is because of the division of the functions.

[450] I do not accept that an apportionment exercise of the kind proposed (and carried out in most of the s 15 cases) is irrational in the sense suggested by Arnold J. It is just one of many evaluative exercises which s 15 requires to be carried out. It is in fact very similar to the assessments of causative potency which the courts are required to make in many situations: by way of example only, when contributory negligence is raised a defence to a claim in tort.

Other problems with the application of s 15

[451] Despite disagreeing with the majority in relation to causation and apportionment, I nonetheless accept that the application of s 15 has been problematic in practice.

[452] The concept of "income and living standards" is uncertain. Is earning capacity a sufficient proxy for this concept? What about investment income (which the

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546 See above at [324] of his reasons.

majority say is to be ignored,[547] at least if derived from assets sourced in relationship property)?[548] Does it matter that on the division of property one party actually winds up with more of the assets than the other (which is what I think happened here)? Is that to be ignored too? What significance should be attached to parental support, separate property resources, re-partnering and accepting other responsibilities in respect of children not within s 15(2)(b)?

[453] There is an overlap between maintenance and s 15 awards. Judicial practice as to this is reviewed in the Law Commission's paper and has not been consistent.[549]

[454] Over what period of time should the s 15 calculation be carried out? As will become apparent, I would start the calculation at the time property is divided, an approach which I see as consistent with the wording of s 15(1) which applies "on the division of property" and provides for an exercise which is forward looking in nature (that is in terms of future likely standards of living and income). This language is not easily applied to circumstances as they were prior to division of property, that is as between separation and division. I regard my approach as also consistent with the commentary in the Select Committee Report:[550]

> **At what date is the economic disparity assessed?**
>
> The [Family Law Section of the New Zealand Law Society] asks whether economic disparity under the proposed new sections is to be determined on the date of separation or the date of the hearing. We intend that the disparity in income and living standards should be determined as at the date of the hearing. We are advised that the provision implements this intention. This is consistent with the current approach under the principal Act, which generally provides that property be valued at the date of the hearing. It would be inappropriate for a lump sum to be awarded on the basis of the position of the partners as at the date of separation. This would take no account of changes since the date of separation. For example, the applicant partner may have become employed, so removing or reducing any differences in income and living standards.

On this basis, I would see disparity in income between separation and division of property as best addressed by way of maintenance.

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547 See Glazebrook J above at [260]–[262]; Arnold J above at [329]; and O'Regan J above at [390].
548 See above at [254] and [258] of Glazebrook J's reasons.
549 See Law Commission report, above n 543, at [19.59]–[19.67].
550 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25, above n 545, at 19.

[455] As to end point, I consider that considerations of personal autonomy and the clean break principle require some limitation to the period of time which is taken into account. The courts, however, have not provided much in the way of principled guidance on this issue.

[456] Because s 15 compensation is assessed on a once and for all basis and is not capable of review if the assumptions on which it is based are not borne out by events, there is a necessity to allow for contingencies. This provides at best rough justice as the reality will be that the contingencies allowed will seldom reflect the actual course of later events. Furthermore, judicial practice in relation to contingencies has not been particularly consistent. And having regard to the actuarially based Ogden Tables, it is apparent that the allowances for contingencies usually allowed by the courts are too high.[551]

[457] Judicial practice as to the factors material to what is a "just" order are reviewed in the Law Commission's Issues Paper and once again the courts have not been consistent.[552]

[458] The cost of running a s 15 argument tends to be disproportionate to the likely outcomes. In part this is a result of the indeterminacy of the language of s 15. There are almost always a number of issues about which it is possible to argue and, more significantly in terms of cost, lead evidence. As well, in the absence of clear judicial guidelines, each case has to be prepared on a one-off basis.

[459] Irrespective of whether s 15 is to be reformed, it would be worthwhile for an official agency (perhaps the Law Commission) to come up with a set of tables similar to the Ogden Tables but based on New Zealand conditions and the s 15 context. This would limit extensive and expensive evidence prepared for each case on a bespoke basis and, as well, produce what I am confident would be more accurate and structured assessments of contingencies.

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551 See Government Actuary's Department, *Actuarial Tables with explanatory notes for use in Personal Injury and Fatal Accident Cases* (7th ed, The Stationery Office, London, 2011).

552 See Law Commission report, above n 543, at [18.71]–[18.80].

The capital positions of the parties

[460] In most cases involving s 15(1), the capital positions of the parties will be similar at the point at which property is divided. If so, and assuming that there are no other significant factors bearing on standard of living and income, s 15(1) can be applied primarily by reference to an earning capacity comparison. This is essentially what happened in the Family Court in the present case. I, however, have some reservations whether this was appropriate here.

[461] I find it by no means easy to form an accurate view of the asset positions of the parties, and particularly that of Mr Williams, following the division of relationship property. I am, however, left with the impression that the capital position of Ms Scott on division, but prior to the s 15 adjustment, was distinctly stronger than that of Mr Williams. This is because of: (a) the inclusion of super profits in the relationship property pool; and (b) a significant proportion of Mr Williams' assets being tied up in his business. In any event, it would be well-open to Ms Scott to sell the Remuera properties, acquire a smaller house and have a substantial sum left over which would produce an investment income. While I accept that the inconvenience to her of shifting from the Remuera properties justified vesting them in her, I see that conclusion as more difficult to justify in a context in which she wishes to retain those properties and, at the same time, be compensated in respect of an income shortfall which she could, at least in part, easily make up with investment income if she sold the Remuera properties.

[462] Because this line of argument was not pressed by counsel for Mr Williams I will not pursue it in these reasons. In any event, as it turns out, the point is largely taken care of by treating Mr Williams' continuing share of the super profits of the firm as being investment income on his interest in the firm and thus not material for the purposes of the s 15 assessment. But while this achieves what might be thought to be a fairish outcome, it does so in a way which highlights the indeterminate nature of the concept of "income and living standards". On the approach adopted, there is what I see as an arbitrary exclusion of the standard of living advantages derived by Ms Scott from living in an expensive home in Remuera and her potential investment income should she chose to sell the properties which is more or less balanced out by an equally

arbitrary exclusion of the super profit component from the assessment of Mr Williams' future income. It follows that the exercise which is carried out will not reflect reality of the income and living standards each is likely to enjoy.

Income and living standards: the relevant period

[463] I would start the calculation at the date of hearing; this being the time of "division of property". As is apparent, I see this as consistent with the language of s 15 and the wider statutory scheme in terms of which maintenance orders are available. I think it also reflects the reality in this case that, for the period between separation and date of hearing, Ms Scott has been credited with half the super profits of the firm (along with a not inconsiderable amount of interest). Although property, the super profits were also an income stream. This was the primary reason why Judge McHardy did not make a maintenance order.[553] If maintenance was not appropriate for the period between separation and division, I find it difficult to see why this period should be brought into account for the s 15 assessment.

[464] In assessing the earning capacity of each of the parties, I would terminate the calculations on the 65th birthday of Mr Williams. My principal reason for doing so is the need to recognise personal autonomy, particularly in the context of the clean break principle. As well, there is the practical consideration that, the longer the period of calculation, the greater the uncertainties in relation to contingencies. Both Mr Williams and his business partner have had health issues and, the more extensive the period of assessment, the greater the difficulty in allowing for associated risks. There are also other contingencies which would have to be allowed for. For instance, if the period goes past Mr Williams' 65th birthday, there is the possibility of a reversal of disparity should Mr Williams retire and Ms Scott carry on working.

[465] The evidence as to their ages is in fact rather vague. On the basis of what I have read, I will treat Mr Williams as turning 65 in October 2020.[554]

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553 See FC decision, above n 498, at [474]-[479].

554 Given that I am in disagreement with the majority on the outcome of the s 15 claim, nothing turns on the precise accuracy of this assumption.

Mr Williams: income and earning capacity

[466] There is scope for dispute as to how Mr Williams' income/earning capacity should be calculated. His share of the future maintainable earnings of the firm is $425,000 and it may be (as I have postulated) that this provides the most appropriate basis for calculation, albeit some allowance would have to be made for the value of the firm calculated on the basis of the capitalisation of the super profit component ($225,000) of the future maintainable earnings. On the approach taken by the majority, however, his earning capacity should be assessed as representing his salary (of $200,000), on the basis that the super profit is to be treated as the investment return on property (being his goodwill).

[467] As will be apparent, I am prepared to go along with the approach of the majority on the basis that it is in effect a quid pro quo for not making allowance for Ms Scott's potential investment income. I see this as resulting in an assessment of disparity based on two arbitrary but largely counter-balancing decisions.

[468] For the reasons just given, and despite my reservations, I will proceed on the basis that Mr Williams' earning capacity is $200,000.

Ms Scott: income and earning capacity

[469] Ms Scott's case, largely accepted by Judge McHardy, was that but for the division of functions in the marriage, her earning capacity would have been in the order of $330,000 a year at the time of the hearing.[555] This involved the assessment of a career which never happened and was necessarily highly contingent. I note that broadly similar issues arise in jurisdictions in which damages for loss of earning capacity are required to be assessed in respect of early stage careers that are terminated by accident. Some guidance may be obtained from the associated jurisprudence.[556] In the present case, however, this is of no moment as I see the upper end of the disparity calculation as capped by the assessment of Mr Williams' earning capacity at $200,000 per annum.

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555 FC decision, above n 498, at [342].

556 Reviewed in Harvey McGregor *McGregor on Damages* (19th ed, Sweet and Maxwell, London, 2014) at [10-080] and following.

[470] The Judge's assessment of Ms Scott's actual earning capacity at $84,000 per annum was not challenged.

Valuation

[471] The disparity which falls for assessment represents the difference between $200,000 and $84,000 per annum. I propose to value that disparity on the basis that, until Mr Williams turns 65, it represents the difference after tax between $200,000 and $84,000.

[472] In *M v B*, I referred to the Ogden tables which are used in England and Wales for the calculation of damages for loss of earning capacity.[557] They are designed for use in personal injuries litigation and to some extent reflect that context: particularly in relation to the discount rates. As well, and awkwardly in the present context, the underlying data informing the tables presuppose an age of retirement for women of 60.[558]

[473] English law and practice as to discount rates in respect of damages for personal injuries reflect the assumption that the proceeds of an award will be invested in government stock with the income derived taxable and inflation thus not protected against.[559] This can result in the apparent contradiction of a negative discount rate.[560] As well, and more generally, I am at least sceptical whether a loss of earning capacity resulting from personal injury is necessarily to be treated as the same as a loss of earning capacity resulting from an agreed division of functions in a relationship, particularly as the clean break principle applies to s 15 but obviously not in personal injuries assessments. I am generally inclined to see the discount rates built into the Ogden tables as too low for s 15 purposes.

[474] For ease of arithmetic, I adopt a discount rate of three per cent which is the largest of the discount rates built into the Ogden tables.

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557 *M v B*, above n 522, at [170].
558 *Actuarial Tables*, above n 551, at [43].
559 See the discussion and the cases cited in *McGregor on Damages*, above n 556, at [38-118]–[38-125].
560 See for instance: Damages (Personal Injury) Order 2017 (UK).

[475] Applying the Ogden tables as best I can[561] I would assess the disparity as follows:

[561] This is far from an ideal exercise as it requires some "off the tables" extrapolation which would plainly best be done with actuarial assistance (which I do not have).

Disparity assessment June 2014–October 2020[562]						
Years	Period (years)	Earnings	Multiplier to retirement (mortality)	Multiplier to retirement (other)	Multipliers combined	Loss (A)
June 2014 to October 2020	6.33	$77,720.00[563]	5.37[564]	0.9[565]	4.83[566]	$375,620.76

562 Figures in this table are rounded whereas the calculations were undertaken with non-rounded figures; this may lead to some minor discrepancies.

563 This figure was reached by taking the salaries of both parties and using the Inland Revenue's "Tax on Annual Income Calculator" <brc2.ird.govt.nz> to give after tax figures and then taking the differential. Thus: $200,000 after tax is $143,080; $84,000 after tax is $65,360; and the difference between $143,080 and $65,360 is $77,720.

564 Multiplier for loss of earnings to pension age 65 (males) at 3 per cent, assumes 59 years old: Actuarial tables, above n 551, Table 9 .

565 This is an "off-table" estimation, premised upon Table A, *Actuarial Tables,* above n 551, at 17. Note was taken of this warning: "Tables A to D include factors up to age 54 only. For older ages the reduction factors increase towards 1 at retirement age for those who are employed and fall towards 0 for those who are not employed. However, where the claimant is older than 54, it is anticipated that the likely future course of employment status will be particularly dependent on individual circumstances, so that the use of factors based on averages would not be appropriate. Hence reduction factors are not provided for these older ages": at [42]. Mr Williams was categorised as "D" due to his education and as "employed". The 0.9 multiplier adopted was extrapolated from this data.

566 The "current approach" to dependency was adopted: see *Actuarial Tables*, above n 551, generally at [52]–[59]; and specifically at [60]–[63]. Mr Williams' multipliers were calculated as shown in the table. Ms Scott's multiplier on this approach was 5.44: see Multiplier for loss of earnings to pension age 60 (females) at three per cent, assumes 54 years old: Table 8 at 43. No additional adjustments were made at step (6). Pursuant to step (7) the lower multiplier is to be used, hence 4.83.

[476] On this basis, the earning capacity differential is $375,620.76. Half of this is $187,810.38.

A just order

[477] I would fix compensation at $188,000.

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