NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.

ANY COMPLYING PUBLICATION IS TO REFER TO THE PARTIES AS DICKSON V KINGSLEY AND TO GENEVA AS THE COMPANY AND IS TO COMPLY WITH ANY ADDITIONAL LATER MINUTE APPROVING FOR PUBLICATION A MORE DEEPLY ANONYMISED VERSION OF THIS JUDGMENT.

IN THE FAMILY COURT
AT AUCKLAND

FAM-2013-004-000875
FAM-2013-004-000876
[2015] NZFC 9596

IN THE MATTER OF	PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	JAKE DIXON Applicant
AND	CAROL KINGSLEY Respondent
Hearing:	20-23 October 2015 27-30 October 2015 2-3 November 2015
Appearances:	K Muir and C Tataru for Applicant D Chambers QC and A Choi for Respondent
Judgment:	11 December 2015

RESERVED JUDGMENT OF JUDGE D R BROWN
[Relationship Property]

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[1] In the three years since the parties to this proceeding separated, the value of the wife's shares in the business of which she is chief executive has grown exponentially. Initially she accepted singlehanded the financial load of the family home (heavily indebted as a consequence of earlier unsuccessful financial decisions made by the husband) but she desisted in the face of his failure to contribute financially. Suspicion, now shown to be not without substance, that the wife was not being candid about her business fed his unwillingness to see the home sold. In time, his financial viability declined to the point that, electricity cut off, he handed over his share of the care of the two children.

Issues

(a) Ms Kingsley's shareholding; □

(b) Date of valuation of the shares; □

(c) The value of the shares; □

(d) Post separation contributions; □

(e) The bach; □

(f) Loans from Mr Dixon's father; □

(g) Ms Kingsley's tax liability; □

(h) Occupational rental □

(i) Dividends; □

(j) Chattels; □

(k) Vehicles and boats; □

(l) Bank accounts; □

(m) Payments to mortgages;

(n) John Morley debt.

Background and history

[2] The applicant Jake Dixon and the respondent Carol Kingsley began a relationship in 1992 and married two years later.

[3] At the date of the marriage Mr Dixon had been practising as a barrister and solicitor for 18 years. Ms Kingsley (who is English born) was that year appointed Clinical Services Manager at the M Hospital having qualified as a registered nurse nine years before and then worked as a registered nurse, nurse manager and nurse educator at L Hospital and later A Hospital.

[4] Mr Dixon was half-owner (with longterm friend Mr Neil Welch and his wife) of a bach.

[5] Shortly after the marriage the parties purchased a home at [family home address redacted].

[6] In 1997 Ms Kingsley joined Skinner Co. This was a venture by Mr Dominic Skinner, who was then disposing of his successful business interests in other recruitment areas, into a new area of the recruitment business. In 2000 Mr Skinner transferred a 30% shareholding in the company to Ms Kingsley and they signed a shareholders' agreement. The company was subsequently renamed [name of the company redacted].

[7] In 2003 and 2004 the parties' two children Jim and George were born.

[8] In 2004 Ms Kingsley directed company strategic focus toward the provision of Industry X services. Industry X services ([details of Industry X services redacted]) were and are provided by the State through primary agencies (Government Agency Gamma and Government Agency Delta), through Regional Agencies and through multiple agencies and organisations.

[9] In 2008 Mr Dixon's legal career reached a cross-road. While practising in the commercial litigation field he had had substantial management involvement and responsibility in a large Auckland firm. His hours of work were excessive.

[10] In 2000, a long-running proceeding in the New South Wales Courts (which concluded successfully with judgment against some defendants whose underwriters then promptly went into liquidation) resulted in conflict between Mr Dixon and his partners. Mr Dixon chose not to continue and elected to set up chambers as a barrister. An ultimate success on appeal in another cause of action in the New South Wales proceeding resulted in a fee sufficient to virtually pay off the $1m plus mortgage on the family home property. But there were also, in Ms Kingsley's words, "lows" including failures of contingency funded work to produce income. Mr Dixon increasingly found his work grinding and unrewarding.

[11] Two decisions were taken, primarily by Mr Dixon with, I find, only reluctant ultimate agreement by Ms Kingsley, to borrow, in the company of friend and colleague Mr John Morley, and invest sums totalling more than $1.5m in a television merchandising venture TV Merchandise Co and an American telemarketing firm Telemarketing Co. The borrowings were secured over the family home property and the bach.

[12] The Telemarketing Co investment provided initial returns but by December 2008 it had failed completely and the TV Merchandise Co business was in liquidation soon thereafter.

[13] The net result was that the parties were now again servicing a substantial level of indebtedness with the added complication that approximately $500,000 of borrowing was now secured against their property on behalf of Mr Morley.

[14] Ms Kingsley had been attempting for some time to increase her shareholding in the company on the basis that her significant contribution to it and its increasing fortunes so entitled her. Her first approach to Mr Skinner on the issue had not been rejected by him but had faded into nothing. In 2009 the issue was raised again by Ms Kingsley but this time more assertively and she and Mr Skinner became locked in

uncharacteristic conflict. Eventually it was agreed that Ms Kingsley would purchase Mr Skinner's interest in the company for the sum of $8m.

[15] There was insufficient security to raise this money through primary financial avenues. An approach was made to mutual friends, Thomas and Geraldine Barbera, who operated a finance business named Barbera Finance. The Barberas announced that the money would be available but there would need to be a "capability payment" by Ms Kingsley and Mr Dixon of $US500,000 which would be repaid to them with the advance. Ms Kingsley was anxious. Mr Dixon sought to safeguard the capability payment by requiring it to be held on trust but the money disappeared in the unravelling of the Barberas' business which eventually ended in charges of fraud. The $US500,000 capability payment (which had been sourced through increasing the borrowing from the bank and by a loan from Mr Dixon's father) was lost.

[16] These events occurred around a decision made by the parties to spend a year in London where the business had a branch which was not flourishing. The decision, made at dinner at a Parnell restaurant, is remembered vividly but differently by both. For Mr Dixon, relinquishing his legal work and its stress was a matter of health, perhaps of life or death. Free of legal practice he was to be a "house husband". Ms Kingsley accepted his decision to abandon legal practice but the issue for her was Mr Dixon establishing a new occupation and accepting a share of their debt load.

[17] The initial intention was that the stay in London would be for a year. It was however nearly three years before they returned.

[18] In London there was an unsuccessful attempt by Mr Dixon to develop a commercial interest in photography. But for him the pivotal and enduring activity of the London period was his development of a complex scheme to collect and process compost using primary schools as collection points. Mr Dixon is in my judgment sincere and dedicated to the proposition that the lives and health of disadvantaged and poor people can be improved by such a scheme. Ms Kingsley is not dismissive of the scheme or of Mr Dixon's dedication. But the business has to date (Mr Dixon has been involved since their return to New Zealand with a New Zealand attempt to develop it) not produced any real income.

[19] After the collapse of the agreement to buy out Mr Skinner, attempts were made to sell the business but they came to nothing. Mr Dixon and Ms Kingsley returned to New Zealand with her shareholding remaining at 30%, Mr Skinner's at 53% and 17% of the shares being held by various other senior staff members.

[20] Towards the end of 2011 the business focused on a decision by Government Agency Delta to put out to tender its Industry X services operation which was worth annually nearly $500m. Its services were being provided by more than 80 providers of all sizes.

[21] Actively led by Ms Kingsley, the company filed its tender on 30 March 2012.

[22] On 24 April 2012 Mr Dixon and Ms Kingsley separated. I am satisfied and I find that the major reason for separation was that the relationship was corroded by vast difference in financial contribution exacerbated by the losses caused by Mr Dixon's investment and borrowing decisions.

[23] Very shortly after separation three senior members of the company's staff who each held small shareholdings left the company's employ. The operative shareholding agreement entitled Mr Skinner to buy back such shares at a price favourable to Mr Skinner. Mr Skinner agreed that Ms Kingsley could purchase the shares. She set up a trust, the S[1] Trust of which she and the two children were beneficiaries and the shares were transferred to the trust.

[24] The company was shortlisted with 24 other providers to make a presentation to Government Agency Delta. Ms Kingsley was deeply involved in preparation and led the company's presentation.

[25] On 4 July 2012 Government Agency Delta announced to the significant surprise of the Industry X services industry (which did not anticipate such a resolute response) a decision to award contracts to only four national and two regional suppliers. One national supplier was the company.

[1] Name of the street in which the parties lived in London.

[26] It was urgently necessary for the company to expand radically its resources and capabilities. This it did by purchasing two companies which had been unsuccessful in the tender and drawing in other suppliers as subcontractors. Ms Kingsley was actively involved in these processes.

[27] The separation settled, reluctantly from Ms Kingsley's side, into an arrangement (termed "nesting" in the papers) wherein the parents spent alternate weeks living in the family home property with the children. Mr Dixon's housekeeping standards are low and Ms Kingsley found that not only was she the sole provider of finance for and to the household but also she was being obliged to clean up a mess at each changeover. Mr Dixon made awkward and unsuccessful attempts to revive his legal career. He was distractible in his care of the children and more than once left them in situations of unsupervised risk. Ms Kingsley soon became unattracted to the burden of servicing the significant debt over the family home. She sought, and Mr Dixon resisted on the basis that his share of the company shareholding would enable him to retain it, the sale of the family home. Ms Kingsley was supported in this by their straightforward and loyal friend Neil Welch.

[28] In the absence of agreement Ms Kingsley began legally complex attempts in the High Court to refashion the trust which owned the family home to enable its sale against Mr Dixon's wishes. Mr Dixon sought an injunction and applied to this Court for maintenance and an interim distribution of relationship property, in particular a half share of any dividends being paid by the company.

[29] Mr Dixon's position was heavily shaped by his inability to obtain information he suspected Ms Kingsley was hiding that her shareholding in the company had expanded. Ms Kingsley was unwilling or unable to answer fully his direct questions.

[30] Mr Dixon's application for maintenance was heard on 10 April 2014. It was dismissed.

[31] Ms Kingsley was in a relationship with Mr Joshua Rampling, the chief financial officer at the company. They had purchased a property near Mt Hobson. The children spent every second week with her there.

[32] After the unsuccessful maintenance hearing, Mr Dixon gave up on his determination to keep the family home. He was living there in economically impossible circumstances. He had been unable to pay the power bills and the power had been cut off at which stage he had relinquished care of the children to Ms Kingsley. The house had become unkempt. Mr Dixon gave ground slowly and reluctantly but eventually agreed to a sale. But the price achieved $3.08m was $780,000 more than the price urged by Ms Kingsley in the first attempted sale 2 years before.

The S Trust shares

[33] This issue begins at the point at which Ms Kingsley and Mr Skinner agreed to the initial structure of the company.

[34] Capital for the venture was provided exclusively by Mr Skinner. Ms Kingsley's essential part in the enterprise was recognised by her 30 percent shareholding, along with the provision in the shareholders agreement that she and Mr Skinner would make decisions unanimously.

[35] Paragraph 3.4 of the shareholders agreement provided:

> **Change in circumstances:**
>
> (The Parties acknowledge and agree) that changes in circumstances may mean that it is appropriate for the Interest held by each of them to change. The Parties therefore confirm that, from time to time and on request from one party, they will negotiate in good faith to achieve any appropriate amendment to this Agreement.

[36] Ms Kingsley saw paragraph 3.4 as an expression and confirmation of the need for Mr Skinner to recognise, by additional shareholding, her contributions to the company. Mr Skinner's response to her initial request for further shares was to agree to consider the issue but nothing further came of it. Her second approach was direct and assertive. Although she and Mr Skinner are both observably capable of dealing subtly and courteously with disagreement, on this occasion there was an element of threat in her position. Although she now disavows the reasoning behind,

and worth of, that approach, I am satisfied that at the time that was the position she crafted with Mr Dixon, who was often her wordsmith.

[37] That approach was subsumed in the later abortive agreement between herself and Mr Skinner for her to buy all his shares.

[38] It is entirely reasonable for Mr Dixon to have become deeply suspicious of the circumstances that led to the transfer of 10 percent of the company shares to the S Trust. On 18 April 2013 he had sought her confirmation that:

> (her) beneficial interest in the shareholding of (the company) remains exactly as it has been for the past 15 years or so, down to the present time without change? Is that right and is it true?[2]

[39] It was in my view plain from her evidence under cross-examination that Ms Kingsley knew what a beneficial interest was and that her interest in the S Trust shares was a beneficial interest, but she answered Mr Dixon (in her words responding "specifically to (his) questions"):

> I have a 30% shareholding in [the company.][3]

[40] Mr Dixon responded:

> In this regard I see your specific response to my questions. It does not look like an adequate response to me but it seems pointless going back and forth repeating questions that are perfectly clear. I would like you to reread my questions and review your responses. If having done so you give me your absolute assurance that your responses are full, fair, honest and complete in all respects, I will have to accept that assurance in the meantime.[4]

[41] While in those circumstances it was reasonable for Mr Dixon to suspect that Ms Kingsley's interest in the S Trust shares which came to her so soon after separation was the result of pre-separation agreement or machination I am satisfied that it was not.

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[2] A 21
[3] A 21
[4] A 22

[42] The shares in question were owned by three shareholder employees, Penelope Piper, Jennifer Johnson and Bertie Blake. They had each received their small parcel under an agreement put in place in 2003 to incentivise senior employees.

[43] Ms Piper worked in a division called the Subsidiary. At the time of Mr Dixon and Ms Kingsley's separation, the Subsidiary was making significant losses and was under review. I am satisfied that a Board meeting on 26 April 2012 reached a bona fide decision to terminate the Subsidiary. Ms Piper became redundant. Shortly thereafter Mr Blake resigned: issues had been being raised as to his performance as chief financial officer. Ms Johnson then resigned: she believed that the influence of Mr Rampling was behind the departure of her colleagues and that the culture of the enterprise was at risk.

[44] The shareholders agreements of these three employees required them to sell their shares to Mr Skinner. The sale price set by formula in the Agreement was significantly below market value.

[45] It is to be noted that Ms Kingsley agreed initially to defer the issue of the surrender of Ms Piper's shares.

[46] By late June 2012 Ms Kingsley had come to an agreement with Mr Skinner. In an email of that date she said:

> Just to be clear, I am very happy to work my butt off for the next couple of years to optimise the value of the business mainly for each of our purposes, however do not feel the same way about doing it Penelope/Jennifer/Bertie etc. *As I've said before given my current situation and the likely event that I will need to split any value I gain from the business with Jake, I am not as relaxed as I may have been previously about this and for the first time am really wanting to optimise my own personal position as much as I can.* Therefore I want us to be clear in the understanding that we will enforce the share buyback provision in the shareholders agreement and not allow Penelope, Bertie or Jennifer to retain any of their shareholding. The purchase price will be set by our external accountants and [the company] will provide a loan to my Trust up to the amount of the anticipated dividend to be paid alter in the year, which will repay this loan. I will get this completed as quickly as possible.

[47] I have quoted this email as produced by Ms Kingsley as an exhibit to her affidavit of 13 August 2015.[5] She had however produced the same email as an exhibit to an earlier affidavit (sworn 30 January 2015[6]) with the italicised sentence completely missing.

[48] Taxed on this issue, Ms Kingsley was unable to give any satisfying explanation. Indeed, there was an implausible lack of body language in her responses. If she was not responsible for, or privy to, the redaction, someone had placed her at great risk. I am unable to accept her denial of responsibility and her credibility on these issues suffers.

[49] But the bottom line is that it is clear that Mr Skinner agreed that Ms Kingsley could have the shares and she nominated the S Trust to be the purchaser.

[50] I am satisfied that Mr Skinner's agreement was for "her long and loyal service in support" with "particular reflection on...the additional work that had gone into getting that Government Agency Delta tender in on time".[7]

[51] For Mr Dixon it is argued that the Court should exercise its discretion under s 9(4) and treat the shares as relationship property.

[52] Section 9(4) provides:

> The following property is separate property, unless the Court considers that it is just in the circumstances to treat the property or any part of the property as relationship property:
>
> (a) All property acquired by either spouse or partner while they are not living together as a married couple [or as civil union partners] or as partners:

[53] In *Thompson v Thompson*[8] Young J delivering the judgment of the Supreme Court said:

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[5] D6/2947
[6] D2/1546
[7] NOE 733
[8] [2015] NZSC 26

> [36] The authorities as to the approach to be taken in respect of s 9(4) are sparse. What was referred to as the discretion under s 9(4) was described in *Morris v Morris* as having been "conferred in the broadest terms" and as "not expressly fettered in any way". The comment was also made that, "[it] must ... be exercised having regard to the purposes of the legislation.

[54] *In Cossey v Bach*[9] Fisher J said:

> Treatment as matrimonial property under the discretion in s 9(4) is normally founded upon evidence that the property in question is directly or indirectly traceable to assets which had constituted matrimonial property during the marriage or at least on broader grounds establishing some connection between the existence of the separate property and the earlier marriage partnership.

[55] In *Batterham v Batterham*[10], Hillyer J upheld a finding that fishing quota issued to the appellant after separation was to be treated as relationship property, saying:

> In my view, the Judge was quite correct when he said the issue of the ITQ was based on the husband's fishing history, which occurred during the marriage.

[56] The distinction is illustrated in *DJE v TJAE*[11] where a bonus payment paid after a separation was treated as relationship property pursuant to s 9(4).

> ...because the bulk of it represents fruits of the relationship, namely part of the respondent's overall package of remuneration

but redundancy payments similarly paid after separation were not because

> (these) payments were forward-looking for disruption to the respondent's employment and are not analagous to superannuation or other payment that can be regarded, in an appropriate sense, as having its genesis in the relationship and representing a reward built up during the relationship.

[57] In my view the case for exercising the s 9(4) discretion in favour of Mr Dixon is compelling. The agreement by Mr Skinner to transfer the shares to Ms Kingsley was made within days of the separation. Mr Skinner's agreement was a reward for, and recognition of, Ms Kingsley's work for the company which had all been within the term of the marriage. It was also the resolution of an issue which had (near fatally)

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[9] [1992] NZFLR 673 at 685
[10] [1993] 1 NZLR 742
[11] [2012] NZFC 830

disturbed what had been a harmonious working relationship during the term of the marriage. In my view it would be just and consistent with the underlying principles of the Act to treat the whole of this property as relationship property.

[58] I see no need to address the arguments for and against the availability on such a finding of an order under s 44 to set aside the disposition to the S Trust (I would have thought in any event an order under s 44C would have been more worthy of debate). The reason is that, in my view, the property which passed to Ms Kingsley under the agreement was the right to the shares and their value, less the purchase price paid for them. That is the property which is to be *treated as* relationship property pursuant to the discretion in s 9(4) and I so order.

Date of valuation of the shares

[59] Section 2G of the Act provides:

> **Date at which value of property to be determined**
>
> (1) For the purposes of this Act, the value of any property to which an application under this Act relates is to be determined as at the date of the hearing of that application by the Court of first instance.
>
> (2) However, the Court of first instance or, on an appeal [the High Court, Court of Appeal, or Supreme Court] may, in its discretion, decide that the value of the property is to be determined as at another date.

[60] In *Burgess v Beaven*[12] [2012] NZSC 71 William Young J, delivering the judgement of the Supreme Court, said:

> [24] The courts used the s 2(2) discretion to value property otherwise than at hearing date primarily to allow for post-separation contributions whether positive (debt reduction, property maintenance or improvements) or negative (reduction in the value of the property as a result of the actions of one of the partners). The general approach, however, was that hearing date values were conducive of equity and in particular that both parties should usually share increases in values associated with inflation (as opposed to personal effort).
>
> [25] Although the language of s 2G does not differ much from its precursors, it operates in a very different statutory environment. This is because the 1976 Act, as first enacted, did not explicitly provide for allowances for post-separation contributions to, or dissipation of,

[12] [2012] NZSC 71

> relationship property, thus necessarily leaving considerable and necessary scope for the exercise of the s 2(2) discretion. This lacuna has now been filled by ss 18B and 18C which specifically address post-separation contributions and dissipation. Given the enactment of these two sections, there is less need than in the past to depart from the default position of hearing date valuation.

[61] Surveying the section 2G landscape, the following year the Court of Appeal said in JFM v JAM[13]:

> [35] We consider the following summarises the current position of ss 2G and 18C, as they have been interpreted and applied by the Supreme Court and this Court:
>
> (a) *Overall aim*: The Court's overall aim should be to achieve a just division of relationship property between the parties having regard to the purposes and principles of the Act set out in ss 1M and 1N.
>
> (b) *Presumption*: Since 1976, under s 2(2) and then (from 1 February 2002) s 2G, the presumption under the Act has been for valuation at the date of hearing. That presumption was strengthened by the introduction of ss 18B and 18C.
>
> (c) *Basis for s 2G(1) presumption*: The presumption reflects the basic premise of the Act that parties share equally in the "product" of their marriage or relationship, and that the value of that product is to be assessed by the court at contemporary and not historic values, because otherwise equal sharing would not be achieved. Specifically, delivering the judgment of the Supreme Court in *Burgess v Beaven*, William Young J observed:
>
> > The general approach, however, was that hearing date values were conducive of equity and in particular that both parties should usually share increases in values associated with inflation (as opposed to personal effort).
>
> (d) *Onus*: The onus of persuading the Court to depart from the default or presumptive position in s 2G(1) rests on the party contending for a different valuation date. In that respect we agree with *Fisher on Matrimonial Property*, notwithstanding the observation of Robertson J in this Court's judgment in *M v B* that "notions of onus of proof fit uncomfortably within [the Act]".
>
> (e) *Use of ss 18B and 18C rather than the s 2G discretion*: Section 2G is not expressly subject to ss 18B and 18C. Nevertheless, where a court desires to attribute to one party

[13] [2013] NZCA 660

> the benefits or losses that party has brought about post-separation, that is "more directly" achieved under ss 18B and 18C respectively, and "there is less need than in the past to depart from the default position of hearing date valuation".

[62] I note the decision of Heath J in *Bullians v Bullians*[14] in which a six-fold increase in value of the company shareholdings did not dissuade the Court from adopting a date of hearing value.

[63] Ms Kingsley's case recognises and accepts the presumption but argues that a date of separation value is appropriate and necessary to achieve a just result between the parties.

[64] She contends:

(a) Firstly, that had the parties resolved their property issues immediately upon separation, it was highly likely that she would have retained the shares and Mr Dixon the former family home and the phenomenal gains in the value of the shares would have accrued solely to her □

(b) Secondly, that those gains in value (five-fold on her valuer's figures and four-fold on Mr Dixon's valuer's figures), have largely been the result of her post-separation work for the company including her presentation to Government Agency Delta, her recruitment of subcontractors and acquiring of new businesses and training new management staff and managing risks. By contrast, she says, Mr Dixon had by the end of the relationship "managed to sink his family into huge debt when it was once more or less mortgage free". She had "advised against" the failed investments and, further, Mr Dixon's execution of the Barbera Finance loan had been foolish and unprofessional. □

(c) Thirdly, that Mr Dixon failed to take care of the children, did not work to help service the relationship debt and pursued maintenance and □

[14] HC Hamilton, CIV-2005-419-1283, 7 December 2005

delayed proceedings while refusing to accept reasonable offers by Ms Kingsley to settle proceedings on the sale of the house.

[65] It is clear that the growth in value of the company since separation has been spectacular and it is clear on the evidence (indeed Mr Dixon accepts it) that Ms Kingsley is a skilled, competent and effective chief executive. However her proposition that her work was the major cause of the post-separation rise in value of the company is subject to several qualifications.

[66] The trajectory of the company had begun to be established many years before, particularly by the redirection of the business by Ms Kingsley towards Industry X services. The development of the company to the point where it was both positioned and capable of filing an effective tender for Government Agency Delta business occurred through many years of the marriage. The tender itself was prepared before separation and successfully placed the company in the shortlist. It is hard to know how much Ms Kingsley's presentation to Government Agency Delta (described by some as a "knockout" presentation) secured the contract and it seems clear from the evidence of Mr George Simpson, who managed the Government Agency Delta process for a successful competitor, that marshalling and arranging resources to be in place on a successful tender was a necessary and standard step.

[67] Mr Dixon's borrowing decisions certainly affected the relationship property but by no stretch could they amount to gross and palpable misconduct by Mr Dixon. Firstly, the two investment decisions were ultimately agreed to by Ms Kingsley, however reluctantly (and they had attracted the support of their friend Mr Morley). The evidence of Mr Dixon (which has not been contradicted) suggests that they were relatively mainstream. The same qualifications need to be expressed about the Barbera Finance borrowing. The parties were obliged to borrow from third tier lenders. Mr Dixon failed to appreciate the threat and message of the capability payment and attempted to safeguard it by conventional means, completely inadequate, had he known it, to safeguard the money from about to be detected fraudsters.

[68] It is true in my view that a ponderous obstinacy developed in Mr Dixon against the sale of the family home but it was seeded by Ms Kingsley's failure to be straight with him about the S Trust shares and fuelled by her lack of transparency regarding the company dividends.

[69] This was a large rise in value. Ultimately, however, the issue that tips the scales for me is the fact that Mr Dixon was clearly on the evidence an active and valued participator with Ms Kingsley in her dealings with and for the company. The papers are full of communications drafted by or commented on by Mr Dixon, and it is clear that as well as his being her "wordsmith", he was the person she relied on for perspective and judgement[15]. The fact that she now doubts his judgement does not persuade me that it was valueless. It remains for me a possibility that the negotiating tactics suggested by Mr Dixon and agreed by Ms Kingsley and now deprecated by her and Mr Skinner were an ingredient in his ultimate decision to let her have the S Trust shares.

[70] I hold that Ms Kingsley has not displaced the presumption for a hearing date valuation.

Value of Ms Kingsley's shares

[71] The company is a group of closely held companies. It originally operated in the Industry Y services area but 80 percent of its revenue is now derived from Industry X services.

[72] In broad terms, that revenue has increased from $16.5 million in 2010 to $55.5 million in 2013 and to $96.2 million in the 2014 year. If its 2015 year-to-date revenue is annualised, it will amount to $98.2 million.

[15] A biopsy is available in emails (B3/4386 and onwards) forwarded, copied and sent to and by Mr Dixon in 2010-2011.As well as communications between Mr Dixon and Ms Kingsley there are *direct* communications between the company's staff members and Mr Dixon on legal and strategic issues.

[73] The applicant's valuer Mr Eric Lucas records the company's EBITA[16] and the respondent's valuer Mr Brendan Lyne records the company's EBIT[17] for the years 2013 – 2015 (in $ 000's) as follows (percentage to revenue shown in brackets):

	Lucas	Lyne
2013	EBITA 995 (1.8%)	EBIT 296 (1%)
2014	EBITA 2.665 (2.8%)	EBIT 2.685 (3%)
2015	EBITA 1.283 (annualised) (1.3%)	EBIT 1.608 (1.65%)

[74] Valuation of the company required the valuer to assess and weigh the revenue significance for the company of the Government Agency Delta contract. As signed, the contract ran until July 2015 but it is common ground that it has been rolled over. The slightly divergent information understood by each valuer was that it was likely that the contract would be rolled over until 2017 but the sale of its business by one of the original six contract holders to another may bring this forward to 2016. Also to be weighed by the valuer was the risk of cancellation or non-renewal as a result of complaints against the company, in particular, a complaint under the consideration of the Oversight Agency.

Applicant's valuation

[75] For the applicant, Mr Lucas elected to value the company on a capitalisation of earnings approach which "...entails assessing value by estimating an earnings figure to capitalise and applying an appropriate multiple to that earnings figure. In this

[16] Earnings before interest tax and amortisation
[17] Earnings before interest and tax

case we have capitalised an appropriate earnings before interest tax and amortisation (EBITA) to derive an enterprise value for the business. Enterprise value is the value of business as a whole, irrespective of whether it is debt or equity funded."

[76] Mr Lucas noted that year to date EBITA for the company was just under $0.75 million or $1.3 million annualised which is 1.3 percent of revenue.

[77] Mr Lucas considered the (generally higher) EBITA margins achieved by arguably comparable companies and concluded that the company would be attractive as a purchase to a large Industry X services provider who would be confident that its earnings would rise from current levels. He considered that a buyer would assess earnings to capitalise at a level of 3.0% of annualised 2015 revenue.

[78] Turning to the multiple to be applied to those capitalised earnings, Mr Lucas assessed the data available from comparable companies and from recent sales and purchases in New Zealand and concluded that the appropriate multiple was 7.0 - 8.0 x EBITA. On that basis he calculated an equity value of 100 percent of the company was $18.385 million to $21,330 million.

Respondent's valuation

[79] For Ms Kingsley, Mr Lyne valued the company using discounted cashflows methodology. Using the company's forecasts, he estimated its future cashflows against the eventuality that the Government Agency Delta contract would be continued or renewed and against the eventuality that it would not. He applied a discount rate to the two eventualities resulting in very different cashflows for the forecast periods. The result was a midpoint valuation of $11.747 million if the Government Agency Delta contract was extended and $4.794 million if it was not. He then assessed the likelihood of the contract continuing at 70 percent and weighted an ultimate calculation accordingly, On that essential basis he produced a midpoint valuation of $12,200 million.

[80] Ms Kingsley's response to Mr Lucas' valuation was primarily and centrally that his selection of 3 percent of EBITA as an earnings figure to capitalise was

aspirational and inconsistent with the company's performance, both past and present, and did not reflect the true risks and issues of the industry. While it was plain that any purchaser would want to reduce overheads and improve margins the industry was in reality a low margin monopsony and Mr Lucas could not identify any particular method available to a purchaser of the company to improve its margins.

[81] For Mr Dixon, Mr Lynes' valuation approach was said to be compromised by the need to assess and apply in it a large number of numerical assumptions in which any error would multiply itself as the calculation progressed.

[82] For Mr Dixon, it was further said there was intrinsic risk in the fact that Mr Lyne's approach depended essentially on forecasts rather than history and there were grounds to be cautious about the company's forecasts. For example Mr Rampling had produced figures for the discussion of a merger which the company had contemplated and they showed an EBITA of 3.5 percent for the 2015 year and figures supplied to the company's bank in support of an overdraft similarly showed high forecasts of revenue. Additionally, Mr Lyne had not checked previous company budgets against outcomes (those budgets having never been produced despite requests for them by Mr Dixon). Mr Lyne did accept that one instance was visible (2014) where forecast profit was much less than actual (but the significance of this is materially diminished by the fact that the forecast had been based on projections for the two companies purchased by the company, neither of which had been reliable).

[83] This is a structural issue to be weighed against Mr Lyne's valuation approach but I experienced Mr Lyne in cross-examination as open and realistic on the issue of "low-balling" of figures and at a personal level cautiously rejecting on balance the possibility of the issue in these proceedings. It is significant to him that a company's officers are willing to meet with both valuers together, to give both valuers the same information and to be prepared to answer questions (all of which the company did)

[84] Each party complained that the other party's range of comparable companies and transactions was not valid. Mr Lucas' comparable companies were not, with one exception, New Zealand companies while Mr Lyne's companies were in the recruiting rather than the Industry X business.

[85] There really is no hard evidence on which to determine the extent that the 2015 results are atypical on the basis that they contain one-off costs. It appears to be acknowledged that some of those costs are structural in that they represent further supervisory layers of staff revealed to be necessary by the performance management process put in place by Government Agency Delta when the complaint now before the Oversight Agency was before it. There was what I thought was a genuine spontaneous ruefulness in Ms Kingsley when she spoke of clipping of business margins by unexpected happenings such as the implementation of new rules for [details of Industry X services redacted].

[86] In all the complexities of the situation, my central conclusion between the two professional valuations of the shares can be shortly stated. No constituent part of the Lyne's valuation for Ms Kingsley has been significantly dented. On the other hand I am left in serious doubt about the earnings figure on which Mr Lucas valuation pivots. While it is possible to observe that the forecast of EBITA for 2015 was 3.47 percent and the EBITA margin for 2011 was 3.2 percent, the actual average EBITA of the company over the five years from 2010 to 2014 is 1.58 percent. Mr Lucas' evidence is focused on what a company like the company could and should make by way of margin. In my view a willing but not anxious purchaser's view of the value of the company would be significantly influenced by the company's historic performance and a valuation based on an estimate of what the company should or could be earning is significantly compromised.

[87] It is also my view that the risks and realities of the situation are not overstated in the Lyne valuation. While there is a real-world plausibility in Mr Lucas' evidence that funders of the provision of virtually unsupervised Industry X services know and accept that there will inevitably be mishaps and sometimes tragedies and will not act disproportionately on them, the reality is that the company is potentially on a first warning. A second tragedy, particularly if it became the subject of public political attention, could be a real risk.

[88] Additionally, I accept Mr Lyne's position that the fundamental direction of Government expenditure and therefore margins is downward.

[89] For those reasons I prefer Mr Lyne's opinion of a value of $12.20 million. □

[90] A Court's role on an issue of valuation is not however to accept one valuation □opinion or the other, indispensible though such opinions are. A Court must neither over or under-estimate its ability to look past the valuations. In this case this requires appropriate recognition of the fact that Competitor A, a direct and comparable competitor with the company, of similar size, was in fact bought in November 2014 for the sum of $14.82m. While there are in Mr Lucas' words, "never any
perfect comparables", this transaction gets close.

[91] Attention to it in proceedings was however comparatively mild because it suited neither party's position.

[92] Competitor A was one of the six successful tenderers for the Government Agency Delta contract. □

[93] Competitor A was purchased by Gold Co, a New Zealand Industry Z provider chiefly involved in the Sector P area with an annual turnover exceeding $300m. The financial performance of Competitor A in the four months *following* its acquisition is able to be reconstructed from the Gold Co annual report of 2015. The price paid for it was $14,821,000 paid by cash of $10,510,000 and the taking over of net liabilities of $4,311,000.

[94] Annualised, Competitor A had a *post acquisition* EBITDA of $1.218m on revenue
of $97.464m. These figures are very directly comparable to those of the company.

[95] But I do not know the precise figures on which Competitor A was purchased. Mr Lucas records that Competitor A's turnover was "approximately $85m per annum" (no
source is stated) and I do not know its pre-purchase EBITDA.

[96] The gravitational pull of this transaction on the assessment of the company's value is considerable. On the other hand I am acutely aware that the transaction was only the subject of relatively superficial analysis at hearing.

[97] Weighing all these factors against the opinion of Mr Lyne I fix the value of the company at $13.5m.

[98] Mr Dixon's expert himself accepted that a minority/negotiability discount should be subtracted. Even though Mr Lyne came late to the point, it is clear to me that there should be such a discount and I accept it should be set at 10 percent. The 40% share value to be divided is therefore $4.86 million.

Post-separation contributions

[99] Section 18B of the Act provides:

> **18B Compensation for contributions made after separation**
>
> (1) In this section, relevant period, in relation to a marriage [, civil union,] or de facto relationship, means the period after the marriage [, civil union,] or de facto relationship has ended (other than by the death of 1 of the spouses or [partners]) but before the date of the hearing of an application under this Act by the Court of first instance. □
>
> (2) If, during the relevant period, a spouse or [partner] (party A) has done anything that would have been a contribution to the marriage [, civil union,] or de facto relationship if the marriage [, civil union,] or de facto relationship had not ended, the Court, if it considers it just, may for the purposes of compensating party A— □
>
> (a) order the other spouse or [partner] (party B) to pay party A a sum of money: □
>
> (b) order party B to transfer to party A any property, whether the property is relationship property or separate property. □
>
> (3) In proceedings commenced after the death of 1 of the spouses or [partners], this section is modified by section 86. □

The company shares

[100] Application of s 18B to the present situation is difficult. □

[101] In simple human terms Ms Kingsley can fairly say that the difference between her and Mr Dixon's post-separation contribution is uniquely vast. Mr Dixon has earned effectively nothing since separation. His involvement with, and contribution to, the care of the children collapsed when he could no longer function financially, and for the two years since then, his involvement with them has been minimal and his financial contribution non-existent.

[102] But the s 18B question in this proceeding does not depend on whether or how much Mr Dixon should be blamed. It is a question of weighing Ms Kingsley's contributions. But they must be weighed on the basis that there is no counterbalancing contribution on Mr Dixon's side.

[103] I decline to allow this exercise to be conditioned by the proposition that it is necessary to weigh any outcome against its potential as a precedent to encourage the "lazy" (not that that word is used as a direct descriptor of Mr Dixon). It is not my sense of Mr Dixon that he is lazy: it may be that his defeats and experiences have made him deliberate (and perhaps depressed) and I am not sure whether he is employable in the reality of the present world. But his energy for his involvement in his composting venture is strong if its revenue has been unforthcoming.

[104] Nor am I willing to treat Mr Dixon in this s 18B analysis as the party to be held to account for the slowness of the sale of the family home property.

[105] In my view the s 18B question in this area requires consideration of three issues.

[106] The first issue is contribution to the increase in value of the company shareholding and quantification of that contribution.

[107] It is not in dispute that Ms Kingsley is a gifted, competent, strategic chief executive and that her contribution to the company in the period after separation was considerable.

[108] Ms Kingsley led the company's Government Agency Delta tender presentation. It is accepted that this was a significant if not pivotal step in the process which led to the company's selection out of the pool of 24 presenters.

[109] The radically altered Government Agency Delta Industry X services landscape on the completion of the tender process required the company to "upsize" immediately to be able to address its now large part of the market. This it did by moving immediately to secure, as sub- contractors, agencies which had been unsuccessful in the tender process. I accept the evidence that she was able to call in a long knowledge of the industry, carefully managed relationships within it and astute inter-personal skills and that in some cases her success was against the odds.

[110] At the same time Ms Kingsley saw and seized the possibility offered by two unsuccessful contestants, Copper Co and Zinc Co, and the company purchased them. Ms
Kingsley oversaw their consolidation with the company. They now represent a large proportion of the company's revenue and of its profits. The Copper Co purchase brought with it a Government Agency Gamma contract which was able, post-acquisition, to be expanded to be national rather than local.

[111] This was a period of stress and change for the company and some employees fell away. Ms Kingsley's burden was, I am satisfied, significantly greater because, whether or not the parties were sharing the care of the children, she was the parent who was managing that care and the household.

[112] It is fair to note that the very credible evidence of Mr Simpson, who managed these processes for one of the other successful contestants, revealed similar steps and achievements in his company's success and the intelligent personal skill and strategic sense of *its* manager.

[113] It is accepted for Mr Dixon that "some adjustment" may be appropriate but only if it is established that Ms Kingsley was not properly remunerated for this work.

Assessing the surprisingly cloudy and belated evidence on this issue of Ms Kingsley's income, it is accepted for Mr Dixon that there may be a relatively small shortfall of approximately $200,000 in respect of the employment income totalling approximately $1.3 million over four years.

[114] In my view, however, the fact that Ms Kingsley was performing work for which she was remunerated as part of the process that led to the increase in the value of the company shares is but one of the factors in this evaluation and the adequacy of remuneration is not the primary issue.

[115] In my view, while it can be fairly said that another similarly skilled and similarly paid chief executive could and would have achieved similarly, the issue whether Ms Kingsley's work should be considered a contribution and if so, its quantification, requires the posing of a question: what would have occurred if she had not continued as chief executive after the separation. There is no simple answer. It can probably be fairly said that, had she resigned at the date of separation, the tender process would have been unsuccessful for the company. It can probably be further said that, although the shareholders' agreement does not require Ms Kingsley to be an employee to hold her shares, the entire ownership structure between her and Mr Skinner was built around that employment and in some way or another that structure would have come to an end.

[116] This is the first of three overlapping considerations operating in an unavoidably non-arithmetical assessment of this issue.

[117] The second is the fact that the company that has surged in value in the three years since separation is the company which had been the subject of 15 years of management and development by Ms Kingsley during the term of the marriage and was an organisation positioned and capable of winning and coping with the Government Agency Delta work for which its successful tender document had already been filed.

[118] The third consideration is that allowance must be made in this assessment for growth in the value of the company shares if the Government Agency Delta process had not occurred or had not been successful.

[119] This third consideration is that some of the increase in value in the company shares from separation to hearing was brought about by market forces. A useful part of Mr Lyon's opinion was his analysis of the increase in the value of listed companies, particularly Industry Z companies, over the period. Mr Lyon's conclusion was that such companies had increased in value by 80% over the period. If the midpoint of $1.3 million between the two separation date valuations is used in this broad assessment $1.03 million would be notionally removed from consideration from the increase in value of $3.56 million from separation to hearing.

[120] In *Tarr v Tarr*[18] Thomas J said of s 18B "As the cases emphasise it is not an arithmetical exercise." It is a question of weighing the facts and the factors and making an assessment and judgment. I would award Ms Kingsley $750,000 in compensation for her post-separation work for the company.

[121] The second area of contribution to be considered under s 18B is Ms Kingsley's care for the children post-separation and her financial support of that care.

[122] While it is true that there was, nominally, shared care for the first nine months of separation in that the parties cared for the children in the relationship home for alternate weeks, I am satisfied on the evidence that that care and the household were managed throughout by Ms Kingsley who organised and paid for all the food and all the amenities. I am satisfied further that Mr Dixon was unconcerned with domestic issues and allowed the home to degenerate into a mess during his week, leaving and causing Ms Kingsley to have to begin her work by cleaning and righting it.

[123] Ms Kingsley has had financial responsibility for the children since separation. Since January 2013 Ms Kingsley has had the fulltime care of the children. She has

[18] [2014] NZHC 1450

been solely responsible for housing them and their financial upkeep. Mr Dixon's involvement with them has been very small.

[124] Again, arithmetical computation is not possible. In *IAT v SJG*[19] a global assessment of $40,000 for the care of the children for more than 6 years without maintenance was upheld. In *Tarr v Tarr*[20] an award of $75,000 for contributions including care of children over 20 years was upheld. But every case turns on its own facts.

[125] In the unique facts of the present proceeding where formal Child Support would have been trivial if assessed but there is relatively considerable property to share I think there would be inequity if Ms Kingsley were not awarded compensation under this head. I award her $40,000

[126] The third issue of s 18B contribution is payment of monies by Ms Kingsley (and Mr Dixon). That issue is dealt elsewhere in this judgment.

Waiheke bach

[127] Mr Dixon is the owner of a half share of a bach. Long term family friends are the other half owners.

[128] The bach is on a double section with high sea views. It is said to be the "first to see the sun at the beginning of the day and the last to lose it at the end".

[129] The bach is by all accounts a humble structure. It was more than once spoken of in evidence as a "traditional kiwi bach". There is some evidence that its subfloor structures are failing: certainly the floors are uneven.

[130] Mr Dixon's valuer values the property at $1,1000,000 (land value $1,000,000, improvements $100,000). Ms Kingsley's valuer values it at $1,299,900 (land value $1,150,000, improvements $149,900).

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[19] [2013] NZHC 2976
[20] supra

[131] Mr Dixon's half share is accepted to be his separate property.

[132] Ms Kingsley applies under s 9A(1), s 9A(4) and s 17.

[133] Section 9A(1) provides:

> **9A When separate property becomes relationship property**
>
> (1) If any increase in the value of separate property, or any income or gains derived from separate property, were attributable (wholly or in part) to the application of relationship property, then the increase in value or (as the case requires) the income or gains are relationship property.

[134] In *Rose v Rose*[21], the Supreme Court, referring to the issue of general inflation, said:

> But that does not defeat a claim under ss 1 if some part of the increase (excluding anything which is merely trivial or minimal) is attributable to the application of relationship property.

[135] The issue is whether sundry improvements to the property over the years funded out of relationship property have increased its value more than "nominally or minimally".

[136] I find these improvements to be:

(a) A ramp or stairway leading from the section to a neighbour's walkway (and thence to the beach);

(b) A small deck approximately three square metres and the installation of french doors leading to it;

(c) The levelling off and buttressing up of a small garden area;

(d) The reinforcing of the top of the septic tank to support the weight of the cars parked on top of it;

[21] [2009] NZSC 46 [2009] NZLR 814

(e) The removal of carpet and the polyurethaning of the wooden floors;

(f) New readymade kitchen units;

(g) Installation of a shower mixer and an outside bath.

[137] Mr Dixon's valuer, Mr Sprague said that the value in the property lay in the land which would inevitably be bought by a person intending to remove the existing bach and build a home on it appropriate to the value of the land. Minor improvements to the bach would be inconsequential to such a person.

[138] Ms Kingsley's valuer, Ms Hoskin took the view that such a purchaser might for example not intend to develop the site immediately and the improvements would result in a modest increase in the attractiveness of the property and therefore its value.

[139] I record initially that in my broad judgment of the situation any increase in value of the property resulting from the stated improvements would be trivial or minimal. I think this is also so as a matter of calculation. The cost of the kitchen cabinetry was $2,186, its installation, the small deck and adjacent French doors cost $1,860 and the reinforcing of the septic tank top cost $2,362, a total of $7,408. The other items would struggle in my view to cost more than $2,500. If the total expenditure is accepted to be $10,000 or less, it is less than 1% of the total property value at its lower valuation. In the words of Mr Dixon's valuer, "cost doesn't necessary reflect value" but even if these improvements sounded dollar for dollar in improvement in value, the increase in value at less than 1% would in my view be minimal or trivial.

[140] In my view the claim under s 9A(1) fails.

[141] Ms Kingsley's second argument is that pursuant to s 9(4) of the Act, the Court should exercise its discretion in her favour and treat any post-separation increase in value in the bach as relationship property in which she is entitled to share.

[142] For Mr Dixon, Mr Muir disputes that an increase in value is property. But to the extent that increase in value is, arguably only, outside the primary definition of property in s 2, it is specifically covered in s 9(3) which provides:

> Subject to s 9A, any increase in the value of separate property and any income gained or derived from separate property are separate property.

[143] Ms Kingsley's case is based upon her having serviced the loan and contributed to reducing the principal of the loan secured on the bach using her post-separation earnings and relationship property and having paid the outgoings of the bach using the same funding.

[144] I do not accept this application. While it is true that borrowings were secured over the bach, they were not by any account borrowings for the acquisition of the bach. Payments towards the outgoings on the bach were significantly offset by the continuing use by Ms Kingsley and the children of that facility.

[145] Mr Dixon accepts that Ms Kingsley has a claim under s 17 of the Act.

[146] Section 17 provides:

> **17 Sustenance of separate property**
>
> (1) This section applies if the separate property of 1 spouse or partner (party A) has been sustained by—
>
> (a) the application of relationship property; or □
>
> (b) the actions of the other spouse or [partner] (party B). □
>
> (2) If this section applies, the Court may—
>
> (a) increase the share to which party B would otherwise be entitled in the relationship property; or □
>
> (b) order party A to pay party B a sum of money as compensation. □
>
> (3) This section overrides sections 11 to 14A. □

[147] Throughout the years of the marriage the two owning families paid a regular sum into a fund for the bach. In later years the figure was $250 per month. There is little (if any) evidence how precisely the money was spent but it is plain that the

property was repainted more than once and there were the improvements I have listed above. I proceed on that basis and on the basis that the contributions also paid the rates and insurance.

[148] Sustain means "to keep or keep up". It is plain that these expenditures meet this definition.

[149] Setting a figure in the circumstances cannot be mathematical. For Mr Dixon it is proposed that the compensation sum under s 17 should be $50,000. For Ms Kingsley the sum of $150,000 is proposed on the basis that the payments themselves over 21 years would total $63,000 and there were top ups, working bees and other issues. I order compensation in the sum of $50,000. My reason is that the expenditure has not on any argument resulted in any increase in value. Expenditure resulted in a considerable benefit to the entire family on an ongoing basis through the marriage.

Alleged loan from Mr Nathaniel Dixon

[150] Mr Nathaniel Dixon is Mr Dixon's father.

[151] This issue is emblematic of these proceedings. In the wings there are complicated legal/financial structures, of which the documentation is in places counter-factual. At its centre is an assertion by Mr Dixon that his father on multiple occasions loaned money to the parties for large and small purposes. None of the loans are formally documented and there are no records confirming the payments. If the loans were intended to bear interest, it was not documented but when Mr Dixon "advanced" $380,000 to his father in 2015, it was to "stop interest running".

[152] Except in regard to one category of payment Ms Kingsley took the position that she was continuing to put Mr Dixon to proof and he had not formally proved most of the claimed debts. In regard to interest she acknowledged that she had been told of interest and an interest amount but implied that she had not agreed to it. Mr Dixon responded at one stage with what appeared to me to be unfeigned incredulousness
that these debts were ultimately going to be contested on "legal technicality".

[153] It was acknowledged in a question put to Mr Dixon in cross-examination that Ms Kingsley "does acknowledge the first two items which relate to Barbera Finance, which was effectively the $150,000 US which got sent off overseas and never seen again, right, and so she has always acknowledged that $150,000 US was borrowed from your father, right?"[22] The said two items (the first two in a schedule of claimed borrowings by Mr Dixon) were $196,281.55 and $21,025 – a total of $219,306.55.

[154] To the extent that the concession of the second of those payments may have been withdrawn in slightly later cross-examination (..."my error as counsel..."[23]) and therefore Ms Kingsley concedes no more than the first sum the evidence in general persuades me that the first payment to Barbera Finance was US$150,000, the New Zealand equivalent at the time was likely to have been $219,000 and the debt is proved by a narrow balance of probabilities at $219,306.55

[155] There is simply insufficient proof of any of the other debts and I make no order in respect of them.

[156] I believe that Ms Kingsley knew that the debts were interest bearing. In a letter of 15 October 2012 her previous counsel wrote:

> In addition to the Westpac debt, I understand there are sums owing to your father which carry interest.

On the balance of probabilities, Ms Kingsley's then counsel was speaking on her instructions and information.

[157] Ms Kingsley acknowledged that she had heard of an interest rate of 8 percent. I fix interest on this loan at that figure.

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[22] NOE 103
[23] NOE105/20

Ms Kingsley's tax liability

[158] Ms Kingsley's accountants have calculated that she has an outstanding tax liability including penalties and interest of $135,107 from 2008 until separation. The figure is based upon draft returns completed on the eve of hearing.

[159] In, or earlier than, 2013 Ms Kingsley's accountant sought from Mr Dixon verifying documentation for the failed investments and the Barbera Finance loss. Mr Dixon has not supplied them. The simple reason is that they do not exist. Each loss was effectively the result of the payment of sums of money into pools or to entities without formal documentation.

[160] Mr Dixon provided Ms Kingsley's accountant with a "chronology".

[161] On the eve of hearing Mr Dixon prepared an affidavit, setting out the history of the investments and the loan and confirming there was no supporting documentation. This represents all that can be done to attempt to claim tax losses for the years in question.

[162] It is accepted that the taxation is a relationship debt and is to be shared. It is not accepted however that the draft documentation prepared by Ms Kingsley's accountant will necessarily be, or represent, the final tax and penalty burden. For Mr Dixon, it is contended that in any event there would be no residual tax liability if a complete tax structure set up for Ms Kingsley had been adhered to.

[163] I am not able to conclude this issue. There is only one ultimate determinant of this question and that is the amount of tax penalties and interest finally determined to be payable The orders to be made in this Judgment will therefore include an order for the retention of sufficient funds from Mr Dixon's entitlement to meet his share of the potential liability to Inland Revenue when it is established.

Occupational rental

[164] Ms Kingsley claims $52,250 as occupational rent for the family home. This is calculated at $1,100 per week for 95 weeks from January 2013 until November 2014 when the house was sold.

[165] For Mr Dixon, it is argued that the Court should make no award in respect of occupational rental because Ms Kingsley had the benefit of, and access to, dividends from, her shareholding which I have found to have had a value at date of hearing of $4.4 million. That is of course more than the ultimate sale price of the home (and it is to be appreciated that for the last 12 months Mr Dixon has had access only to an agreed $750,000 of the house sale equity).

[166] In *GAM v GFM*[24], Woodhouse J dismissed an appeal against a Family Court judgment declining to make an award for post-separation occupation of a home. He said:

> [154] Whilst the wife has occupied the home since October 2004, from the same date the husband had de facto control of the businesses. There were burdens associated with this, and in particular arising out of the ongoing difficulties with the Iguacu and Metropole. And I am satisfied that the husband recognised that the wife had entitlements in respect of business assets as demonstrated by the drawings that continued to be made by her. But the de facto control also meant that the husband was in a position to draw benefits, which in my judgment offset at least some of the benefits derived by the wife to the extent that she had use of the husband's share of the home.

[167] In S v W[25], the Court of Appeal declined to grant leave to appeal against a decision of Kós J who had "declined to disturb the Family Court order because, through the "relevant period" each party had relationship property of roughly the same value."

[168] On the basis that post separation each party had the advantage of control of and access to relationship property of approximately equal value I decline to make any award for occupational rental.

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[24] [2012] NZHC 290
[25] [2014] NZCA 199

Dividends

[169] It is agreed that dividends arising from the S Trust shares are not at issue because they were applied to the purchase cost of those shares.

[170] The total of $378,578.57 was received by Ms Kingsley in dividends from separation until hearing.

[171] It is conceded by Mr Dixon that $43,451.96 of those dividend monies was used for relationship purposes. It is plain that the resulting balance of $335,126.61 is to be evenly shared and I order that Mr Dixon receive $167,563.30 in this regard.

Chattels

[172] Mr Dixon agreed at hearing that he would pay $20,000 for chattels and tools. I so order.

Vehicle and boats

[173] It is effectively agreed that Mr Dixon will pay $52,889 to compensate for his retention of these items. (This calculation allows for the fact that Mr Dixon paid $8,627 towards relationship debt from the proceeds of sale of one of these items).

Bank accounts

[174] At separation the one relevant account was an HSBC account containing $15,607.75.

[175] $9,700 was applied to relationship debt. The balance of $5,975 is relationship property to be divided between the parties.

Payments towards family home mortgage

[176] It is accepted that Ms Kingsley paid $74,106.41 from non-relationship property sources and Mr Dixon paid $16,930. The difference is $57,176.41 and Ms Kingsley is entitled to reimbursement of half of that sum.

John Morley debt

[177] Mr Dixon has agreed that he will take this debt as part of his share of relationship property. It is not possible for me to reconstruct the history of repayment of this confused item. I therefore value the loan owing by Mr Morley at $500,000. Ms Kingsley contends that she should be paid interest on this sum from the date of the repayment of the bank loan from the sale of the family home. She suggests 12.5% is appropriate. I think that that interest rate would be grossly excessive in the circumstances but I decline to order interest against Mr Dixon in any event. I found Mr Dixon to be an honest witness and I accept his parole evidence that Mr Morley shouldered the burden of the entire family home interest payment for a period. In the round I decline to order Mr Dixon to account for more than the face value of the loan of $500,000.

[178] I now set out in table form my calculation of the outcome.

Property pool	
Ms Kingsley's 40% parcel of the company shares	4,860,000
Nathaniel Dixon loan for B'On advance	-219,306.55
John Morley debt and interest	500,000
The company dividends	335,126.61
Vehicle and boats	52,889
Bank accounts	5,975
Proceeds held by DG Law	502,567
Interim distribution received by Mr Dixon	770,000
Interim distribution received by Ms Kingsley	20,000
Chattels and tools	40,000
Total	6,867,251.06

Compensation and determination of shares of relationship property		
	Mr Dixon	**Ms Kingsley**

Initial division of value	3,433,625.53	3,433,625.53
Section 17 compensation for the bach	-50,000	50,000
Section 18B award (mortgage)	-28,588	28,588
Section 18B award (childcare)	-40,000	40,000
Section 18B award (the company increase in value)	-750,000	750,000
Share of relationship property after compensation awards	2,565,037.53	4,302,213.53

Division of Relationship Property

	Mr Dixon	**Ms Kingsley**
Ms Kingsley's 40% parcel of the company shares		4,860,000
Bank accounts		5,975
Nathaniel Dixon loan for B'On advance	-219,306.55	
John Morley debt and interest	500,000	
The company dividends		335,126.61
Vehicle and boats	52,889	
Proceeds held by DG Law	502,567	
Interim distribution received by Mr Dixon	770,000	
Interim distribution received by Ms Kingsley		20,000
Chattels and tools	40,000	
	1,646,149.45	5,221,101.61

[179] Ms Kingsley is required to pay Mr Dixon $918,888.08 being the shortfall between his share and the property to come to him through this Judgment.

Orders

[180]

(a) Ms Kingsley is to pay Mr Dixon within 60 days, $918,888.08. This sum will incur interest at the rate of 5% from the date of this judgment.

(b) The property listed in this judgment as credited to each party shall thereafter be that party's sole and separate property.

(c) Mr Dixon shall cause to be retained and lodged in a solicitor's trust account, the sum of $67,553.50 from the sum paid by Ms Kingsley pursuant to this judgment. He is to pay that sum or a lesser sum

representing half the sum ultimately paid if it is less than $135,107 to Ms Kingsley when her tax liability including penalties for the years 2008-2012 is established and paid. □

Costs

[181] Costs are reserved. Counsel are to agree a timetable for the filing of submissions.

D R Brown□
Family Court Judge