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IN THE HIGH COURT OF NEW ZEALAND
BLENHEIM REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WAIHARAKEKE ROHE

CIV-2018-406-19
[2020] NZHC 923

BETWEEN	WAN LAN KWOK Plaintiff
AND	DAVID ERNEST RAINEY First Defendant
	DAVID ERNEST RAINEY AS TRUSTEE OF THE DAVID RAINEY FAMILY TRUST Second Defendant
	GASCOIGNE WICKS LAWYERS Third Party

Hearing:	9-12 March 2020
Counsel:	J R Hosking for Plaintiff D M Fraundorfer and R A Rosser for Defendants F B Barton and S McLean for Third Party
Judgment:	6 May 2020

JUDGMENT OF THOMAS J

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Introduction

[1] Wan Lan Kwok, a Hong Kong resident, met David Rainey, a builder from Tauranga, when she was in New Zealand as a tourist in August 2008. They quickly developed a relationship and, by 1 March 2009, Ms Kwok was living and working with Mr Rainey in New Zealand. When granted a resident's visa on the basis of her partnership with Mr Rainey in August 2011, she relocated to New Zealand, in her mind permanently, to be with Mr Rainey.

[2] Mr Rainey, having seen his assets halved on two occasions as a result of relationship property proceedings, was committed to the relationship but wanted to protect his own assets. After the couple had lived together for approximately two and a half years, he sought advice from the law firm Gascoigne Wicks (GW) as to how to do so. By this stage he had purchased a section in Tauranga where he intended to build a house in which both he and Ms Kwok would live. Based on GW's advice, he set up a trust which was to own the section. He and Ms Kwok then built a house on the section and they lived there as a couple until the relationship came to an end in September 2016.

[3] Is Ms Kwok entitled to a half share of the house? Does the trust provide an effective defence to the claim? If not, is GW, as the law firm who advised Mr Rainey, liable for Ms Kwok's claim against Mr Rainey? These are the questions addressed in this decision.

The claim

[4] Ms Kwok claims:

(a) a half share of the property at 85 Oteki Park Drive, Welcome Bay, Tauranga (Oteki Park);

(b) a half share of the current account in Mr Rainey's company, Building and Painting Specialist (2007) Limited (the Company);

(c) maintenance at $785 per week;[1] and

(d) a half share of the family chattels.

Grounds for the claim

[5] There are four alternative bases on which Ms Kwok claims a share in Oteki Park:

(a) that the David Rainey Family Trust (the Trust) is not a valid trust, with the result that Mr Rainey retains a full proprietary interest in Oteki Park which should be shared equally under s 11 of the Property (Relationships) Act 1976 (the Act);

(b) that Mr Rainey's powers under the Trust amount to property (an in personam claim) that is relationship property. Ms Kwok acknowledges some enforcement issues connected with this ground;

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[1] Ms Kwok's application for a final maintenance order was transferred to the High Court on 20 May 2019.

(c) that Mr Rainey disposed of Oteki Park to the Trust and used funds to build the family home in order to defeat Ms Kwok's interests under s 44 of the Act; and

(d) that Ms Kwok made contributions to Oteki Park in the reasonable expectation she would gain an interest in it and Mr Rainey as trustee should reasonably expect to yield such an interest to her.

[6] Although not pleaded, Ms Kwok also seeks compensation under s 18B of the Act for Mr Rainey's use of Oteki Park since separation.

[7] The result is that Ms Kwok claims:

Family home	$1,100,000.00
Chattels	7,000.00
Current account (Company)	29,109.00
Subtotal	1,136,109.00
Less Mortgage at date of separation	100,290.00
Equity	$1,035,819.00
Divided equally	**517,909.50**
Plus Occupation rent	63,530.45
Total	**$581,439.95**[2]

[8] Mr Rainey and the Trust defend the claim on the following grounds:

(a) the Trust is valid and Mr Rainey's powers are not unfettered;

(b) at the time the Trust was created:

(i) Oteki Park was Mr Rainey's separate property; and

(ii) he did not know that he could potentially be defeating Ms Kwok's future rights by disposing of Oteki Park;

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2 Plus maintenance.

(c) the parties were not in a qualifying de facto relationship until August 2011, after the Trust was established;

(d) Ms Kwok did not contribute significantly to the Company or Oteki Park, and what contributions she did make were compensated by wages from the Company;

(e) Mr Rainey considered he had the right to occupy Oteki Park to the exclusion of Ms Kwok after separation; and

(f) Ms Kwok has had sufficient time to become self-supporting, and there is no causative link between her inability to support herself and the relationship.

Defendants' claim against the third party

[9] Mr Rainey and the Trust then claim against GW in negligence and breach of contract, based on the alleged failure of the firm properly to advise them on the relationship property risks. Their claim for compensation will depend upon what award, if any, the Court makes against them in relation to Ms Kwok's claim. Furthermore, Mr Rainey and the Trust seek (although there are no associated pleadings) general damages of $35,000 for stress, damages in the amount of any legal costs awarded against them in favour of Ms Kwok, and the costs they have incurred in defending Ms Kwok's claim.

[10] At the trial, GW accepted that the Trust is ineffective in protecting Mr Rainey's assets from Ms Kwok's claim. It admits its advice was negligent. The issues are causation and damages. GW relies on three factors:

(a) That by March/April 2011, when Mr Rainey sought legal advice, the die was cast. Ms Kwok's rights were already in existence. Mr Rainey had bought the section at Oteki Park after the relationship began and/or it was purchased for the common use and benefit of Ms Kwok and Mr Rainey.

(b) If the only practical advice GW should have given was that Mr Rainey should have terminated the relationship (and it is accepted GW did not advise Mr Rainey to do so), then objectively there was little likelihood that Mr Rainey would have followed that advice, given the status of the relationship at the time.

(c) In any event, damages are limited to half of Mr Rainey's separate property at the time, totalling $330,000 ($165,000).

Structure of decision

[11] Ms Kwok's claim and that of the defendants are considered in Parts 1 and 2 of this decision respectively. Most of the evidence is relevant to both claims and I therefore address the evidence first.

[12] Part 1 begins by addressing the question of when Ms Kwok and Mr Rainey commenced their de facto relationship. This is important in order to determine the ownership status of the section at Oteki Park and the status of the parties' relationship when the Trust was formed.

[13] I next address Ms Kwok's claim for a half share of Oteki Park under the four grounds of that claim. I then address her claims for a share of what Ms Kwok alleges is relationship property before addressing her claim for occupation rent and maintenance.

[14] Part 2 of the decision begins with addressing the evidence relevant to the defendants' claim before addressing the claim itself.

The evidence

Early stages of the relationship

[15] Ms Kwok[3] first arrived in New Zealand at the end of July 2008 and, in August 2008, she moved to Tauranga where she met Mr Rainey. They exchanged phone

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3 Ms Kwok's evidence given in Cantonese was translated by a duly sworn interpreter.

numbers and began messaging. Ms Kwok said she asked a co-worker to translate the messages and, very early on, Mr Rainey wrote that he loved Ms Kwok.

[16] Ms Kwok returned to Hong Kong in October 2008. Mr Rainey had pre-arranged a trip to China for another purpose and arrived in Hong Kong on 30 October 2008. During that trip, he and Ms Kwok met up and travelled together. Mr Rainey then stayed with Ms Kwok in her Hong Kong home with her children. Ms Kwok was employed during this period.

[17] Ms Kwok and Mr Rainey attended an interview with Immigration New Zealand on 15 December 2008. They were interviewed separately and provided consistent information. Mr Rainey, described as the sponsor, is recorded in Immigration New Zealand's customer interaction notes as saying:

> His sister is going to get marry [sic] in NZ in March 2009, so he has to go back to NZ and hopes that [Ms Kwok] can go to NZ asap because they want to build on the relationship further, to understand each other more, they will consider marry [sic] after they have long time together. [sic]

[18] The Immigration officer was satisfied it was a genuine and stable relationship. On 20 January 2009, Ms Kwok was granted a six-month visitor visa.

[19] Mr Rainey returned to New Zealand in December 2008. Ms Kwok came to New Zealand on 1 March 2009.

[20] On arrival in New Zealand, Ms Kwok and Mr Rainey cohabited. They attended Mr Rainey's sister's wedding. They lived together at Mr Rainey's parents' house and on various worksites. Ms Kwok travelled with Mr Rainey and worked mainly in the upper South Island as an unpaid labourer in his business as a builder and painter. When Ms Kwok received a work visa, she was paid by the Company. Her income went into the couple's joint account.

[21] In May 2009, Ms Kwok returned to Hong Kong to have a medical issue attended to. Mr Rainey proposed to her and gave her a ring at the airport when she was leaving. Mr Rainey said he did not tell anybody about the proposal because he was embarrassed and concerned as to whether he was doing the right thing.

[22] On 21 June 2009, Ms Kwok returned to New Zealand and the couple resumed living together.

[23] In June 2009, Ms Kwok applied for a work partnership visa. Mr Rainey supported her application by his letter dated 22 June 2009, where he said:

> We have been in a relationship that has developed since August 2008.

[24] He confirmed that they had been living together since she arrived in New Zealand. He then said:

> We intend to apply for residency at a later date but a work permit for two years for now to allow us to further develop our relationship and develop a better understanding of each other.

[25] Immigration New Zealand required evidence that Ms Kwok and Mr Rainey were living together. By way of response, Mr Rainey wrote to Immigration New Zealand on 6 July 2009 saying, "This is ridiculous of you to say that we are not living together".

[26] Immigration New Zealand concluded Ms Kwok and Mr Rainey were in a "genuine, stable and ongoing relationship". A work visa expiring on 21 June 2010 was granted.

[27] Mr Rainey made a will dated 24 December 2009. He bequeathed Ms Kwok the proceeds of his life insurance. Ms Kwok was to have the right to live in the house at Oteki Park for two years after his death (notwithstanding it was not built at the time he made the will).

[28] Ms Kwok returned to Hong Kong in January 2011 while she waited for her New Zealand residency visa. Immigration New Zealand's report dated 29 July 2011 noted the evidence supported Ms Kwok's declaration that the couple had been living together since May 2009. This included joint name bank account statements, photographs of the couple, and letters of support from Mr Rainey and others.

[29] Mr Rainey completed the Partnership Support form in connection with Ms Kwok's application for residency. He stated: "Have loved here [sic] all my life". He said in a letter that the couple intended to get married.

[30] Immigration New Zealand's report noted:

> Evidence, eg courier slips, phone records and emails which support [Ms Kwok] and the NZ partner have maintained a stable partnership during the periods of separation.

[31] Mr Rainey accepted that he lived with Ms Kwok as from 1 March 2009 and they remained living together, although they lived apart at times when he was working away from home and when Ms Kwok went to Hong Kong. Despite this, Mr Rainey stressed that he was always unsure where the relationship "would go", given the difficulties with communication. He said, for example, that there were issues between them even before Ms Kwok's visitor visa expired. Mr Rainey's understanding was that, although he and Ms Kwok lived together, there were no legal consequences of that as far as his property was concerned until they had been together for more than three years.

[32] Mr Rainey confessed that his representations to Immigration New Zealand were not always entirely accurate. Essentially, he said he over-egged the pudding somewhat but, from his online research, he knew what Immigration New Zealand required to be satisfied as to the status of their relationship.

[33] Despite the evidence that he professed his love for Ms Kwok from almost the first meeting, Mr Rainey explained that it would be more accurate to say he was infatuated. He said they were both keen to push the relationship to see how it developed. He accepted he proposed to Ms Kwok in May 2009 but was somewhat evasive when it came to whether he did indeed intend to marry her. Mr Rainey explained that marriage depended upon Ms Kwok's English proficiency and their ability to communicate. He intimated that he had told Ms Kwok any commitment to marry her was conditional upon her improving her English.

[34] While Mr Rainey sought to categorise the period between January and August 2011 as a break in their relationship, the evidence provided to Immigration

New Zealand and its resulting conclusion point to the contrary. In her evidence, Ms Kwok explained that they spoke regularly on the phone and communicated via her daughter. Ms Kwok did not accept any suggestion of a separation during this period, saying she had no concerns about her visa situation because she was satisfied she and Mr Rainey were partners.

[35] When Ms Kwok's residency visa was granted in August 2011, Mr Rainey came to Hong Kong to collect her. Ms Kwok said Mr Rainey told her to bring all her things to New Zealand because they would settle down and live together. Mr Rainey and Ms Kwok went shopping together in Hong Kong for items for the house they were building, including kitchen benchtops, light fittings and curtains. These were shipped from Hong Kong to New Zealand, along with Ms Kwok's clothes and belongings.

[36] The couple arrived in New Zealand in October 2011. Ms Kwok carried on working with Mr Rainey in the way she always had done. She accepted she had no trade experience but said she would do whatever was asked of her, including mixing concrete, hammering nails, holding up sheets of gib board, sweeping up and doing manual work. She said most of the time it was just the two of them, although Mr Rainey occasionally hired extra people for jobs requiring heavy lifting.

The Trust

[37] Mr Rainey first sought advice from GW as to how to protect his assets in February 2011. In March 20011, he instructed GW to prepare the documents to establish a trust. The Trust was settled on 27 April 2011. Mr Rainey appointed Ms Kwok a discretionary beneficiary of the Trust on 3 October 2011 and removed her as such in May 2015.

[38] Mr Rainey did not discuss the Trust with Ms Kwok, as he thought she would not have understood had he explained it to her. He maintained he did tell her the Trust existed but doubted it meant anything to her. Ms Kwok said she became aware of the Trust only on separation. She said Mr Rainey had told her that the house belonged to both of them as long ago as 2009 when he showed her the section at Oteki Park. He reiterated it in 2011 when they returned together to New Zealand.

[39] Ms Kwok's evidence was that, in 2010, she and Mr Rainey discussed marriage but Mr Rainey said she would first need to sign an agreement saying she had no claim to his money. Mr Rainey told her he had lost money in two divorces already and did not want to lose a significant amount of money again if they separated. Ms Kwok refused, saying she was upset that Mr Rainey would suggest such a thing. They argued. Ms Kwok said she packed her bags to leave but Mr Rainey would not let her go and withheld her passport.

[40] There was a similar discussion in 2011, when Ms Kwok again brought up the topic of marriage. She said Mr Rainey became aggressive and said he would not marry her without such an agreement.

[41] Ms Kwok said she did not understand exactly what Mr Rainey was asking but knew enough to know it would mean she would not share in everything they had built together as a couple. Ms Kwok said, had Mr Rainey told her he would keep his property separate, she would never have come to New Zealand, a country with a different culture and language, leaving friends and relatives behind.

[42] Mr Rainey candidly acknowledged he did not understand trusts. He said at one point in his evidence that his intention was to protect his assets from the world, not specifically Ms Kwok, although he was aware that he had been in a relationship with her for about two and a half years by the time he consulted GW. He was also aware that a trust could protect his assets from rest home fees.

[43] Mr Rainey knew he needed to do something to protect his assets. He said the options were either that Ms Kwok move out and the relationship ended or they could move forward. Mr Rainey explained he was worried about what to do, given Ms Kwok would not sign a contracting out agreement, and he wanted to do something before Oteki Park became the relationship home.

[44] Mr Rainey stressed that his most recent matrimonial property settlement had been a long hard fight and he did not want to put himself through that again. GW had acted for him in those proceedings but the lawyer involved had left GW by the time Mr Rainey consulted the firm in February 2011. Another lawyer was assigned to his

case. Understandably, Mr Rainey rejected the proposition that the new lawyer would not have known the background, pointing out that GW had acted for him for around 28 years.

[45] Mr Rainey accepted he did not tell GW that he and Ms Kwok were engaged. Mr Rainey said, at this stage, he still believed there was a future in the relationship, despite the problems. He thinks it probable he mentioned his plan to build a house on the section at Oteki Park as he had started earthworks by then.

[46] Mr Rainey said the lessons he learned from his two divorces greatly affected how he approached subsequent relationships. He was certain he did not want to have another relationship property dispute and wanted to protect his assets in future. He said he made this very clear to both Ms Kwok and GW.

[47] GW'S file note of the meeting records:

> Just had matrimonial settlement – w/ land – & dwelling – wants to protect.

And that he had a partner of two and a half years who "didn't want to do a separate [property] agreement". Mr Rainey's evidence was that the lawyer told him:

> If Irene was refusing to enter into a contracting out agreement, I could set up a family trust to own the property instead, and that the trust would mean I kept full ownership in some form. He didn't say anything about any risks of Irene still having claims against the property if I put it in a trust or what the risks were if Irene didn't sign a contracting out agreement. He definitely didn't tell me anything about laws that could undo trusts or transfers to trusts in relationship property matters.

[48] Mr Rainey trusted GW to do what was best. He said the lawyer advised him he did not require two trustees and that one trustee (Mr Rainey) was enough because the Trust was ultimately for protection and not control. Mr Rainey said:

> [GW] knew that [Ms Kwok] was the main reason for establishing the trust in the first place and they didn't give me any advice on it other than a trust was an alternative to a contracting out agreement.

Establishment of the Trust

[49] On 14 March 2011, GW received a QV estimate of value of the section at Oteki Park of $130,000.

[50] On 7 April 2011, GW wrote to Mr Rainey enclosing a draft trust deed, a sale note of Oteki Park, an acknowledgement of debt, meeting minutes and a declaration of trust. Mr Rainey was the settlor, beneficiary, appointor and sole trustee of the Trust. Two other named discretionary beneficiaries were his two sons. There was no mention of the risk of having one trustee only or that Ms Kwok might have a claim to Oteki Park despite the Trust. Mr Rainey signed the documents on 27 April 2011.

[51] In accordance with his lawyer's advice, Mr Rainey did some gifting to the Trust in June 2011.

[52] Mr Rainey believed his 2009 will, whereby Ms Kwok was bequeathed his life insurance policy and an interest in Oteki Park for up to two years after his death, was done to ensure, were they still together, that she would be looked after. He believed that if they separated while he was alive, the Trust meant that Oteki Park would remain his separate property. He was somewhat puzzled by the change in June 2011 whereby Ms Kwok was named a discretionary beneficiary of the Trust.

[53] In November 2013, the Trust guaranteed a loan to Mr Rainey, secured by a mortgage over Oteki Park.

[54] It was only when Mr Rainey contacted GW around March 2015, wanting to discuss termination of the relationship, that he was advised there was any prospect Ms Kwok had a claim. Following this, on 18 May 2015, Mr Rainey updated his will, making no provision for Ms Kwok.

The house at Oteki Park

[55] Mr Rainey had used $93,214 from his relationship property settlement with his former wife and about $12,000 of his own money to buy the section at Oteki Park. He agreed the purchase on 3 October 2008 and settlement occurred on

28 November 2008. At this time, he was dealing with Immigration New Zealand in Hong Kong and, on 15 December 2008, informed them that he and Ms Kwok were considering marriage. Mr Rainey acknowledged he had said those things but they were "rubbish". He said at that point he was unsure of his intentions but accepted that, once he started building, it was to build a house for him to live in rather than as an investment.

[56] Ms Kwok said that, when they worked together in the South Island, Mr Rainey said he would have enough money to build "our house" and go to Hong Kong for a holiday. Around October 2010, Ms Kwok and Mr Rainey left the South Island and returned to live in Tauranga in rented accommodation.

[57] In October 2010, a concept plan was drawn up for the house at Oteki Park. Mr Rainey applied for building consent in September 2011. Building consent was granted in January 2012. Some preliminary excavation work began before the building consent was issued. Mr Rainey and Ms Kwok reviewed the architect's plans together and she provided some input. By April 2011, Ms Kwok said she and Mr Rainey worked together on the building site. They moved into the house around August 2013, having moved into the self-contained unit also constructed at Oteki Park in 2012. They remained living at Oteki Park until they separated in September 2016.

[58] Ms Kwok said they both worked hard, using their own labour and income from the joint account. At the same time, she was responsible for the domestic duties. Ms Kwok agreed with the way in which one of Mr Rainey's friends characterised their working relationship – that they were like a surgeon and a nurse; Mr Rainey doing the technical work and she assisting.

[59] Ms Kwok was aware that, during the building process, Mr Rainey needed another $100,000 to finish the house. He told her when he took out the loan secured by the mortgage. She acknowledged some money came from Mr Rainey's capital but said their income paid the mortgage and provided the cash to build the home.

[60] Mr Rainey did not accept that Ms Kwok came to the site most days. He said that, when she did, it was more that she was company for him and they were trying to

build a relationship. He said that Ms Kwok was often more of a hindrance than a help. Because of her limited English, it took him quite some time to explain even basic tasks to her and it would have been quicker to do them himself. He used at least two friends to help him at various times in building the house, as well as qualified tradespeople such as an electrician and plumber.

[61] Mr Rainey estimates the building cost was around $330,000, funded from his matrimonial settlement of approximately $219,000 plus the mortgage, and not from his income.

[62] Oteki Park now boasts a three-bedroom, three-bathroom house with a separate self-contained unit. Jessica Bartlett is a registered valuer and, in her expert opinion, the market value of Oteki Park as at 25 February 2020 was $1,100,000.

The relationship

[63] The relationship was turbulent at times. Ms Kwok now has a permanent protection order against Mr Rainey. Mr Rainey claims Ms Kwok was violent to him during the relationship. There is no doubt that, when the relationship finally terminated, Ms Kwok damaged some household items at Oteki Park.

[64] Mr Rainey expressed frustration at Ms Kwok's limited English, intimating that his commitment to the relationship was conditional on her English improving. Ms Kwok explained that, although she tried, she found it difficult to learn English. She pointed out that Mr Rainey made no effort to learn Cantonese.

[65] When Mr Rainey went to see GW on 16 March 2015, he wanted to remove Ms Kwok from the will and the Trust. He told GW that they had split up several times. Ms Kwok denies this. She accepted they argued but said, throughout the period, they continued to have a physical relationship, worked together on building sites and attended social functions together.

[66] On 18 May 2015, the GW lawyer made a file note which suggested Mr Rainey informed him that Ms Kwok was still living at Oteki Park but they had not reconciled. He had signed the will which removed Ms Kwok as a beneficiary. At this stage,

Mr Rainey was working in the South Island. Ms Kwok accepted that they were arguing but said they had not separated.

[67] By July 2016, Mr Rainey had entered into another relationship.

Financial arrangements

[68] Mr Rainey is the sole shareholder and director of the Company. There seems little doubt that Mr Rainey controlled the couple's finances. Ms Kwok's working visa was granted on 6 July 2009. From January 2010, Mr Rainey's monthly records for the Company showed his income and that of Ms Kwok's divided between them, although Ms Kwok did not really know about that. Mr Rainey explained he did this for tax reasons, a practice he had followed with his former wife.

[69] Ms Kwok had a debit card and Mr Rainey said she had free access to the joint account which was used for household expenditure, travel and the mortgage.

[70] Ms Kwok looked after the renting of the self-contained unit. The tenants paid cash which she used to pay the bills.

[71] Both Ms Kwok and Mr Rainey agreed they lived frugally in comparison to many others. Ms Kwok said she bought no new clothes other than work clothes from The Warehouse, believing that she was contributing to the couple's future. She foraged for food and went fishing. Despite this, they returned to Hong Kong to see her family every two years and travelled throughout New Zealand.

Current situation

[72] Ms Kwok is 54 years old, in reasonably good health, although she suffers from depression in light of her circumstances. After the relationship terminated, she resided first at a women's refuge and now lives in a small studio. She is on a benefit. Her English, and correspondingly her ability to find a job, is very limited.

[73] Ms Kwok still has no chattels from Oteki Park. When she left, Mr Rainey gave her $200 in cash via the police and allowed her to collect some personal effects only.

Mr Rainey pointed out that, following separation, Ms Kwok emptied the joint bank account of some $700.

[74] Ms Kwok said she came to New Zealand expecting a better lifestyle. In comparison with her modest lifestyle in Hong Kong, she considered she lived lavishly in New Zealand during the relationship. She now describes herself as stranded in a foreign country, unable to speak the language and with no career prospects. Despite this, she wants to remain in New Zealand as her daughter has moved here.

[75] Mr Rainey is now 54 years old. Since separation, Mr Rainey has suffered his own health issues but does not appear to require any ongoing treatment. He says that he can still work but his ability to do so, probably through a combination of age and illness, is impaired.

[76] Oteki Park has been successfully rented out as bed and breakfast accommodation, particularly during the summer months. For example, in January 2018, approximately $11,205.00 was earned from the bed and breakfast business and about half that amount in February and March. Mr Rainey said, however, this impacted his ability to work as a builder, as he was devoting his energies to managing the rental properties.

[77] There is a permanent tenant in the self-contained unit paying approximately $300 per week.

[78] Mr Rainey says he earns around $75,000 per annum gross in wages and, after tax, receives around $1,631 per month.

[79] On 15 October 2018, an order for interim maintenance was granted. The Family Court Judge recognised the disparity between the parties and ordered Mr Rainey to pay Ms Kwok $200 per week for 26 weeks. This was paid in one lump sum.

[80] Mr Rainey says the Company has no assets apart from a car. He has remarried and wants to get on with his life.

PART 1

When did Ms Kwok and Mr Rainey's de facto relationship commence?

[81] Section 2D(1) of the Act defines a de facto relationship as follows:

> **2D Meaning of de facto relationship**
>
> (1) For the purposes of this Act, a **de facto relationship** is a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman)—
>
> (a) who are both aged 18 years or older; and
>
> (b) who live together as a couple; and
>
> (c) who are not married to, or in a civil union with, one another.

[82] Whether a couple is in such a relationship is a matter of evidence. However, as Heath J observed in *B v F*:[4]

> By their very nature, disputes of this type which fall to be resolved by the Court will often arise out of the unconventional living arrangements of particular individuals. To some extent, there will always be the problem of trying to fit a square peg (representing the parties' choices about their own living arrangements) into a round hole (representing the concept of a *de facto* relationship, for the purposes of the Act). Nevertheless, even in an unusual relationship, the law requires a Court to evaluate the evidence to determine whether the legal threshold is met.

[83] In the present case there was a relationship between two people, both over 18, who were not married or in a civil union with each other. The issue is when they commenced living together as a couple.

[84] In determining whether two people live together as a couple, all the circumstances of the relationship are to be taken into account, including the matters listed in s 2D(2) of the Act. Section 2D(3) makes it clear that findings on these criteria are not necessarily determinative.

[85] Gendall J in *Miller v Carey* aptly described the Court's task as follows:[5]

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4 *B v F* [2010] NZFLR 67 (HC) at [54].

5 *Miller v Carey* [2015] NZHC 887, (2015) 30 FRNZ 675 (citation omitted).

> [19] Determining the point at which it can be said that the parties are living together as a couple requires the Court to make a holistic assessment of the relationship and a determination as to whether that relationship can properly be described as a "de facto" one. When undertaking this task, Courts must examine all facets of the relationship, including those set out in s 2D(2). However, a mechanical or arithmetical assessment of those non-exhaustive factors will not suffice. There is always a need to stand back and assess the relationship as a whole – a qualitative rather than quantitative determination is called for.
>
> [20] In most cases where the parties dispute the existence of (or the date of commencement or determination [sic] of) a de facto relationship, the Court will be called upon to discern, and adjudicate upon, disparate strands of evidence drawn upon by each party. It is the assessment of the cumulative weight of that evidence which will be determinative.

Discussion

[86] Having considered all of the evidence, I am satisfied that Ms Kwok and Mr Rainey commenced their de facto relationship on 1 March 2009, after the date Mr Rainey settled his purchase of Oteki Park on 28 October 2008. My analysis includes the following s 2D(2) factors.

(i) Duration of the relationship

[87] By 1 March 2009, Ms Kwok and Mr Rainey had known each other for six months. They had already spent weeks living together in Ms Kwok's Hong Kong home between the time Mr Rainey travelled to Hong Kong on 30 October 2008 and when he returned to New Zealand in late December 2008. Ms Kwok arrived in New Zealand on 1 March 2009, having been granted a six-month visitor visa. They then lived together as a couple until Ms Kwok had to return to Hong Kong for medical treatment on 27 May 2009, returning 21 June 2009. Although Ms Kwok returned to Hong Kong on 29 January 2011 and did not return until her residency visa was granted on 10 August 2011, the relationship continued through phone calls and electronic communication. Mr Rainey travelled to Hong Kong in August 2011 and they returned together to New Zealand in October 2011.

(ii) Nature and extent of a common residence

[88] From Ms Kwok's arrival in New Zealand on 1 March 2009, the couple lived together and worked together. At all times they were in the same country, they lived together.

(iii) Whether or not a sexual relationship exists

[89] There was a sexual relationship from the outset.

(iv) Degree of financial dependence or interdependence

[90] From the time Ms Kwok arrived in New Zealand on 1 March 2009, she was financially dependent upon Mr Rainey. That continued throughout the whole course of their relationship. The only money she earned was by working for the Company.

(v) Ownership, use and acquisition of property

[91] Apart from personal items, there is no evidence Ms Kwok acquired any property which was shared with Mr Rainey. Mr Rainey, however, shared what he had with Ms Kwok.

(vi) Degree of mutual commitment to a shared life

[92] On an objective analysis, Ms Kwok and Mr Rainey were mutually committed to a life together from 1 March 2009 when, at Mr Rainey's behest and with his constant encouragement and support, Ms Kwok came to live in New Zealand, leaving behind her home, job, family and friends. The information provided to Immigration New Zealand confirms that they were both committed to trying to achieve a long-term relationship. Mr Rainey's qualifications about their relationship do not alter the fact they were in a de facto relationship as from 1 March 2009. As Immigration New Zealand noted, the courier slips, phone records and emails support the conclusion Ms Kwok and Mr Rainey maintained a stable partnership during the periods of separation.[6]

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6 See [30] above.

(vii) Care and support of children

[93] Both parties had adult children who were not dependent upon the couple (despite Mr Rainey providing support to Ms Kwok's daughter from time to time).

(viii) Performance of household duties

[94] Ms Kwok performed the domestic duties in the main, with Mr Rainey taking more of a traditional role in terms of tasks outside the home.

(ix) Reputation and public aspects of the relationship

[95] The parties presented as a couple. On 9 March 2009, they attended Mr Rainey's sister's wedding. The letters from family and friends in support of Ms Kwok's various applications to Immigration New Zealand spoke clearly of Ms Kwok and Mr Rainey as a couple. The fact they did not publicise their engagement does not alter the fact of a de facto relationship.

(x) Other factors

[96] In Mr Fraundorfer's submission, the de facto relationship did not commence until August 2011 when Ms Kwok was granted her residency visa. He suggested it was Ms Kwok's absence of family, money or permanent visa status prior to that date which meant that the relationship progressed quickly in *appearances* but it was plagued by communication issues. It was not, in his submission, until Ms Kwok learned better English, became more independent and had a permanent visa that the relationship could begin in a complete sense. Mr Rainey was, he said, forced to support Ms Kwok out of necessity rather than necessarily commitment to the relationship. He said it was not until June 2011, when Mr Rainey added Ms Kwok as a discretionary beneficiary of the Trust, that there was evidence of a commitment to caring for Ms Kwok and providing for her.

[97] Responding to that last point first, Mr Rainey made a will in December 2009 providing for Ms Kwok. As to the other factors, while undoubtedly correct that the nature of the relationship was in large part dictated by Ms Kwok's nationality and

dependence on Mr Rainey when in New Zealand, that does not mean they were not in a de facto relationship.

Section 44 Disposition to defeat

[98] Although Ms Hosking said her real focus was on whether the Trust was in fact valid, to me the most obvious and straightforward route to answer Ms Kwok's claim is s 44 of the Act. I will therefore address this first.

[99] Section 44 provides:

> (1) Where the High Court or the District Court or the Family Court is satisfied that any disposition of property has been made, whether for value or not, by or on behalf of or by direction of or in the interests of any person in order to defeat the claim or rights of any person (party B) under this Act, the court may make any order under subsection (2).
>
> (1A) The court may make an order under this section on the application of party B, or (in any proceedings under this Act or otherwise) on its own initiative.
>
> (2) In any case to which subsection (1) applies, the court may, subject to subsection (4),—
>
> (a) order that any person to whom the disposition was made and who received the property otherwise than in good faith and for valuable consideration, or his or her personal representative, shall transfer the property or any part thereof to such person as the court directs; or
>
> (b) order that any person to whom the disposition was made and who received the property otherwise than in good faith and for adequate consideration, or his or her personal representative, shall pay into court, or to such person as the court directs, a sum not exceeding the difference between the value of the consideration (if any) and the value of the property; or
>
> (c) order that any person who has, otherwise than in good faith and for valuable consideration, received any interest in the property from the person to whom the disposition was so made, or his or her personal representative, or any person who received that interest from any such person otherwise than in good faith and for valuable consideration, shall transfer that interest to such person as the court directs, or shall pay into court or to such person as the court directs a sum not exceeding the value of the interest.
>
> (3) For the purposes of giving effect to any order under subsection (2), the court may make such further order as it thinks fit.

> (4) Relief (whether under this section, or in equity, or otherwise) in any case to which subsection (1) applies shall be denied wholly or in part, if the person from whom relief is sought received the property or interest in good faith, and has so altered his or her position in reliance on his or her having an indefeasible interest in the property or interest that in the opinion of the court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may be.

[100] The key element of s 44 is that the person who disposed of property must have intended to defeat the other partner's rights. Relevantly for these purposes, the courts have clarified that this requirement will be met if a person disposes of property to a trust knowing that, as a consequence, his or her partner risks losing rights to that property. There will be an intention to defeat the partner's rights, even if the person transferring the property did not wish to cause the partner loss.[7]

[101] The Court of Appeal has said that the task is to assess the intention or purpose of the person disposing of the property at the time the disposition is made. That requires an assessment of all the relevant evidence.[8]

[102] Importantly, s 44 does not require that the applicant have any rights or interests in the property at the time of disposition.[9] In *SMW v MC*, Wylie J held that there is nothing in s 44 which expressly requires that the rights and interests must exist at the time of disposition and that an applicant's entitlement under the Act has to be assessed as at the date the relationship came to an end.[10] Wylie J concluded that this interpretation was consistent with the finding that an intention to defeat another party's rights or claims includes an intention to defeat a future claim.[11] I agree.

[103] Therefore, whether Ms Kwok was entitled to a share of Oteki Park at the date of disposition is immaterial. The central issue is whether Mr Rainey intended to defeat Ms Kwok's claim or rights at the time of disposition to the Trust.

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7 *R v U* [2010] 1 NZLR 434 (HC) at [33] per French J applying *Regal Castings Ltd v Lightbody* [2009] NZSC 87, [2009] 2 NZLR 433 at [53] per Blanchard J.

8 *M v ASB Bank Ltd* [2012] NZCA 103, [2012] NZFLR 641 at [53]; and *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [134].

9 *SMW v MC* [2013] NZHC 396, [2014] NZFLR 71.

10 At [65], citing s 2F.

11 At [64].

[104] The hurdle faced by Mr Rainey and the Trust is Mr Rainey's clear evidence that his intention on creating the Trust was to protect Oteki Park from any claim from Ms Kwok.

[105] Mr Rainey does not dispute that there was a disposition and it was in his interest. What he does dispute is whether the transfer of Oteki Park to the Trust was done in order to defeat Ms Kwok's claim or right. In Mr Fraundorfer's submission, if the party disposing of the asset did not understand that what they were disposing of was in fact relationship property, then there could be no claim for relief under s 44(1).[12] Mr Fraundorfer's argument was that it could not be proven that Mr Rainey intended to build a family home for him and Ms Kwok on the section at Oteki Park. Mr Fraundorfer referred to Mr Rainey's evidence that he was aware of the "three year de facto rule", which he understood to mean that Ms Kwok had no rights in the section until their relationship had lasted more than three years and that, while he did consider building a house from around 2010, the final decision was not made until after the formation of the Trust.

[106] Therefore, in Mr Fraundorfer's submission, at the time the Trust was formed, Mr Rainey understood that Oteki Park was not relationship property, he was not in a qualifying relationship, and, if he disposed of Oteki Park before Ms Kwok accrued any rights, that would not be defeating any possible claims.

[107] Furthermore, Mr Fraundorfer relied on the lack of appropriate advice from GW. That is, Mr Rainey was not advised that there was the potential for him already to be in a de facto relationship with Ms Kwok having obtained some rights; that a disposition to the Trust could still be unwound by the Court in certain circumstances; or that, in order to protect himself completely, he would require a contracting out agreement or termination of the relationship.

[108] The situation in the present case is different from the High Court decision in *K v V*,[13] which concerned, amongst other matters, one party having purchased an apartment two months after commencement of a de facto relationship, using funds

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[12] Relying on *Gardiner v Dyer* [2018] NZHC 355 at [246].

[13] *K v V* [2012] NZHC 1129.

from his previous relationship. He transferred it to a trust a year after the purchase. Collins J concluded that s 44 did not apply because, at the time the transfer was made, the appellant assumed the respondent had no relationship property rights in the apartment and therefore he could not have had the intention to defeat an interest that he thought did not exist at the time.[14] The difference is that, in *K v V*, the appellant was not motivated by a desire to defeat any potential property claims. It was unclear whether he even foresaw that as a likely consequence of the transfer. He took the steps he did for tax reasons. In contrast, Mr Rainey was well aware that Ms Kwok could in the future obtain an interest in Oteki Park, particularly given the intention to build the family home and live there.

[109] As noted above, it does not matter whether Ms Kwok had or had not any rights in Oteki Park at the time it was transferred to the Trust. The issue is Mr Rainey's intention. His own evidence established that. He had been in two previous relationships which had both resulted in an adverse financial outcome for him and he wanted to ensure it did not happen again. He therefore was well aware that, unless he did something about Oteki Park, Ms Kwok would have some sort of claim to it pursuant to the Act. I am also satisfied that by April 2011, when the Trust was created, the intention to build a house on the section at Oteki Park had already crystallised. It had been discussed between Mr Rainey and Ms Kwok. He had shown her the section at an early stage in their relationship and had discussed his plans to build a house there. He wanted to ensure that she could not have any claim on that house.

[110] The requirements of s 44(1) are therefore met.

[111] The Court then has a discretion whether or not to order that any person to whom the disposition was made (the Trust) transfer Oteki Park to some other person.

[112] In Mr Fraundorfer's submission, the Court's ability to make orders under s 44(2)(a) is restricted to directing a person transfer property to another only if it had been received not in good faith *and* without valuable consideration – in other words, there must have been an absence of both good faith and valuable consideration before

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[14] At [110].

the Court can make any orders.[15] In his submission, the transfer to the Trust was for valuable consideration. Mr Fraundorfer submitted that, if one of the factors of s 44(2)(a) is present, then the Court does not have jurisdiction to make orders under s 44(2)(a).

[113] I disagree with that interpretation. The phrase "in good faith and for valuable consideration" is clearly intended to be plain English for a "bona fide purchaser for value". I agree that the requirements are conjunctive – both good faith and valuable consideration are required before the Court's discretion to make an order under s 44(2)(a) is ousted. The Court may make an order *unless* the receiver received the property both in good faith and for valuable consideration. That this is the case is confirmed by s 44(1) which allows the Court to make an order where property has been disposed of "whether for value or not". If the Court could not make an order when there has been valuable consideration for the disposition, those words would not be required and indeed s 44(1) would simply provide that the Court could make an order except when the disposition had been for value.

[114] To say otherwise would defeat the clear intention of the section, which is that the Court can interfere in a transaction, except if it was made in good faith and for valuable consideration. Otherwise, a person could transfer property into a trust in return for a simple acknowledgment of debt, which, while valuable consideration, would mean that the Court is unable to intervene. The intention of s 44 is to prevent relationship property being siphoned into a trust and thereby falling outside the scope of the Act's sharing regime.

[115] In the present case, while there was valuable consideration provided by the sale note and deed of acknowledgment of debt, I am not satisfied that it can be considered a bona fide or good faith transaction.

[116] In Mr Fraundorfer's submission, Mr Rainey's knowledge is imputed to the Trust, he being the sole trustee, and therefore the Trust received Oteki Park with Mr Rainey's intentions.[16] He suggested that, because Oteki Park was separate

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15 Relying on *SMW v MC*, above n 9.
16 *Herbest v Herbest* [2013] NZHC 3535 at [58].

property at the time it was transferred to the Trust, that was evidence of Mr Rainey's, and thus the Trust's, good faith.

[117] I agree with Wylie J's observation in *SMW v MC* that, once "the disposition was made with intent to defeat [the other party's] claims or rights, it must follow that it was made otherwise than in good faith".[17] Mr Rainey made the disposition with intent to defeat Ms Kwok's claims or rights. It was therefore not in good faith. The Trust received Oteki Park on the same basis.

[118] For these reasons, I am satisfied that s 44 applies to Oteki Park and that it is appropriate to use my discretion to make an order under s 44(2)(a), with the result the Trust must transfer Oteki Park to Mr Rainey. It then becomes the family home and the presumption of equal sharing applies. The practical result is that Mr Rainey must pay half the value of the family home to Ms Kwok.

[119] Mr Fraundorfer then submitted that the Court should consider whether to allow Mr Rainey credit for the cost of making the improvements to the section – that is building the house. That would be appropriate in his submission, given Mr Rainey's evidence of his losses from two prior relationships, that he looked after Ms Kwok and supported her throughout the relationship and built the house himself. Furthermore, he said the house and mortgage were funded entirely by Mr Rainey or the Trust, with the exception of approximately three years of mortgage payments from the parties' joint account, which on his calculation totalled $25,431. Finally, Ms Kwok had the benefit of living in the house and paying no rent. Mr Fraundorfer submitted Ms Kwok should receive five percent of the value of Oteki Park only to reflect her "minimal" contributions.

[120] I disagree. Such an approach would thwart the purpose of the Act and its recognition of the many ways in which parties can contribute to a relationship.[18] Furthermore, it would fail to recognise the sanctity of the family home and the presumption of equal sharing in it.[19]

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17 *SMW v MC*, above n 9, at [83].
18 Section 18.
19 Sections 8 and 11.

[121] While Mr Rainey no doubt performed the functions listed by Mr Fraundorfer, Ms Kwok also made considerable contributions to the relationship. First and foremost, she left her home, family, friends and employment in Hong Kong to come and live with Mr Rainey in New Zealand, where she enjoyed none of those things. Furthermore, she came to a country with different customs, culture and language. That she became dependent, socially and financially, on Mr Rainey is hardly a surprise. Notwithstanding her diminutive stature and lack of building skills, she worked with Mr Rainey on building sites and in building their family home. When not on site, she was fishing for food or taking care of the house. She cooked the meals, cleaned the house and worked in the garden. She lived frugally and any money she earned was ploughed back into the joint account and used to pay the mortgage and household expenses. Although they made different contributions, the couple worked together as a team. In all of those circumstances, I cannot see any rationale for anything but an equal division of the value of the family home.

[122] Incidentally, the $200,000 which was also "trust" property, was used in the construction of the house. In fact, it appears that it was paid as proceeds of Mr Rainey's previous matrimonial settlement into the joint account on 18 February 2011. It became, in any event, relationship property.[20]

Is the Trust valid?

[123] Despite my decision under s 44 of the Act, I will discuss the validity of the Trust.

Preliminary point

[124] First, a preliminary point. The defence objects to Ms Kwok's claim that the Trust was not valid on the ground that it was not specifically pleaded.

[125] The second cause of action in the statement of claim is headed "proper interpretation of the trust deed". It pleads that the trust deed establishing the Trust (the Trust Deed) creates an illusory trust because it fails to draw a distinction between the

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[20] Section 81(c).

legal and the beneficial ownership of the assets of the Trust. It then pleads that the powers conferred on Mr Rainey can be used for his own benefit and free of restriction, and those powers are a property right, the value of which is the assets of the Trust.

[126] The prayer for relief is for either an order declaring that ownership of the assets in the Trust be vested in Mr Rainey personally or an order that the powers conferred by the Trust be classified as relationship property.

[127] There is no doubt that the issue of the validity of the Trust – is it a trust or not – was adequately raised in the statement of claim. Although the pleading uses the term "illusory trust", the term is used in the context of a claim that the Trust is not, in law, a trust. As the Supreme Court observed in *Clayton v Clayton*, there is little value in using the illusory label, as there is either a valid trust or there is not.[21] I am satisfied that Mr Rainey was informed of the nature of the claim against him.[22]

The Trust

[128] The Trust was settled by Mr Rainey on 27 April 2011. Mr Rainey is the appointor and sole trustee.

[129] The discretionary beneficiaries are Mr Rainey, his two sons and any other person whom Mr Rainey, as appointor, appoints. In the absence of any decision by the trustee, the assets of the Trust vest in Mr Rainey's children in equal shares on the date of distribution.

[130] Clauses of note are:

> 5.2 Until the Date of Distribution, the Trustee may pay, apply or appropriate any part of the capital to or for the benefit of the Beneficiaries in such shares as the Trustee in their absolute discretion shall determine. The Trustees' decision as to the distribution of capital shall be binding on all parties.
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> 7.1 The Trustee shall have and may exercise tho [sic] fullest possible powers in relation to the Trust Fund and may do anything pertaining to the Trust Fund which the Trustee thinks fit as if they were the beneficial owner absolutely. Without restricting the application of this

21 *Clayton v Clayton* [2016] NZSC 29 at [123].
22 High Court Rules 2016, r 5.26.

clause, the Trustee may … (3) exercise any and all of the powers set out in the Schedule of this Deed.

7.3 No trustee or former trustee of the Trust Fund acting or purporting to act in the execution of the Trust of these presents shall be under any personal liability for any loss however arising whether directly or indirectly (and whether in equity or in negligence or otherwise at law) from the execution of or otherwise in connection with the Trust, unless such loss is attributable to the dishonesty of the trustee or to the trustee commission or omission by the trustee of an act known by the trust to be a breach of trust. Each trustee's liability is limited to the assets of the Trust.

7.6 The Appointor may at any time before the Date of Distribution declare (whether revocably or irrevocably) by deed that the Beneficiaries cease to include any person or persons.

9.1 Subject to clauses 8.2 and 9.2, the Trustee may from time to time by deed add to, vary, or revoke all or any of the trusts in this deed or make any addition, variation or alteration to this deed and may by the same or any other deed or deeds declare any new or other trusts or powers or discretions for the management of the Trust Fund or any part of it.

9.2 Any action taken under clause 9.1: …

b. Must be for the benefit of at least one of the Beneficiaries

Schedule of Trustees' Powers

It is the Settlor's Intention that the Trustees have the fullest possible powers to do all things they from time to time consider necessary, desirable or expedient even if they would normally have no power to do so in the absence of an express power or an order of Court.

The Settlor accordingly declares that the Trustees have absolute and uncontrolled power and discretion in the management of the Trust Fund … and everything relating to the Trust Fund which they think proper or expedient as if they were the absolute owners of the Trust Fund or as if the Settlor was personally acting.

By way of illustration (but without limitation) the Trustees have power to do any of the following in each case in whatever manner and by whatever means they consider appropriate…

31. To do all things the Trustees think to be in the interest of the Beneficiaries or any one or more of them (including by way of illustration and not limitation):

a. To sell any Beneficiary any property forming part of the Trust Fund on terms the Trustees consider fair and reasonable …

33. A Trustee may, with the approval of the other Trustees, purchase any asset owned by the Trust or an Interest in any such asset on the following terms:

a. The purchase price shall be the then current market value of the asset or interest as fixed by an independent valuer or valuers appointed by the Trustees;

b. Such other terms and conditions as are:

i. Usual or reasonable having regard to the nature of the asset or interest; and

ii. Fixed by the other Trustees whose decision in that respect shall be binding and final.

It being the intention of the Settlor that any such transaction shall not result in any commercial disadvantage to the Trust or its Beneficiaries.

What constitutes a trust?

[131] In its review of the law of trusts in 2012, the New Zealand Law Commission defined a trust as follows:[23]

> At its most simple, a trust is a legal relationship whereby someone (the settlor) gives property to someone (the trustee) to look after it and use it for the benefit of someone (the beneficiary) … at the heart of the concept of a trust is a separation between the person holding and managing the property, and the person or persons receiving the benefits of the property.

[132] While it has yet to come into force, the Trusts Act 2019 helpfully reinforces the central features of a trust. It provides that an express trust must have the characteristics set out in s 13.[24] Those characteristics are:[25]

> (a) it is a fiduciary relationship in which a trustee holds or deals with trust property for the benefit of the beneficiaries or for a permitted purpose; and
>
> (b) the trustee is accountable for the way the trustee carries out the duties imposed on the trustee by law.

[133] The Trusts Act 2019 also provides that a sole trustee of a trust must not be the sole beneficiary of the trust.[26]

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23 Law Commission *Review of the Law of Trusts: Preferred Approach* (NZLC IP31, November 2012) at 16.
24 Trusts Act 2019, s 12.
25 Trusts Act 2019, s 13.
26 Section 14.

The three certainties

[134] In order to create a valid express trust, the three "certainties" must be present. These are certainty of intention, subject matter and objects.[27] In Mr Fraundorfer's submission, the three certainties were satisfied when the Trust was formed. He submitted that Mr Rainey intended to create a trust, as he confirmed in evidence, explaining he wanted to protect his assets not only from Ms Kwok, but also from other creditors. He therefore had a genuine intention to establish a trust. Secondly, in his submission, the subject matter of the Trust included Oteki Park and the funds. Thirdly, the beneficiaries of the Trust were Mr Rainey and his two sons. Mr Fraundorfer noted that there is nothing unusual in one person being the settlor, the trustee and a beneficiary.[28]

[135] In Mr Fraundorfer's submission, while Mr Rainey's powers as appointor are wide, limited fiduciary duties do apply, and Mr Rainey will be subject to the courts' supervisory jurisdiction. Mr Fraundorfer identified what, in his submission, were fundamental differences between the Trust and that in *Clayton v Clayton* (discussed in more detail below). For example, he pointed out that self-dealing was not expressly permitted. Essentially, Mr Fraundorfer submitted that under the terms of the Trust it is possible for the other beneficiaries (Mr Rainey's two sons) to allege breaches of fiduciary duties. Mr Fraundorfer said that limited weight should be attached to some of the administrative problems with the Trust, as these were as a result of GW'S negligence and should not be laid at the feet of Mr Rainey, who could hardly be described as a sophisticated businessman.

[136] GW conceded the Trust was ineffective for the purposes of protecting Oteki Park from a claim under the Act, but denied it could not be considered an effective trust for other purposes.

[137] In Miss Hosking's submission, Mr Rainey did not intend to create "a genuine trust".

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27 Andrew S Butler "Creating of an express trust" in Butler (ed) *Equity and Trusts in New Zealand* (online ed, Thomson Reuters) at [62.4.2.1].

28 *Clayton v Clayton*, above n 8, at [45].

[138] The issue is whether, objectively, Mr Rainey intended to create a trust.[29] While Mr Rainey said he intended to create a trust, in that he had been advised by GW to do so as a means of protecting his assets, whether the Trust Deed in fact evidences an intention to create a trust relationship is another matter. In this case, I have reservations as to whether it did.

[139] The Trust Deed gives Mr Rainey wide reaching powers and there is a very real question as to whether those powers carry with them fiduciary obligations. The starkest example is that, given his power as appointor to remove beneficiaries, Mr Rainey could remove all other beneficiaries other than himself and then be the sole beneficiary, something that will be prohibited when the Trusts Act 2019 comes into force. While the schedule to the Trust Deed requires that any *sale* to a beneficiary of trust property must be on fair and reasonable terms, pursuant to cl 5.2 Mr Rainey, as trustee, could pay all the capital to Mr Rainey as beneficiary. If Mr Rainey removes the other beneficiaries before he does so, there would be no one to challenge such a payment. There would be no need for him to consider the interests of other beneficiaries because there would be none. Overall, I agree with Ms Hosking's submission that there is a real question as to whether, objectively, the Trust Deed evidences an intention to create a trust.

[140] As to certainty of subject matter, there is an issue regarding ownership of Oteki Park. While Mr Rainey as vendor executed a sale note for Oteki Park to Mr Rainey as trustee for $130,000, and executed a declaration of trust in respect of it, Oteki Park was never formally transferred from Mr Rainey personally to Mr Rainey as trustee, and there was no registration of such transfer. Accordingly, the title to Oteki Park would not reveal that there had been any change in ownership in 2011.

[141] What happened to Mr Rainey's $200,000 is even less certain. The declaration of trust records that "the trustee" held $200,000 in a Bank of New Zealand bank account. However, it appears likely from the evidence that the money was in Mr Rainey's personal account/joint account. Although the Trust had a separate bank account, there is no detail as to when that account was opened or what funds went

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29 *Official Assignee v Wilson* [2008] 3 NZLR 45 at [44].

through it. It is no longer active. The only Trust accounts were prepared after the date of separation.

Other provisions of the Trust

[142] Simply because a trust gives a trustee wide powers, it does not necessarily mean that the trust is invalid. For example, in *Vervoort v Spears,* Mr Duffy was the settlor, one of two trustees, one of two final beneficiaries, and one of several discretionary beneficiaries.[30] He had the power to appoint new trustees but could not appoint himself as sole trustee. He did not have the power to change beneficiaries but could nominate additional beneficiaries. The Court of Appeal agreed that, despite the wide powers, it was a valid trust.

[143] Mr Fraundorfer relied on *McLaren v McLaren* to say Mr Rainey was subject to fiduciary duties. *McLaren* can easily be distinguished.[31] In that case, the appointor had removed his parents, who were the settlors of the trusts, as beneficiaries. The Court held that was a breach of the basic fiduciary duties he owed them, in the context of there being a shared expectation that the parents would be considered for distributions of income during their lifetime.[32] That case is not, however, authority for the proposition that the power of appointment is always fiduciary. It was considered so in the context of the particular circumstances of that case. No such considerations arise in this case. There is no evidence that Mr Rainey's sons were involved in the Trust, or indeed shared any long-term expectation of distributions under it.

[144] In Mr Fraundorfer's submission, a trustee is subject to common law obligations to act honestly and in good faith for the benefit of the beneficiaries. He also referred to common law rules regarding self-dealing and fair-dealing, describing them as fiduciary duties.[33] Mr Fraundorfer suggested that Mr Rainey's powers are not uncontrolled and he has enduring accountability to beneficiaries. He referred, for example, to cl 7.3 – trustee liability for losses attributable to dishonesty or wilful

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30 *Vervoot v Spears* [2015] NZHC 808.
31 *McLaren v McLaren* [2017] NZHC 161.
32 At [69] and [67].
33 *Wong v Burt* [2005] 1 NZLR 91.

omission of any act that is in breach of trust, and the schedule of powers, including cl 33, whereby a sale to a trustee cannot be to the disadvantage of the Trust or beneficiaries.

[145] In response, Ms Hosking referred to cl 5.2, discussed above. The purported restrictions in the schedule were no answer, in her submission, given Mr Rainey's power of appointment. She said, in contrast to other cases, there is no restriction on self-dealing in the Trust Deed that prevents Mr Rainey becoming the sole trustee and sole beneficiary, and thereby being able to restore the trust assets to himself.[34]

Validity of the Trust

[146] I turn now to consider the Supreme Court's decision in *Clayton v Clayton*, where the Supreme Court held that powers under a trust deed can be considered property for the purposes of s 2 of the Act.[35] Although that is not the focus of this part of this decision, the Court did make some observations about what constitutes a trust.

[147] Much of the case focused on the Vaughan Road property trust (VRPT), settled by Mr Clayton in 1999, ten years after the couple's marriage and thirteen years after they started living together. It owned land and buildings from which Mr Clayton's business operated and was the most valuable of the trusts he settled.

[148] Mr Clayton was the settlor and sole trustee of the VRPT. The discretionary beneficiaries were Mr Clayton as "Principal Family Member", Mrs Clayton and the two daughters. The daughters were also the final beneficiaries.

[149] Mr Clayton's powers under the trust were extensive. The deed gave him the powers to:

(i) distribute the income and capital of the trust to himself as one of the discretionary beneficiaries;

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[34] *Goldie v Campbell* [2017] NZHC 1692; see also *Buxton v Buxton* [2017] NZHC 131 at [33] sets out the clause that restricted Mrs Buxton's ability to self-benefit. A further clause required there to be two trustees at all times. Similarly, in *Wylie v Wylie* [2019] NZHC 2638 the terms of the deed did not give Dr Wylie the power to make unilateral decisions –; *FMA v Hotchin* [2012] NZHC 323 in which Mr Hotchin had power of appointment of both trustees and discretionary beneficiaries, but there was a specific prohibition on self-dealing.

[35] *Clayton v Clayton*, above, n 21.

(ii) make such distributions to himself without considering the interests of the other beneficiaries and notwithstanding any duty to act impartially towards beneficiaries;

(iii) subject to the terms of the trust, to deal with the trust fund as if he was the absolute owner of it and beneficially entitled to it;

(iv) exercise all the trustee's powers and discretions notwithstanding any conflict of interest; and

(v) revoke any of the provisions of the deed concerning the management or administration of the trust.

[150] Mr Clayton also had the power to appoint and remove any of the discretionary beneficiaries and appoint and remove trustees.

[151] As the Supreme Court appeared to acknowledge, the terms of the VRPT deed were very unusual.[36] In particular, it authorised the trustee to exercise a power or discretion even though the interests of all beneficiaries were not considered, the exercise would or might be contrary to the interests of any present or future beneficiary and/or the exercise resulted in the whole of the trust or income being distributed to one beneficiary to the exclusion of others. A trustee who was also a beneficiary could exercise any power or discretion vested in a trustee in his own favour. A trustee could exercise any power or discretion, notwithstanding that the interest of the trustee might conflict with the duty of the trustee to the beneficiaries or any of them.

[152] The Supreme Court found that Mr Clayton could thereby resolve to apply trust capital to himself, without considering the interests of others, with any conflict of interest being irrelevant. He was therefore not constrained by any fiduciary duty when exercising the VRPT powers in his own favour to the detriment of the discretionary and final beneficiaries.[37]

[153] The Court accepted that Mr Clayton's powers amounted to a general power of appointment[38] which creates a property interest akin to absolute ownership.[39] The

36 At [127].
37 At [58].
38 At [68].
39 At [70].

value of the general power of appointment was an amount equal to the net value of the assets in the VRPT.[40]

[154] The Court observed that the term "illusory" trust is unhelpful, and that the ultimate question is whether there is a trust or not.[41] Although the Court did not conclude whether the VRPT was a valid trust or not, it did acknowledge that a trust can fail to come into existence in the first place.[42] That is, despite the subjective intentions of the parties creating a trust, a trust will nonetheless fail if it lacks the core ingredients of a trust, namely the alienation of beneficial ownership and accountability of the trustees. If a trustee can exercise powers of appointment of trust assets free from fiduciary duties, that would seem to suggest that the settlor did not intend to set up a trust relationship.

[155] In a more recent decision, the Court of Appeal of the Cook Islands, in *Webb v Webb*, considered a trust that allowed Mr Webb to nominate himself as the sole nominated beneficiary in substitution for the existing beneficiaries.[43] The Court said if Mr Webb:[44]

> had retained himself the power to restore the property to himself, the result would be that he had not effectively alienated the beneficial interest in the first place.

[156] As Ms Hosking observed, that would appear to be the position in the present case.

Conclusion

[157] In the present case, the Trust Deed would appear to allow Mr Rainey to take full control of the assets of the Trust and there would be no effective accountability. As Professor Palmer said in relation to Mr Clayton, "that is an anathema to a trust".[45]

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40 At [99]-[107].
41 At [123].
42 At [123]. It could be said that, given the Court's ultimate decision, it must have proceeded on the basis that the trust was a valid one.
43 *Webb v Webb* [2017] CKCA 4. This decision was appealed but there has been no decision from the Privy Council.
44 At [63].
45 Prof Jessica Palmer "Trusts and Relationship Property" (paper presented to New Zealand Law Society Family Law Conference, Dunedin, October 2017) at 237.

[158] For these reasons, I have significant reservations as to whether the Trust is in fact a valid trust rather than a nullity, with the consequence that Oteki Park would remain vested in Mr Rainey personally.

Powers as property

[159] Ms Kwok claims as an alternative that, following the approach of the Supreme Court in *Clayton v Clayton*, the powers conferred upon Mr Rainey by the Trust Deed are a property right which has the value of the assets of the Trust and the property right is relationship property. She therefore seeks an order that the powers conferred by the Trust Deed be classified as relationship property.

[160] The Supreme Court in *Clayton* began with a survey of the Act and noted its purpose of providing for a just division of relationship property.[46] The Court accepted that the definition of "property" in the Act should be given a wide meaning considering its statutory context and the purposes of the Act.[47] The Court also emphasised the need for "worldly realism" in the relationship property context.[48]

[161] If my analysis of the Trust Deed in the present case is correct, then it must follow that the powers Mr Rainey has under the Trust Deed are his personal property. The question is whether they are relationship property. If the claim is considered in this way, it must proceed on the assumption that the Trust is valid.

[162] The relevant provisions of the definition of relationship property in s 8 of the Act are as follows:

> (1) Relationship property shall consist of—
>
> (a) the family home whenever acquired; and
>
> (b) the family chattels whenever acquired; and
>
> (c) all property owned jointly or in common in equal shares by the married couple or by the partners; and

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[46] *Clayton v Clayton*, above n 21, at [15].

[47] At [38].

[48] At [75]-[79], citing *Kan Lai Kwan v Poon Lok To Otto* [2014] HKCFA 65, (2014) 17 HKCFAR 414; *Charman v Charman* [2005] EWCA Civ 1606, [2006] 1 WLR 1053.

(d) all property owned by either spouse or partner immediately before their marriage, civil union, or de facto relationship began, if—

(i) the property was acquired in contemplation of the marriage, civil union, or de facto relationship; and

(ii) the property was intended for the common use or common benefit of both spouses or partners; and

(e) subject to sections 9(2) to (6), 9A, and 10, all property acquired by either spouse or partner after their marriage, civil union, or de facto relationship began; and

(ee) subject to sections 9(3) to (6), 9A, and 10, all property acquired, after the marriage, civil union, or de facto relationship began, for the common use or common benefit of both spouses or partners, if—

(i) the property was acquired out of property owned by either spouse or partner or by both of them before the marriage, civil union, or de facto relationship began; or

(ii) the property was acquired out of the proceeds of any disposition of any property owned by either spouse or partner or by both of them before the marriage, civil union, or de facto relationship began; and

…

(l) any income and gains derived from, the proceeds of any disposition of, and any increase in the value of, any property described in paragraphs (a) to (k).

[163] And, as far as separate property is concerned, s 9 provides:

(1) All property of either spouse or partner that is not relationship property is separate property.

(2) Subject to sections 8(1)(ee), 9A(3), and 10, all property acquired out of separate property, and the proceeds of any disposition of separate property, are separate property.

(3) Subject to section 9A, any increase in the value of separate property, and any income or gains derived from separate property, are separate property.

(4) 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 de facto partners:
>
> (b) all property acquired, after the death of one spouse or partner, by the surviving spouse or partner, as provided in section 84.

[164] The Act then defines when separate property becomes relationship property.

[165] That creates an interesting situation in this case. If it is the powers under the Trust which are relationship property, then arguably those powers are separate property because they were derived from separate property (Mr Rainey owned the section before the de facto relationship commenced and did not acquire it for the common use or common benefit of both him and Ms Kwok).[49] This is in contrast to the case of Mr Clayton, who acquired his powers ten years after the marriage.

[166] Even if the powers are relationship property, an order that the powers be classified as relationship property would not necessarily result in a straightforward outcome. In any event, there is no need to decide the question, given my conclusion on s 44 of the Act.

Constructive trust

[167] In the alternative, Ms Kwok claims an interest in Oteki Park by virtue of a constructive trust. This is on the basis she contributed directly and indirectly to Oteki Park and those contributions were provided in the reasonable expectation that it would be owned by both her and Mr Rainey in equal shares.

[168] The relief sought is a declaration that the assets of the Trust are held on trust for both Ms Kwok and Mr Rainey.

[169] There are clearly fundamental problems with that claim as far as Mr Rainey being the beneficiary of a constructive trust is concerned. There is no evidence *he* contributed to the Property in the expectation of beneficial ownership under a

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49 Section 8(1)(ee). There is a stronger argument in respect of the $200,000 which was transferred by GW into the joint account and then used to finance construction of the family home.

constructive trust. In fact, quite the reverse. His contributions were intended to benefit the Trust.

[170] Furthermore, there are difficulties in assessing the value of contributions (which are different from contributions for the purposes of assessing contribution to relationship property) and the benefit that Ms Kwok can been said to have received from living at Oteki Park.

[171] In any event there is no need to make a finding under this heading, given my finding under s 44 above.

Other relationship property

[172] Ms Kwok also seeks an equal share of the Company and family chattels.

The Company

[173] In contrast to the pleading, rather than a share of the Company, Ms Hosking sought on behalf of Ms Kwok an equal share in the Company's current account of $29,109 as at 31 March 2016. The Company's financial statement for the year ended 31 March 2016 showed $29,109 as a liability in respect of the shareholder current account (ie a debt the Company owed Mr Rainey). At that point, the Company's financial position was a net loss of $15,549.

[174] If this sum is relationship property, Mr Rainey seeks that the Court exercises its discretion under s 13 to displace the equal sharing presumption, because, in Mr Fraundorfer's submission, this is a paper debt that the Company cannot afford to pay to Mr Rainey as at 31 March 2016, or now. If the debt is paid, the Company will be insolvent, and Mr Rainey will be at risk of voidable preferences and director duties' claims. Mr Fraundorfer pointed out that the Company has been Mr Rainey's business since 1994 and said it is in the interests of justice that Ms Kwok's claim fails. In response, Ms Hosking said that there was no need for Mr Rainey to "call on the Company", he could simply account to Ms Kwok and how he did that was a matter for him.

[175] I note that in his affidavit of assets and liabilities, Mr Rainey himself identified the current account as an item of relationship property which, in the circumstances already discussed, it clearly was.

Exception to equal sharing

[176] On the division of relationship property under the Act, each partner is entitled to share equally in any relationship property.[50] However, there are exceptions to this, with the provisions of s 13(1) being of relevance in this case:

> **13 Exception to equal sharing**
>
> (1) If the court considers that there are extraordinary circumstances that make equal sharing of property or money under section 11 or section 11A or section 11B or section 12 repugnant to justice, the share of each spouse or partner in that property or money is to be determined in accordance with the contribution of each spouse to the marriage or of each civil union partner to the civil union or of each de facto partner to the de facto relationship.

[177] Section 13 requires a two-step process:

(a) a finding of extraordinary circumstances; and

(b) a consideration of whether those extraordinary circumstances make equal sharing repugnant to justice.

[178] In *Castle v Castle*, Quilliam J said:[51]

> The extraordinary circumstances will, I think, require to be those which force the court to say that, notwithstanding the primary direction to make an equal division, the particular case is so out of the ordinary that an equal division is something the court feels it simply cannot countenance.

Analysis

[179] Although there was no direct evidence on this, it is fair to say that this money represents Mr Rainey's investment in the Company which has allowed it to continue trading. The Company was operating at a net loss as at 31 March 2016 and was not in

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50 Section 11.

51 *Castle v Castle* [1977] 2 NZLR 97 at 102.

a position to pay the debt owed to Mr Rainey as shareholder. That point, in and of itself, is sufficient to dispose of the claim. Alternatively, the reality of the situation constitutes extraordinary circumstances. Although Mr Rainey had an asset of the debt owed to him by the Company, the asset was of no value as the Company could not pay the debt.

[180] To make equal sharing of the current account of the Company a requirement in the overall division would be repugnant to justice in the circumstances. I therefore dismiss Ms Kwok's claim in respect of the Company.

Family chattels

[181] Mr Rainey accepted that the value of family chattels was approximately $7,000, of which Ms Kwok is entitled to half, as the chattels are relationship property.[52]

Further claims

[182] Although not pleaded, Ms Kwok seeks compensation of $63,530.45 under s 18B of the Act for Mr Rainey's use of Oteki Park since separation. Ms Kwok also seeks maintenance from the date of separation until the date of final distribution of relationship property, at $785 per week.[53]

Occupation rent

[183] The claim is on the basis that Ms Kwok was excluded entirely from any benefit from Oteki Park. In Ms Hosking's submission, where one party has had to accommodate themselves when the other has had full use and benefit of the relationship property, the Court should order compensation if it is just in all the circumstances to do so.[54] Ms Bartlett's expert evidence was that the market rent for the house is $590.00 per week and for the self-contained unit $320.00 per week. Ms Hosking submitted that the appropriate order is for Ms Kwok to be compensated

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52 Section 8(1)(b).

53 The total maintenance claimed as at the trial date was $142,870. Mr Rainey has already paid Ms Kwok $5,200. That leaves a claim for $137,670 plus $785 a week from the trial date to the date of payment to Ms Kwok.

54 *E v G* HC Wellington CIV-2005-485-95, 18 May 2006.

for half of the market rent for Oteki Park for the past three and a half years, less rates, mortgage interest, insurance and a 3.5 per cent discount to reflect average rental increases from 2016 to 2020, resulting in an award of $63,530.45.

[184] Mr Rainey opposes the claim for occupation rent, principally on the basis that s 18B does not apply because Oteki Park is not relationship property. Given my decisions above, this argument is not tenable.

[185] Mr Rainey then opposes the claim not only because it was not pleaded, but also because Mr Rainey has occupied Oteki Park to date on the basis he believed he had the authority to do so.[55] He also refers to the costs he has incurred while undertaking sole responsibility for Oteki Park.

[186] Section 18B of the Act provides:

> (1) In this section, relevant period, in relation to a marriage, civil union, or de facto relationship, means the period after the marriage, civil union, or de facto relationship has ended (other than by the death of one of the spouses or partners) but before the date of the hearing of an application under this Act by the court of first instance.
>
> (2) If, during the relevant period, a spouse or partner (party A) has done anything that would have been a contribution to the marriage, civil union, or de facto relationship if the marriage, civil union, or de facto relationship had not ended, the court, if it considers it just, may for the purposes of compensating party A—
>
> > (a) order the other spouse or partner (party B) to pay party A a sum of money:

[187] There was no pleaded claim for occupation rent. Highlighting issues in pleadings alerts other parties to the nature of the claim and, most importantly, allows them to prepare their response(s). When assessing whether to grant relief that was not pleaded, I must consider whether there would be significant unfairness and prejudice not only to Mr Rainey and the Trust but also to GW, as Mr Rainey and the Trust seek to be indemnified by GW in respect of any successful claim brought by Ms Kwok. I consider there would be both unfairness and prejudice to Mr Rainey and the Trust, and

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55 *Ronanye v Coombes* [2016] NZCA 393 at [11].

to GW if occupation rent were awarded. The amount sought is significant and needed to be foreshadowed to allow both Mr Rainey and GW to prepare their responses.

[188] Furthermore, s 18B states that a court can make an order for the payment of a sum of money if it considers it just. I do not consider it is. It would not be just for Ms Kwok to receive both the claimed maintenance and occupation rent. Any occupation rent would effectively represent income to Ms Kwok and would be relevant to her earning capacity or a relevant circumstance to be considered in respect of the maintenance claim.[56] It would therefore reduce any maintenance award. In any event, the maintenance Ms Kwok seeks exceeds the occupation rent.

Maintenance

[189] Section 64 of the Family Proceedings Act 1980 relevantly provides:

> **64 Maintenance after marriage or civil union dissolved or de facto relationship ends**
>
> (1) Subject to section 64A, after the dissolution of a marriage or civil union or, in the case of a de facto relationship, after the de facto partners cease to live together, each spouse, civil union partner, or de facto partner is liable to maintain the other spouse, civil union partner, or de facto partner to the extent that such maintenance is necessary to meet the reasonable needs of the other spouse, civil union partner, or de facto partner, where the other spouse, civil union partner, or de facto partner cannot practicably meet the whole or any part of those needs because of any 1 or more of the circumstances specified in subsection (2).
>
> (2) The circumstances referred to in subsection (1) are as follows:
>
> (a) the ability of the spouses, civil union partners, or de facto partners to become self-supporting, having regard to—
>
> (i) the effects of the division of functions within the marriage or civil union or de facto relationship while the spouses, civil union partners, or de facto partners lived together:
>
> (ii) the likely earning capacity of each spouse, civil union partner, or de facto partner:
>
> (iii) any other relevant circumstances:

[56] Under s 64A(3)(c)(iv).

> (b) the responsibilities of each spouse, civil union partner, or de facto partner for the ongoing daily care of any minor or dependent children of the marriage or civil union or (as the case requires) any minor or dependent children of the de facto relationship after the dissolution of the marriage or civil union or (as the case requires) the de facto partners ceased to live together:
>
> (c) the standard of living of the spouses, civil union partners, or de facto partners while they lived together:
>
> …
>
> (3) For the purposes of subsection (2)(a)(i), if the marriage or civil union was immediately preceded by a de facto relationship between the spouses or civil union partners, the effects of the division of functions within the marriage or civil union include the effects of the division of functions within that de facto relationship.
>
> (4) Except as provided in this section and section 64A,—
>
> (a) neither party to a marriage or civil union is liable to maintain the other party after the dissolution of the marriage or civil union:
>
> (b) neither party to a de facto relationship is liable to maintain the other de facto partner after the de facto partners cease to live together.

[190] Section 64 is subject to s 64A which states that once a de facto relationship has ended, the parties are expected to assume responsibility for meeting their own needs within a time that is reasonable. As Richardson J observed in *S v S*:[57]

> … the former spouses should go their own ways with their respective share in the matrimonial property and free of any continuing financial responsibility of one and other. The subsection contemplates that in the ordinary run neither spouse will be financially dependent on the other for more than a transitional period.

[191] In considering whether it is reasonable to require a party to provide maintenance, the considerations set out in s 64A(3) must be taken into account:

> (3) The matters referred to in subsection (2) are as follows:
>
> (a) the ages of the spouses, civil union partners, or de facto partners:
>
> (b) the duration of the marriage or civil union or de facto relationship:

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57 *S v S* [1983] 1 FRNZ 54 (CA).

(c) the ability of the spouses, civil union partners, or de facto partners to become self-supporting, having regard to—

(i) the effects of the division of functions within the marriage or civil union or de facto relationship while the spouses, civil union partners, or de facto partners were living together:

(ii) the likely earning capacity of each spouse, civil union partner, or de facto partner:

(iii) the responsibilities of each spouse, civil union partner, or de facto partner for the ongoing daily care of any minor or dependent children of the marriage or civil union or (as the case requires) any minor or dependent children of the de facto relationship after the dissolution of the marriage or civil union or (as the case requires) after the de facto partners ceased to live together:

(iv) any other relevant circumstances.

[192] Mr Rainey's position is that Ms Kwok should assume responsibility for her own needs and it is not reasonable for Mr Rainey to support her. He pointed out that his own income is limited due to his age and health issues. Mr Rainey considered Ms Kwok's budgeted living expenses too high, noting that she was by nature frugal. He accepted she had not included any budget for travel and that, since separation, he has travelled overseas.

[193] I have already discussed the extent of Ms Kwok's contribution to the relationship, which saw her move to a foreign country with no support. While her daughter might now live in New Zealand, the other factors remain the same. Had matters been resolved at an early date and had Ms Kwok received her rightful share of the relationship property, then there would be scant basis for this application. She did not. The expectation that parties to a relationship should become financially independent within a reasonable time must be predicated on the basis that they have received their respective share in the relationship property, as Richardson J's observations above suggest.

[194] Mr Rainey may have a decreasing ability to earn, but it remains superior to that of Ms Kwok. Nearly four years have expired since the separation and Ms Kwok is still living in relatively straitened circumstances. The maintenance she seeks is very

modest. While she has decided to remain in New Zealand because of her daughter, her English is limited, as is her ability to obtain employment.

[195] For these reasons, I order maintenance at the rate of $785 per week from the date of separation to the date of final distribution of Ms Kwok's relationship property entitlement, less the $5,200 already paid by Mr Rainey to Ms Kwok.

PART 2

[196] I now turn to consider the defendants' claim against the third party, GW.

The claim for negligence and breach of contract

[197] Mr Rainey and the Trust sue GW in negligence and for breach of contract. At the trial, GW conceded liability. This means that GW accepts it owed Mr Rainey a duty of care in its capacity as legal adviser and/or in performance of the contract for the provision of professional services, including protecting his assets from future claims under the Act by Ms Kwok.

[198] Mr Rainey and the Trust seek:

(a) general damages in the sum equal to the value of Mr Rainey/the Trust's liability to Ms Kwok with respect to the Trust and the property related claims;

(b) general damages in the sum of $4,316.50 (including GST and disbursements) representing wasted costs relating to pre-litigation advice prior to commencement of legal proceedings;

(c) general damages in the sum of $35,000 for distress and inconvenience; and

(d) special damages in the sum of $3,471.66 for legal fees paid to GW.

[199] They also seek costs related to Ms Kwok's claim, both as to costs they are ordered to pay Ms Kwok and those they incur in defending her claim.

[200] GW accepts it breached the duty of care by:

(a) failing to act with all reasonable care and skill;

(b) failing to act in Mr Rainey's best interests in breach of its fiduciary obligations;

(c) failing to advise Mr Rainey of the applicable risks to his assets under the Act, including the risk that he would be subject to the presumption of equal-sharing;

(d) failing to advise Mr Rainey that a family trust would only be effective against the "trust-busting" provision of the Act if accompanied by a valid agreement under s 21 of the Act (a contracting out agreement);

(e) failing to advise Mr Rainey that, in the absence of a contracting out agreement, he might wish to consider protecting his assets by ending the relationship with Ms Kwok, or alternatively, by choosing not to live with Ms Kwok; and

(f) failing to assist Mr Rainey to establish a trust with an effective structure to protect against an allegation of a sham.

[201] As far as breach of contract is concerned, GW accepts it breached the terms of the contract with Mr Rainey in that it failed adequately to carry out its duty as a fiduciary and failed to act with all reasonable skill and care.

[202] The issues are causation and damages.

The evidence

[203] Although liability was conceded, it is worth considering the evidence called by Mr Rainey on this issue.

[204] Expert evidence was provided by way of two affidavits from Lewis Grant, trust and estates partner at an Auckland law firm. The evidence is not in dispute. He reviewed the Trust Deed and GW's advice and was of the opinion that GW's advice was not adequate. He considered that the file notes evidencing oral advice were lacking in detail to the point where it was almost impossible to tell what advice was provided and that any written advice was minimal.

[205] From having reviewed the material, Mr Grant concluded that Mr Rainey was led to believe that the Trust was a viable alternative to a contracting out agreement. In Mr Grant's opinion, GW should instead have made it clear that transferring assets to a trust once a relationship was already contemplated had a high chance of creating successful claims under the Act or other related legislation.

[206] In Mr Grant's opinion, any reasonable and prudent trust lawyer would be aware of relationship property issues and would have alerted their clients to the issue. Any reasonable and prudent trust or generalist lawyer would have ensured Mr Rainey was advised that, unless he was prepared to risk losing part of his assets if the relationship ended, he needed his partner to sign a contracting out agreement. Further, that any reasonable and prudent lawyer dealing with trusts would have understood the risk of building a home on trust property and advised against mixing a family home with trust property without a contracting out agreement. In respect of the nature of the Trust, Mr Grant's opinion was that any reasonable and prudent lawyer would have provided detailed advice so that Mr Rainey was aware of the risks and followed up oral advice with written advice.

[207] Mr Grant was of the opinion that Oteki Park was transferred for valuable and adequate consideration given the sale note, minutes of the first meeting of trustees and valuation evidence. In those circumstances, he would consider the transaction to be in good faith and commercially viable, absent any other considerations.

[208] There was no evidence from the lawyer at GW who carried out the work.

Causation

[209] The central issue is whether, on the balance of probabilities, Mr Rainey would have taken action to protect his assets, including the house to be built on the section at Oteki Park, had GW provided him with the correct advice.[58]

[210] The Supreme Court in *Blackwell v Edmonds Judd* set out three stages of assessment to answer such a question:[59]

(a) first, the Court must assess the advice Mr Rainey should have been given;

(b) secondly, the Court must analyse Mr Rainey's objectives in entering into the transactions and the extent to which the transactions met his objectives; and

(c) thirdly, the Court must assess the likely effect of competent advice on the transactions.

[211] In the present case, GW has, by accepting the allegations in Mr Rainey's statement of claim, agreed on the advice Mr Rainey should have been given, as discussed above. I have already analysed Mr Rainey's objectives in taking legal advice from GW. The overriding impetus for the advice was his wish to protect his assets (including the house to be built on the section) from a claim by Ms Kwok. Although he referred somewhat vaguely in evidence to other objectives, such as to avoid rest home fees, they were obviously very much secondary to his primary and driving objective. This is reinforced by the timing of Mr Rainey seeking advice, that is, in the third year of his relationship with Ms Kwok. It is also reinforced by the file note made by the lawyer at GW at the time of the first meeting. There is no reference in that file note to any objective other than protecting his assets from a relationship property claim.

[212] The real question is the likely effect on Mr Rainey of competent advice.

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58 *Benton v Miller & Poulgrain (A Firm)* [2005] 1 NZLR 66 (CA).

59 *Blackwell v Edmonds Judd* [2016] NZSC 40 at [51].

[213] There is no dispute that, by early 2011, a competent lawyer's advice to Mr Rainey as to how to protect his assets against claims by Ms Kwok would have been:

(a) that they enter into a contracting out agreement; or

(b) that Mr Rainey end the relationship with Ms Kwok within three years of its commencement and before the presumption of equal sharing took effect – that is by 28 February 2012 at the latest.

[214] While Mr Fraundorfer suggested that GW should also have advised Mr Rainey to establish a trust which was not vulnerable to challenge, that would not in my assessment have been effective in achieving Mr Rainey's objective. That is, even if there were more than one trustee and the provisions of the Trust Deed were in accordance with best practice in establishing a trust, any such trust would still have been vulnerable to a claim under s 44 of the Act. By the time Mr Rainey sought advice from GW, the state of the relationship and plans for Oteki Park were at such a stage that any trust structure, in the absence of agreement from Ms Kwok, would have been completely ineffectual. As Mr Barton said for GW, the establishment of the Trust was in essence a complete waste of time. Again, it must be remembered that Mr Rainey's primary purpose in seeking advice from GW was to protect his assets from a claim by Ms Kwok.

[215] The only possible exception to that is whether GW should have advised Mr Rainey not to build the relationship home on the section and put the section into a properly constituted trust. I am not sure, however, given the facts, that this advice on its own would have assisted Mr Rainey in his objectives. I say this because first, even if the section were put into a trust, it would still have been vulnerable to a claim under s 44 of the Act. Secondly, Mr Rainey wanted to build for himself a nice property to live in. Concept plans had been drawn up in October 2010. Mr Rainey and Ms Kwok had moved back to Tauranga in 2010 so they could build their home, as confirmed by the couple's landlady in her letter to Immigration New Zealand in support of Ms Kwok's visa application. Finally, work on the section at Oteki Park to build the house had begun by this time.

[216] I do not necessarily accept that the section at Oteki Park was relationship property under either s 8(1)(ee)(i) or s 8(1)(d) of the Act at the time of GW'S advice. I say that because I do not accept it was acquired after the de facto relationship began or that it was acquired in contemplation of the de facto relationship. I do, however, accept that Oteki Park was going to become relationship property as soon as the couple moved into the family home and that work had already started. Furthermore, the $200,000 was always going to be spent on building the family home and therefore become subsumed into relationship property.

[217] Referring in particular to the evidence lodged with Immigration New Zealand in support of Ms Kwok's various visa applications, Ms McLean for GW[60] submitted the couple were strongly committed to one another in 2011 to the extent that Mr Rainey would not have walked away from Ms Kwok in 2011. They intended to get married. Ms Kwok had given up life as she knew it to live in a foreign country. Mr Rainey was planning for their life together and, by 24 December 2009, providing for Ms Kwok in his will. They were also committed to building their home, having purchased items for it when in Hong Kong in 2011 and having a joint bank account.

[218] While all those matters are correct, in my assessment and, I would say, in his own, Mr Rainey was somewhat more level-headed than his communications with Immigration New Zealand might suggest. He had consistently told Immigration New Zealand of the couple's intention to progress the relationship and see how it developed. He was clearly a man looking for love, having intended to visit a woman in China whom he had met over an internet dating site around the time he first met Ms Kwok. What that shows is that he was also a man who was able to progress from one relationship to another relatively quickly. Having "lost" half his property and half his business twice previously, he was adamant he would not allow that to occur again. That is precisely why he went to see GW. He and Ms Kwok argued vehemently when she refused to enter into a contracting out agreement. While Ms Kwok maintained she did not leave at that stage because Mr Rainey had her passport, I do not accept it follows that he would not have been prepared to let her leave if, despite all his efforts,

[60] Ms McLean made closing submissions on this aspect of the case.

she would not agree to enter into a contracting out agreement (had he been given the correct advice).

[219] The will Mr Rainey made in December 2009 is also evidence of his intentions. He described Oteki Park as his "principal place of residence" (although the house was not yet built), and granted Ms Kwok the right to live in the house for two years following his death. That supports his contention that he wanted to provide for Ms Kwok but that she was to have no interest in Oteki Park.

[220] Mr Rainey rejected the proposition that he would not have terminated the relationship had GW advised him that it was the only failsafe way to avoid Ms Kwok having a claim on his assets. He said he could not afford to go through another breakup and end up, ironically, where he feels he is today. GW's advice had alleviated his concerns, he said, and he had paid for that advice.

[221] I am in no doubt that, had Mr Rainey been advised of the correct position regarding the Trust, his relationship status and Ms Kwok's potential claims, he would have paused to take stock of the situation. I accept his evidence that, had Ms Kwok then refused to sign a contracting out agreement, he would have terminated the relationship. As he said:

> It was too important to me to protect my assets – the risk was too high.

[222] Notably Ms Kwok was in Hong Kong, having returned there on 29 January 2011, when Mr Rainey sought advice from GW in February 2011 about how to protect his assets. Mr Rainey instructed GW to prepare the Trust on 2 March and Ms Kwok applied for her residence visa, supported by Mr Rainey, on 6 April. The Trust was settled on 27 April and on 10 August 2011 Ms Kwok was granted her residency visa. Therefore, Ms Kwok was not in New Zealand at the time GW should have provided competent advice to Mr Rainey as to how to protect his assets. That supports the likelihood that Mr Rainey would have taken the hard decision to end the relationship. At that point Ms Kwok had not irretrievably uprooted her life. It was still a relationship of short duration and she did not have residency status. It would have been relatively easy and less traumatic than it might otherwise have been for Mr Rainey to end the relationship and decline to support Ms Kwok's application for residency visa.

[223] Furthermore, I agree with Mr Fraundorfer's submission that, had Mr Rainey terminated the relationship around this time, Ms Kwok would not have qualified for an order for division of relationship property under s 14A(2) of the Act. That would require Ms Kwok to have made substantial contributions to the de facto relationship and the Court would need to be satisfied that failure to make the order would result in a serious injustice. The evidence does not suggest that Ms Kwok would have come anywhere near meeting this test and indeed GW does not contend she would have.

[224] I have arrived at my conclusions by considering the evidence overall, acknowledging the need not to be swayed by hindsight.

[225] For these reasons, I am satisfied on the balance of probabilities that Mr Rainey would have ended the relationship. GW's negligence was therefore causative of Mr Rainey's loss. GW is accordingly liable for the losses suffered as a result of not giving Mr Rainey competent advice.

Damages

The law

[226] The successful plaintiff is entitled to be placed in the position in which he or she would have been had the contract been performed, or the duty of care not breached.[61]

[227] The claim is in negligence and contract. *The Law of Torts in New Zealand* states:[62]

> … In the end, assessment of damages is essentially a question of fact: "Any rules or principles constitute guidance only. The object is to be fair to both sides". The prima facie approaches that the courts have developed provide "a measure of predictability", but "[t]he key purpose when assessing damages is to reflect the extent of the loss actually and reasonably suffered by the plaintiff".

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[61] *Benton v Miller & Poulgrain (A Firm)*, above n 58, at [100]. *Attorney General v Geothermal Produce NZ Ltd* [1987] 2 NZLR 348 (CA).

[62] Bill Atkin "Remedies" in Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) 1305 at 1308 (footnotes omitted).

[228] As the Supreme Court said in *Marlborough District Council v Altimarloch Joint Venture Ltd*:[63]

> The question of reasonableness must be assessed against the premise that parties enter into contracts with the expectation of performance, not with the expectation of compensation for breach.

[229] The appropriate measure for damages in the context of solicitors' negligence in both contract and tort was summarised in *Benton v Miller and Poulgrain*, where it was held:[64]

> what a Court had to do is put the plaintiff, so far as money can do it, in the same position he or she would have been in had the relevant term or duty of care been discharged, either by compensating for benefits of which the client has been deprived or the non-pecuniary losses suffered, or the expenses or liabilities that have been incurred as a result

[230] Mr Barton addressed me on whether the case should be approached on a loss of chance basis. I do not consider that is the appropriate way to address the issue. As said, I have found on the balance of probabilities that Mr Rainey would have terminated the relationship had he received competent legal advice and Ms Kwok refused to enter into a contracting out agreement.

Liability to Ms Kwok

[231] Mr Rainey seeks as damages the award made against him in relation to Ms Kwok's claim.

[232] In Mr Barton's submission, the damages are limited to Mr Rainey's assets at the time the advice was given. He had approximately $330,000 of separate property and any liability should be limited to half that amount, $165,000, in his submission. Mr Barton said Mr Rainey chose to invest his separate property in construction of a house which might have gone up or down in value. There was no causal connection between GW's negligence and the increase in value of Oteki Park. He also referred to the "subsequent event" of Ms Kwok helping increase the value of Oteki Park by assisting in construction of the house.

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[63] *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11 at [171].

[64] *Benton v Miller & Poulgrain (A Firm),* above n 58, at [101].

[233] Mr Barton then suggested that the Trust was not completely ineffectual and, had Mr Rainey built a rental property on the section and maintained it as a completely stand-alone investment, the Trust could have been effective.

[234] In essence, Mr Barton challenged the foreseeability of the loss claimed by Mr Rainey. I accept Mr Fraundorfer's submission that the loss was the very thing likely to happen as a result of GW's negligence and this was undoubtedly foreseeable. Mr Rainey sought advice from GW on asset protection in circumstances where his partner of less than three years would not sign a contracting out agreement. It is not only Mr Rainey's evidence which establishes that premise. It is also the file note the GW lawyer made at the first meeting in February 2011.

[235] The file note also effectively disposes of Mr Barton's submission as to foreseeability about the house. Mr Rainey in evidence said he assumed he had told the lawyer that he intended to build a house for the relationship at Oteki Park. The file note records "land & dwelling – wants to protect". The evidence as to Mr Rainey's intentions regarding the house, as canvassed at length above, is also relevant. Finally, GW cannot hide behind the paucity of the file notes which, in any event, undermine its argument.

[236] It was also entirely foreseeable that the loss would be incurred by Mr Rainey at the time Ms Kwok's relationship property claim was settled. Section 2G of the Act provides that relationship property is valued at the date of the hearing.

Mitigation

[237] In Mr Barton's submission, Mr Rainey was required to mitigate his losses. On this basis, he said Mr Rainey should have reached a settlement with Ms Kwok and then brought a claim against GW.

[238] The principles in relation to mitigation are well established. They are summarised in *Laws of New Zealand*, as follows:[65]

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[65] Hon Justice W L Young (ed) *The Laws of New Zealand* (online ed, LexisNexis) at [110], [112], and [115].

> **110. Principle of mitigation**
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> Plaintiffs who are victims of a tort or breach of contract must respond reasonably to the defendant's wrong. They must act to keep the damages down as far as is reasonable in all the circumstances. …
>
> …
>
> **112. Test of reasonableness**
>
> … The plaintiff's response to the defendant's wrong is judged, not in hindsight, but according to the circumstances as they appeared at the time. When there are various alternatives open to a plaintiff, a reasonable choice of one alternative over another will not be held against a plaintiff if it is subsequently found that one of the other alternatives might have involved some greater mitigation of damages. …
>
> …
>
> **115. Rule as to loss incurred in reasonable attempts to avoid loss**
>
> If the plaintiff, acting in reasonable response to the defendant's wrong, has incurred expenses or further losses in order to avoid or diminish the damage, the plaintiff is entitled to recover those expenses or losses from the defendant. The plaintiff can do this even if the resulting damage exceeds the damage that would have been suffered had no mitigating steps been taken. …

[239] This summary reflects recent case law in relation to mitigation of losses.[66]

[240] One fundamental problem for Mr Rainey in following the approach Mr Barton advocated is that he would have been forced to sell Oteki Park. The evidence of Mr Rainey's financial position makes it clear he would have been unable to fund any settlement with Ms Kwok out of any other assets. But this, ironically, would have left him in exactly the position he sought to avoid by taking advice from GW, ie losing Oteki Park.

[241] Had GW conceded liability at an early stage rather than at the trial, Mr Barton's submission that Mr Rainey should have settled with Ms Kwok would have more force.

[242] For these reasons, I do not consider the step Mr Barton submits Mr Rainey should have taken to be reasonable and I reject the submission.

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[66] See generally *Wu v Body Corporate 366611* [2014] NZSC 137, [2015] 1 NZLR 215 at [134]–[143] and *Marlborough District Council v Altimarloch Joint Venture Limited*, above n 63, at [55].

Occupation rent

[243] Mr Rainey also seeks effective indemnification in respect of the occupation rent claimed by Ms Kwok under s 18B of the Act. Given I have not allowed Ms Kwok's claim, it is not necessary to deal with this issue.

Costs as damages

[244] Mr Rainey and the Trust seek damages from GW of the legal costs:

(a) awarded against them in favour of Ms Kwok; and

(b) they have incurred in defending Ms Kwok's claim.

[245] GW opposes the claim for three reasons:

(a) the claim was not specifically pleaded;

(b) there is no evidential basis for the claim; and

(c) the High Court Rules 2016 (the Rules) adequately cover the situation and there is no need for any exception to be made.

Preliminary issue: claim not pleaded

[246] It is not disputed that these damages were not specifically pleaded. Pleadings must alert the other party to the nature of the claim so it can appropriately respond. However, Mr Rainey and the Trust rely on r 5.31 of the Rules which provides:

> (1) The relief claimed must be stated specifically, either by itself or in the alternative.
>
> (2) Despite subclause (1), it is not necessary to ask for general or other relief but the court may, if it thinks just, grant any other relief to which the plaintiff is entitled, even though that relief has not been specifically claimed and there is no claim for general or other relief.

[247] As r 5.31 makes clear, if a claim has not been specifically pleaded, the Court may nonetheless grant relief to a plaintiff if it considers it just. In considering whether

granting relief that was not specifically pleaded is just, the Court will look at whether there has been prejudice and/or surprise.

[248] In Mr Barton's submission, both surprise and prejudice are present for the following reasons:

(a) Mr Rainey's two affidavits made no mention of costs as damages and there was no reference to the invoices that form the basis of his claim. There was no reference to the subject in his supplementary evidence given in Court either.

(b) Consequently, GW was unable to put any evidence before the Court to counter the claim. That evidence would have encompassed issues of causation, remoteness, reasonableness and mitigation.

(c) The invoices amounting to approximately $140,000 were given to GW on the day the trial started but there was no further reference to them. Mr Barton submitted that these invoices and a reference to the claim at the conclusion of the defendants' opening submissions was "not good enough", particularly as they had insufficient time to scrutinise them.

(d) Had the defendants' claim been properly forecast, Mr Barton submitted he would have put the reasonableness of the defendants' conduct to Mr Rainey. In particular, he said he would have asked questions such as, did Mr Rainey take all wise and necessary steps? Was there an assessment of the strength of the case? Were there negotiations? Were offers made? Were counter offers made? Was the quantum of costs reasonable? Were there attempts at alternative dispute resolution?

[249] Mr Fraundorfer submitted that the claim was explicitly referred to in the defendants' opening submissions, filed on the morning of 10 March 2020, the second day of the trial. GW's cross-examination of Mr Rainey was completed around 11.00 am on 11 March. Accordingly, Mr Fraundorfer submitted that GW was

sufficiently on notice of the defendants' claim some 24 hours prior to the completion of its cross-examination.

Discussion

[250] I agree that the defendants should have sought leave to file an amended statement of claim to include this pleading. They did not. GW contends that, had they done so, GW would have sought an adjournment. An adjournment is usually the appropriate remedy where a party claims to have been taken by surprise or prejudiced. However, in the circumstances of this case, I do not consider there to have been sufficient surprise or prejudice to GW to have warranted an adjournment had one been requested or to deny the relief sought by the defendants.

[251] GW was made aware of this aspect of the defendants' claim through the opening submissions of the defendants, filed on the second day of the trial. It was also put on notice when the invoices detailing the defendants' legal expenses were produced on the same day. Despite this, GW chose not to raise the issue in the cross-examination of Mr Rainey which occurred the following day. Neither was the issue raised with me.

[252] I also consider that, in the context of this case, GW was on notice, and should have been aware well before the trial, of the possibility that it would be liable for the defendants' legal costs. I say this because the legal advice given to the defendants by GW lies at the heart of this proceeding. It was this advice that caused the defendants to believe they had a defence to Ms Kwok's property relationship claim.

[253] I do not accept that GW has been materially prejudiced as a result of not being able to question the defendants about their conduct throughout this litigation. GW appeared to suggest the defendants did not need to pursue their claim in the way they did and should have considered alternate dispute resolution processes. However, as previously stated, it was GW's advice that assured the defendants they were protected against any claim from Ms Kwok. Equally, had GW conceded its negligence at an early stage instead of at trial, the course of Mr Rainey's defence of Ms Kwok's claim would likely have followed a very different and less costly path.

[254] I therefore do not consider it fatal to Mr Rainey and the Trust's claim that costs as damages was not specifically pleaded.

The law

[255] The question of litigation costs as damages has been considered in New Zealand before. The general policy rule that costs may not be claimed as damages, with a few set exceptions, is well established.[67] In *Chick v Blackwell*, Hansen J outlined the policy justification and exceptions:[68]

> … first, that the rules of assessment of costs encourage parties to exercise restraint and, secondly, it would undermine the costs rules and the policy behind those rules if the party claiming costs in an assessment could recover any unrecovered costs as damages.
>
> There are two exceptions to the rule that costs cannot be recovered as damages. The first is where the costs were incurred in proceedings involving a third party. The second is where the claimant is relying on a separate and independent cause of action. …

The parties accept that both exceptions apply in this case.

[256] Although costs as damages are allowed under these exceptions, the normal rules of causation, foreseeability and mitigation apply. Whether GW's negligence caused a loss in a factual sense is a common-sense question of whether the breach was a sufficiently substantial cause of the plaintiff's loss.[69]

[257] There may also be policy reasons to limit a claim.

Causation

[258] Mr Barton submitted it cannot be established that GW was the cause of all Mr Rainey's and the Trust's losses, as they have chosen to embark on an "extremely expensive course of action" which cannot be placed at the feet of GW entirely. I disagree. Had GW provided competent advice at the outset, Mr Rainey and the Trust

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67 See, for example, *Simpson v Walker* [2012] NZCA 191, (2012) 28 FRNZ 815 at [75].

68 *Chick v Blackwell* [2013] NZHC 1525 at [152] and [153].

69 A G Guest (general ed) *Chitty on Contracts* (27th ed, Sweet & Maxwell, London, 1994) at [26-015], cited with approval in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington 2011) at [1.8.1(2)].

would not have needed to engage the services of another lawyer and defend Ms Kwok's claim. I consider GW's advice to have been the substantial cause of Mr Rainey and the Trust's legal spend.

Foreseeability

[259] GW denies it was foreseeable that Mr Rainey and the Trust would spend the amount claimed in litigating this matter when settlement could have been achieved. I address the reasonableness of the claimed costs below, but on the foreseeability point I consider the costs associated with the litigation were a foreseeable consequence of GW giving the advice they did. The issues involved in this proceeding mean it was foreseeable that the legal costs would be considerable. This type of advice does not come cheap.

[260] Mr Rainey approached GW to provide legal advice in a specific context; to avoid a potential claim from Ms Kwok in the future. I consider it would have been in the contemplation of GW that, if it gave Mr Rainey legal advice that was not sound, then both he and the Trust would be forced into litigation where they would have to engage the services of other lawyers to defend Ms Kwok's claim.

Mitigation

[261] Mr Barton submitted that it was incumbent on Mr Rainey and the Trust to mitigate their losses and that a negotiated settlement would have been a much cheaper solution than the current proceeding. Although I agree Mr Rainey and the Trust had a general duty to mitigate their losses, I disagree with GW's contention concerning settlement. I consider it was entirely reasonable for Mr Rainey and the Trust to defend Ms Kwok's claim, which the Trust and GW's advice was at the heart of. Ms Kwok's claim was not straightforward and involved developing areas of trust law.

[262] As I have already observed, GW could have admitted liability at the outset, thus avoiding not only aspects of the negligence proceedings but also significant and legally complex aspects of the defence of Ms Kwok's claim.

Reasonableness

[263] The costs claimed by Mr Rainey and the Trust must also be reasonable, both in amount and how they were incurred.[70] Mr Rainey and the Trust claim that the pre-litigation costs of $4,316.50 and litigation costs of $295,229.50 less a 15 per cent discount (because some of the costs related to the maintenance claims) are reasonable. I do not accept that, because GW did not challenge the invoices tendered to them, these costs are reasonable. That is a matter I will address in considering costs generally.

Conclusion

[264] To summarise, I find that GW's negligence was the substantial cause of the legal costs Mr Rainey and the Trust incurred in defending Ms Kwok's claim, including the costs they must pay Ms Kwok. The legal costs were a foreseeable consequence of GW giving the advice it did. Mr Rainey and the Trust acted reasonably in defending the proceedings brought by Ms Kwok.

General damages — distress and inconvenience

[265] Not only have general damages not been claimed but there was no evidence to support such a claim.

Result

[266] Judgment is given for Ms Kwok as follows:

(a) the sum of $499,855.00, representing a half interest in the family home;[71]

(b) $785 per week in maintenance, from the date of separation to the date the payment in (a) above is received by Ms Kwok, less the $5200 already paid by Mr Rainey; and

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70 High Court Rules 2016, r 14.6(1)(b) states that indemnity costs are available for expenses reasonably incurred by a party. See also *Edel Metals Group Ltd v Geier Ltd* [2018] NZCA 494 at [62].

71 Half the market value of Oteki Park ($550,000) less Ms Kwok's share of the mortgage ($50,145).

(c) a half share of the family chattels, amounting to $3,500.

[267] Judgment is given for Mr Rainey and the Trust as follows:

(a) The sum of $499,855.00, representing Ms Kwok's half interest in the family home. I order that GW pay this sum to Ms Kwok direct pursuant to s 33(1) and (3)(i) of the Act. GW will be aware that any delay in payment will have financial consequences for Mr Rainey in light of [[266] (b)] above.

(b) $4,316.50 (including GST and disbursements) for the pre-litigation advice from Holland Beckett in respect of this proceeding, plus interest at the prescribed rate from the date of payment; $3,471.66 for the legal fees paid by Mr Rainey to GW, plus interest at the prescribed rate from the date of payment.[72]

(c) The costs awarded against Mr Rainey and the Trust as a result of Ms Kwok's successful claim against them. These are to be paid to Ms Kwok directly by GW pursuant to s 33(1) and (3)(i) of the Act.

(d) The legal costs reasonably and properly incurred by Mr Rainey and the Trust in defending Ms Kwok's claim.

[268] Costs are awarded to Ms Kwok in respect of her claim against the defendants. Costs are awarded to the defendants in respect of their claim against GW.

[269] In the absence of agreement between the parties as to the appropriate level of costs, memoranda on costs are to be filed and served within 28 days of this decision, with responses 14 days thereafter. Costs will be decided on the papers.

Thomas J

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[72] Invoices from GW of $2,000.20, $180.00, $451.96 and $839.50 respectively.

Solicitors:
Beachside Legal, Mt Maunganui for Plaintiff
Holland Beckett, Tauranga for Defendants
Anderson Lloyd, Dunedin for Third Party