

IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

BETWEEN **ROSEMARY JULIA WEBB** of Rarotonga,
Teacher Aide
Appellant

AND: **PAUL WEBB** of Rarotonga, Businessman
Respondent

Court: Fisher JA
 White JA
 Grice JA

Hearing: 20 and 21 November 2017

Counsel: I T F Hikaka, B Marshall and L Clews for the appellant
 S McAnally for the respondent

Judgment: 24 November 2017

JUDGMENT OF THE COURT

1. **The appeal is allowed. The leasehold interest in the matrimonial home at Arorangi is vested in the appellant. The remainder of the matrimonial property, other than those items reserved to the appellant in the High Court, is to remain with the respondent.**
2. **The respondent must make a reasonable contribution to the costs of the appellant in both Courts. Costs in the High Court are to be determined by that Court. Costs in this Court are to be determined following memoranda from counsel.**

Solicitors:
Appellant: Little & Matysik, Barristers & Solicitors, Taputapuata, Avarua, Rarotonga
Respondent: Keegan Alexander, Solicitors, PO Box 999, Auckland

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INTRODUCTION

[1] The appellant and the respondent were married for 11 years during which they had one child. In the latter years of the marriage they lived in the Cook Islands where they had most of their assets. The assets were held by family trusts controlled by the respondent. When they separated the appellant brought matrimonial property proceedings in the High Court of the Cook Islands.

[2] In a judgment of 23 August 2017 Potter J found against the appellant. From that judgment the appellant has appealed to this Court.

[3] For the reasons that follow we have allowed the appeal and awarded the matrimonial home at Arorangi to the appellant. We add that in this complex case we have been much assisted by the thorough research and submissions of counsel.

Factual Background

[4] By the time he met the appellant the respondent was already a business entrepreneur with interests in the Cook Islands. With his business partner, Mr Andrew Tauber, he had operated through a range of companies known as the Honk Group and its associated Trust, the Honk Land Trust. In addition to his interest in the Honk Land Trust, the respondent had settled a family trust, the Yogi Trust, in 2002. The Yogi Trust was primarily for the benefit of the respondent and his son from a prior relationship, Sebastian. It already owned a house in Arney Road, Remuera, Auckland before the appellant met the respondent.

[5] The appellant and respondent were married on 2 December 2005. A week later, on 9 December 2005, the respondent settled another family trust, the Arorangi Trust. Relevant extracts from the trust deed are annexed to this judgment. The trust was settled for the purpose of acquiring land at Arorangi and other assets in the Cook Islands. The nominated beneficiaries of the new trust were again the respondent and his son from a previous marriage, Sebastian. On 24 February 2006 the Arorangi Trust completed the acquisition of a leasehold interest in a property at Arorangi. Later in the same year it acquired a half interest in an adjoining property. Mr Tauber was added as a trustee and consultant of the Arorangi Trust and his family as beneficiaries.

[6] For the first eight years of their marriage the couple lived in the Yogi Trust's house at Arney Road, Auckland. During that period their daughter, Bethany, was born on 4 December 2006.

[7] In August 2013 the family moved to the Cook Islands where they lived in the Arorangi property. In the following year, 2014, Mr Tauber retired from his then positions as Trustee and consultant of the Arorangi Trust and he and his children were removed as beneficiaries. One of the Arorangi Trust properties was sold and the proceeds of \$620,000 paid to the Honk Land Trust. There is a dispute as to whether that left other money owing to the Honk Land Trust.

[8] In 2011 the New Zealand Inland Revenue Department investigated the respondent's affairs. The Commissioner determined that certain management fees and loans should be treated as income earned by the respondent under the tax avoidance provisions of the Income Tax Act (NZ). The Commissioner's assessment resulted in a major tax debt which was still owing by the date of separation. Although the respondent challenged the assessment it was ultimately upheld by the Taxation Review Authority.¹

[9] The parties separated on 7 April 2016. The appellant and their daughter stayed on in the Arorangi property. The respondent returned to New Zealand where he began a live-in relationship with a Ms Brenda Dixon at the Arney Rd house. The respondent then arranged for the settlement of a new family trust, the Webb Family Trust. The respondent and Ms Dixon were the new trustees. The respondent arranged for the Arorangi Trust to resettle some of its assets on the new trust.

[10] The appellant issued matrimonial property proceedings in the Cook Islands High Court. New Zealand's Matrimonial Property Act 1976, as originally enacted, is incorporated into Cook Islands Law by the Matrimonial Property Act 1991-92. Subsequent amendments to the New Zealand Matrimonial Property Act 1976 have not been adopted in the Cook Islands. It is therefore necessary to resort to the original Matrimonial Property Act 1976 (NZ) as the source of matrimonial property law in the Cook Islands. Although the Matrimonial Property Act 1991-92 incorporates minor modifications to the New Zealand Act, none is material to the present proceeding.

¹ *Webb v Commissioner of Inland Revenue* [2016] NZTRA 11.

[11] In her High Court proceedings the appellant challenged the validity of the Arorangi Trust and the Webb Family Trust. She contended that because those trusts were invalid, the relevant assets were matrimonial property. The respondent maintained that both trusts were valid. He further argued that even if the relevant assets had been matrimonial property, their value was far exceeded by his deductible debts.

High Court Judgment

[12] In a careful judgment the Judge first traversed the arguments that the Arorangi Trust and/or the Webb Family Trust were nullities. The appellant's first argument in that regard was that clauses in the trust deeds limiting the beneficiaries' right to accounts and information undermined the irreducible core of obligations necessary to create a valid Trust. The Judge found that restrictions on the beneficiaries' rights in that regard did not extend so far as to invalidate the trusts.

[13] The appellant's second argument was that the Trusts were invalid in that the respondent (in the case of the Arorangi Trust) and the nominal settlor along with the respondent and Ms Dixon (in the case of the Webb Family Trust) intended to retain ownership and control of the assets. The argument appears to have had two limbs, one that the trust was a sham and the other that the trust deed failed to disclose an intention to alienate a beneficial interest. Treating both as "essentially a sham allegation"² the Judge held that it failed on the facts.

[14] Thirdly, the appellant argued that due to a drafting error in the Webb Family Trust Deed, the trust lacked certainty of objects. In addition to identifying certain beneficiaries by name, the trust deed included "discrencerny beneficeries" in the list of beneficiaries. The Judge concluded that that phrase was merely a place-holder in a precedent which the drafter had erroneously forgotten to remove. Viewed objectively, the intention was sufficiently clear. For those reasons the Judge concluded that both family trusts were valid.

[15] In case she were wrong in that conclusion, the Judge went on to consider the result if the assets of the two trusts formed part of the matrimonial property pool. She noted that between the two trusts the assets consisted of the Arorangi property, the half interests in the adjoining Terepai Arihii property, bank accounts, shares in Solar 3000 Ltd, shares in Fleet

² First instance judgment at [52].

Lease Ltd and shares in Kuru Investments Ltd (“the Trust assets”). If, contrary to her view, those assets had formed part of the matrimonial property pool, it would have been necessary to consider the respondent’s debts.

[16] The Judge did not find it necessary to resolve a dispute over an alleged debt to the Honk Land Trust. The need to do so was overtaken by the magnitude of the tax debt. For the purpose of determining deductibility the Judge proceeded on the basis of five hypothetical assumptions:

- (a) For present purposes it was to be assumed that the Aorangi and Webb Family trusts were void with the result that all relevant assets and liabilities were those of the respondent.
- (b) The appellant’s highest estimated total value of the alleged matrimonial property was \$8,092,111.41.
- (c) The respondent’s core income tax liability was \$4,435,466.66 (whether a personal or non-personal debt, it being unnecessary to decide).
- (d) The respondent owed Inland Revenue interest and penalties of \$19,426,840.30 which constituted a “personal” debt of the respondent.
- (e) The respondent’s separate property was confined to a Tag Heuer watch worth about \$25,000.

[17] It was evident to the Judge that if the respondent’s core tax debt of \$4,435,466.66 and the personal tax debt of approx \$19.4 million (together “the tax debt”) represented a valid deduction from the assets for division purposes, the debts would far exceed the assets. It followed that there could be no net matrimonial property available for division unless the tax debt was not deductible for this purpose.

[18] The appellant offered a number of reasons for declining to deduct the tax debt. The first was that the Cook Islands Court would decline to enforce the tax and revenue laws of a foreign country. As to that the Judge concluded that s 20 was concerned with the existence of a debt, not its enforceability in the Cook Islands. There was no reason in principle for declining to recognise a foreign tax debt for the purposes of s 20(5). There was a real

likelihood that the debt would in fact be paid given that the respondent lived in New Zealand and that the NZ Inland Revenue Department were in the process of enforcing its claim.

[19] The appellant's second argument was that the debt was "secured" because the Inland Revenue Department had a freezing order and a caveat over the former matrimonial home in Auckland. The appellant argued that that made the debt an immovable and therefore outside the Court's jurisdiction. The Judge concluded, however, that there was no evidence to show that the Inland Revenue Department had secured its claim against the Auckland home, quite apart from the question whether securing a debt against foreign land made the debt itself a foreign "immovable".

[20] Significantly for the purpose of this appeal, the Judge also found the respondent's disclosure of information and documents to be unsatisfactory and his evidence to be "unreliable and contradictory".³

The Appeal

[21] In this Court the appellant advanced a number of grounds of appeal. These are conveniently considered under the following headings:

- A: Deductibility of the respondent's tax debt.
- B: Jurisdiction over trusts where the trustees were not joined as parties.
- C: Validity of the Arorangi Trust and Webb Family Trust deeds.
- D: Net value of the matrimonial property.
- E: Implementation of the division.

[22] We address these in turn.

A: TAX DEBTS NOT DEDUCTIBLE

[23] To put the individual arguments in context it is necessary to begin with the statutory background and its rationale.

Effect of, and rationale for, s 20(5) and (7)

[24] Section 20(5) and (7) provide:

³ Judgment at [30].

- (5) The value of the matrimonial property that may be divided between husband and wife pursuant to this Act shall be ascertained by deducting from the value of the matrimonial property owned by each spouse:
- (a) Any secured or unsecured debts (other than personal debts or debts secured wholly on separate property) owed by that spouse; and
 - (b) The unsecured personal debts owed by that spouse to the extent that they exceed the value of any separate property of that spouse.
- (7) For the purposes of this section, 'personal debt' means a debt incurred by the husband or the wife, other than a debt incurred –
- (a) By the husband and his wife jointly; or
 - (b) In the course of a common enterprise carried on by the husband and the wife, whether or not together with any other person; or
 - (c) For the purpose of improving the matrimonial home or acquiring or improving or repairing family chattels; or
 - (d) For the benefit of both the husband and the wife or of any child of the marriage in the course of managing the affairs of the household or bringing up any child of the marriage.

[25] The broad scheme of s 20(5) is not in doubt. The effect of s 20(5)(a) is that in the division of their property the spouses share the burden of those debts associated with the marriage partnership (conveniently referred to as “matrimonial debts”) but are not required to share the burden of each other’s personal debts. Section 20(5)(b) creates an exception to that approach where one of the spouses has unsecured personal debts that cannot be satisfied from that spouse’s own separate property.

[26] The most significant purpose of the Matrimonial Property Act 1976 is to “recognise the equal contribution of husband and wife to the marriage partnership”.⁴ Consistent with that object, the key provisions of the Act require the sharing of wealth created by the operations of the marriage partnership.⁵ But the true value of that wealth could not ignore those debts which were equally the product of the partnership’s operations. So the effect of s 20(5)(a) is that in the division of their property the spouses share both the property and the debts created by the operations of the marriage partnership.

[27] Although that rationale explains s 20(5)(a) it is necessary to move to a different rationale for s 20(5)(b). The latter brings into the division not only matrimonial debts but also those unsecured personal debts that cannot be satisfied from a spouse’s own separate

⁴ See long title to the Matrimonial Property Act 1976.

⁵ See in particular ss 8-11 and 18.

property. Here the rationale shifts from a just division between the spouses themselves to protection of the spouses' creditors. The object behind s 20(5)(b) is to protect the creditors of a spouse who owes a personal debt in certain circumstances.⁶

[28] Broadly speaking the rights of creditors are unaffected by rights otherwise conferred on a spouse under the Act.⁷ It is assumed that if a debt owed by the debtor spouse is secured, the secured creditor will be able to look to the security for payment without needing to resort to the debtor spouse's matrimonial property. Further, if the value of that spouse's separate property is sufficient to meet the unsecured personal debts the creditors can, if necessary, have their debts satisfied out of those separate property assets. It is only in a situation where debts are both unsecured, and cannot be satisfied from the debtor spouses' separate property, that a creditor must turn to the debtor spouse's matrimonial property for satisfaction.

[29] That is the legislative background against which the appellant's arguments fall for consideration. It is now common ground that the total tax debt of about \$24 million is the respondent's personal debt. It follows that the respondent would not be entitled to deduct any part of that sum if it is disqualified as a foreign tax debt. That will be considered first before considering other grounds on which its deductibility is resisted.

Debt an irrecoverable foreign tax

[30] Mr Hikaka submitted that the tax debt is not deductible on the ground that in the Cook Islands it represents an unenforceable foreign tax.

[31] The applicable conflict of laws principle is not in dispute. Domestic courts will decline to enforce claims by foreign states to recover their claim to taxes and other sources of revenue.⁸ It will be convenient to refer to this as "the foreign tax principle". The principle is recognised in the Cook Islands.⁹ Its rationale was helpfully summarised by Mr McAnally in the following terms (our footnotes):

The rule is said to have its origins in the 17th century, with the Treaty of Westphalia at the end

⁶ *Wilson v Wilson* [1991] 1 NZLR 687 (CA) at 694-695.

⁷ S 20(1) and see further ss 46 and 47.

⁸ *Government of India v Taylor* [1955] AC 491 (PC).

⁹ *USA v A Limited* (High Court, Cook Islands, PL57/00, 4 December 2001, Greig CJ) – case noted [2002] NZLJ 223.

of the Thirty Years' War.¹⁰ In *Government of India, Ministry of Finance (Revenue Division) v Taylor* three justifications for the application of the rule appear:

- (a) The enforcement by one state of a claim for taxes within another is "an assertion of sovereign authority by one State within the territory of another";
- (b) Because the Courts will not recognise liabilities that arise in a foreign State if they run counter to the "settled public policy" of that in which enforcement is sought, there is a risk of embarrassment between the States in question (what might be called the "comity" principle); and
- (c) One State cannot expect another to assume the administrative burden of interpreting and applying that other country's revenue laws ("the practical issue").

[32] The foreign tax principle extends to indirect enforcement through recognition of the debt for a collateral legal purpose. A liquidator has no power to pay a foreign tax debt in circumstances where the foreign government could not have sued for that debt in the country where the liquidation is undertaken.¹¹ Nor can a foreign tax debt be taken into account for the purpose of deciding whether an individual has a valuable interest in property pursuant to a resulting trust and, if so, the conditions which the court should attach to the interest.¹² Former trustees cannot justify a caveat for the protection of an indemnity against future claims where, even if the claims were later made, they would be claims to foreign taxes which the former trustees would be under no practical compulsion to pay.¹³ This extension to collateral purposes is not absolute. A trustee cannot be prevented from electing to use trust funds to pay a foreign tax debt even where the debt could not have been domestically enforced.¹⁴ And once such a debt has been paid, the trustee is entitled to an indemnity for it out of domestic assets.¹⁵ These might be described as exceptional situations in which domestic courts found it unacceptable to maintain the legal fiction that the debtor did not owe the foreign tax debt. But the fundamental principle remains: as a general rule a foreign tax debt will not be recognised for a collateral legal purpose. To recognise a foreign tax debt in the context of a matrimonial property division would run counter to the general rule.

[33] The general rule is a creature of the common law. Common law principles are subservient to legislation. This applies as much to conflict of laws principles as to any other class of common law. The ultimate question is therefore what the Cook Islands Parliament intended, and by incorporation the New Zealand Parliament intended, when adopting the

¹⁰ *Avowal Administrative Attorneys Limited v District Court at North Shore* [2008] 1 NZLR 675 at 683.

¹¹ *Government of India* at 508 and 509.

¹² *Damberg v Damberg* [2001] NSWCA 87, (2001) 52 NSWLR 492 at [167] – [169].

¹³ *S and S Ltd v XYZ Ltd* [2016] NZHC 26 at [123] – [131].

¹⁴ *Re Lord Cable* [1977] 1 WLR 7 at 19-20.

¹⁵ *Re Reid* (1970) 17 DLR (3d) 199 (BCCA).

word “debt” in s 20 of the Matrimonial Property Act 1976. Did they intend to include foreign tax debts?

[34] In our view the answer is to be found in the rationale for s 20(b) discussed earlier. As a general proposition the spouses share in the benefits and burdens produced by the operation of their partnership and do not share in the debts incurred by one of the spouses outside the operations of the partnership.¹⁶ The sole reason for allowing a personal debt to impact on the matrimonial property division under s 20(5)(b) is to protect a debtor spouse’s unsecured creditors. But if, for whatever reason, an unsecured creditor would not be able to execute a judgment against the assets in question there would no longer be any rationale for allowing the debtor spouse to set off that debt against his or her matrimonial property assets.¹⁷

[35] The rationale is readily illustrated by the present case. If the New Zealand tax debt were deducted from the respondent’s Cook Island assets there would be nothing left to divide with the appellant. But if it then turned out that the Commissioner of Inland Revenue could not execute a judgment against the same assets the respondent would have the best of both worlds. He would be able to keep all the matrimonial property for himself even though it remained immune to the claims of his creditor. That cannot have been the intention behind s 20(5)(b).

[36] Everything therefore turns on the question whether the Commissioner could in fact enforce the New Zealand tax debt in the Cook Islands. The foreign tax principle suggests not, for the reasons given earlier.

[37] Mr McNally submitted that the foreign tax principle did not apply in this case due to the special relationship between the Cook Islands and New Zealand. In a well-researched argument he pointed to the nature of the procedure for enforcing a New Zealand judgment by filing a memorial in the Cook Islands High Court,¹⁸ the commonality of the Queen in right of New Zealand as the Head of State of both countries,¹⁹ the right of Cook Islanders to New Zealand citizenship,²⁰ cooperation over double taxation avoidance,²¹ cooperation over the

¹⁶ See s 20(5)(a).

¹⁷ Although differently expressed, that was essentially the approach taken in *Livingstone v Livingstone* (1980) 4 MPC 129 (HC) where the Court declined to make any deduction for the husband’s foreign tax debt having regard to the unlikelihood that it would ever be paid.

¹⁸ Cook Islands Act 1915, s 173.

¹⁹ Constitution Art 2.

²⁰ Citizenship Act 1977 (NZ) s 2.

²¹ Double Tax Agreements (Cook Islands) Order 2010.

exchange of taxation information²² and the well-known historical ties between the two countries. He submitted (our footnotes):

As was recognised by the High Court of New Zealand in *Avowal Administrative*,²³ we now live in an age where there is a great deal of international cooperation and particularly where bilateral double tax agreements exist the "narrowly nationalistic regime, recorded in the 1955 report of *Government of India v Taylor* has been substantially affected by the OECD work". The Court went on to say that a "regime of obstruction has been replaced by one containing a large element of cross-border cooperation".²⁴

[38] We are not persuaded that the right hypothesis on which to approach the division of matrimonial property between these two parties is that the tax debt could be enforced in the Cook Islands. Enforceability here may well be directly tested in proceedings between the Commissioner and the respondent on some future occasion, perhaps with the assistance of the Solicitor General of the Cook Islands. If that occurs we cannot entirely rule out the possibility that a fresh approach to the foreign tax principle might be taken. But for now, rights under the Matrimonial Property Act should be based on the most likely outcome.

[39] The most likely outcome stems from a longstanding conflict of law principle. If the principle is to be called into question it should not be through the side wind of a matrimonial property case. For present purposes we are not persuaded that the close relationship between the two countries would prove to be enough to negate the foreign tax principle. Although the ties are close the fact remains that the two countries are distinct and sovereign entities with distinct and sovereign Parliaments and Governments.²⁵ That brings into play the rationales for the foreign tax principle discussed earlier: to enforce New Zealand's tax claim would be the assertion of sovereign authority by one State within the territory of another and, at least in theory, the tax itself could be contrary to the public policy of the Cook Islands. Although there is a procedure for enforcing New Zealand judgments through the filing of memoranda, local execution may follow only with the leave of the High Court.²⁶ Despite Mr McAnally's careful submissions to the contrary, the leave requirement introduces the opportunity for the Court to refuse enforcement on the ground that it would contravene the foreign tax principle.

[40] Our conclusion is that the New Zealand tax debt should not be taken into account for the purpose of dividing the Cook Islands matrimonial property. At least on the material and

²² Agreement between the Government of New Zealand and the Government of the Cook Islands on the Exchange of Information with Respect to Taxes.

²³ *Avowal Administrative Attorneys Limited v District Court at North Shore* [2008] 1 NZLR 675 at 683

²⁴ At 685.

²⁵ Constitution Art 27; *Controller and Auditor-General v Sir Ronald Davison* [1996] 2 NZLR 278 (CA).

²⁶ Cook Islands Act 1915 s 173(4).

arguments presently before us, the stronger argument is that it is unenforceable in the Cook Islands. That is the basis on which we now consider the rights of these parties under the Matrimonial Property Act.

Other grounds for resisting deduction of the tax debt

[41] That makes it unnecessary for us to consider the other grounds on which the appellant contended that the New Zealand tax debt should be excluded from consideration. For the sake of completeness, however, we express the view that the tax debt is not “secured” within the meaning of that word in s 20(5)(b). Although the Commissioner obtained a freezing order from the New Zealand High Court we agree with Mr McAnally that this operates in personam to prevent the dissipation of assets; it does not give the Commissioner any priority over other creditors. Similarly the fact that the Commissioner lodged a caveat against the Arney Road property merely prevents further dealings with that property; it does not create any proprietary interest in the property that did not already exist at the date of lodgement. The appellant was unable to point to any priority which the Commissioner would enjoy in a bankruptcy. For a debt to be secured, there must at least be something which confers a greater prospect of recovery than that faced by the general run of unsecured creditors. If there is no practical difference between secured and unsecured debts the word “secured” in s 20(5)(b) would lose all meaning.

[42] Similarly the fact that the respondent might yet negotiate with the Commissioner a figure less than the full \$24 million presently owing would not have affected the outcome in the present case. The level of tax debt is so high that it would be unrealistic to expect that the respondent could negotiate it down to a figure less than the total value of the matrimonial property.

[43] Those views are immaterial, however, given our earlier conclusion that the New Zealand tax debt should be disregarded in its entirety.

B: JURISDICTION WHERE TRUSTEES NOT JOINED AS PARTIES

[44] The only formal parties to these proceedings are the appellant and the respondent in their personal capacities. The respondent takes the point that the trustees of the Arorangi Trust and the Webb Family Trust have not been formally joined as parties. He contends that in those circumstances orders cannot be made which would impact upon the property of those

trusts. A preliminary observation is that if the respondent had taken that point at the outset of these proceedings, something more formal could have been done about it. But we are content to examine the sequence as it actually unfolded.

[45] At the time that these proceedings were commenced the sole trustee of the Arorangi Trust was the respondent. The trustees of the Webb Family Trust were the respondent and his partner, Brenda Dixon. Following the commencement of these proceedings in 2016, the appellant sought and obtained an order under s 37 of the Matrimonial Property Act that notice of the proceedings be given to the other trustee, Brenda Dixon. Such notice was duly given. The trial commenced on 8 May 2017. On 1 May 2017, seven days before the trial, the respondent filed an affidavit stating that the trustees of the Arorangi Trust had been changed to the respondent, Ms Dixon, and her brother, Mr Brett Riley, on 6 February 2017. This was the first notice the appellant had that two further trustees had been added for that trust. No further steps were taken by either party to formally join the trustees as parties or to commence parallel proceedings against the trustees seeking a declaration that the trusts were invalid.

[46] Section 37 of the Act provides:

37 Persons entitled to be heard —

Before any order is made under this Act, such notice as the Court directs shall be given to any person having an interest in the property which would be affected by the order, and any such person shall be entitled to appear and to be heard in the matter as a party to the application.

[47] In New Zealand the Court of Appeal has expressed the view that notice given under s 37 permits orders to be made only in certain circumstances. On that view an order can be made affecting the property of a spouse where a third party claims an interest but not an order affecting the property of a third party against which a spouse claims an interest.²⁷ The distinction may not be a useful one given that all interests in property – whether as owner, mortgagee, formal trustee, constructive trustee, or beneficiary – are ultimately capable of categorisation as forms of property. It is only when disputed issues between a spouse and a third party have been judicially determined that one could say whether the property in question should be regarded as the property of a spouse against which a third party had claimed an interest or the property of a third party against which a spouse had claimed an

²⁷ *Johanson v Johanson* (1993) 10 FRNZ 578 (CA) at 580 and 581.

interest or neither. Nor is it apparent how that particular distinction is to be inferred from either the text of s 37 or its implied purpose.

[48] The intended effect of s 37 has not been well expressed in the provision itself. Nor is the Act clear as to the effect of orders affecting trust property where the trustees have not been formally joined as parties.

[49] In our view this is social legislation which ought to be interpreted in a way which achieves its implied purpose. In our view the purpose implied in s 37 is to ensure that the interests of a third party will not be adversely affected by orders made under the Matrimonial Property Act without adequate warning and opportunity to be heard. Depending on the circumstances, mere notice that such proceedings have been issued may not be sufficient. It may be necessary to go further to ensure that the potential prejudice to a third party has been adequately drawn to that party's attention. The particular facts of each case must be closely considered to see whether the implied purpose of s 37 has been achieved.

[50] In the present case the following factors are relevant:

- (a) The appellant had made it clear from the outset of the proceedings that the validity of the Arorangi Trust was at issue.
- (b) At all material times the respondent knew that validity of the Arorangi Trust was under challenge. Following his separation from the appellant he arranged for the settlement of a new trust, the Webb Family Trust, and arranged to have some of the Arorangi Trust assets resettled on the new trust.
- (c) At one point the respondent filed an affidavit stating that it was given in both his personal capacity and in his capacity as the trustee of the Arorangi Trust.
- (d) Ms Dixon was given formal notice of the proceedings in circumstances that could only have related to her role as trustee of the Webb Family Trust.
- (e) Both the respondent and Ms Dixon gave evidence at trial and were present throughout while evidence and arguments were traversed concerning the validity of the trusts. It is safe to assume that they gave continuing instructions to counsel for the respondent throughout.

- (f) It could be expected that the relationship between the respondent, Ms Dixon, and Mr Riley was such that the nature of the proceedings would have been discussed following the change of trustees.
- (g) Full evidence was presented in opposition to challenges to the validity of the trusts.
- (h) Everything that could possibly be said in support of the validity of the trusts was fully and ably offered by Mr McAnally in both Courts.

[51] We are satisfied that the trustees of the two trusts have been given adequate opportunity to present their cases in support of the validity of the trusts and have taken advantage of that opportunity. There could be no prejudice to the trusts in ruling on their validity in the context of these proceedings.

C: VALIDITY OF THE ARORANGI AND WEBB FAMILY TRUSTS

[52] The appellant contends that the deeds for the Arorangi Trust and the Webb Family Trust did not create valid trusts. Essentially the same provisions are to be found in both trust deeds. It is common ground that they stand or fall together. It will be convenient to focus on the Arorangi Trust deed, the material provisions of which are annexed to this judgment as a schedule.

Trust validity principles

[53] The key issue is whether, on an objective analysis of the powers reserved to the respondent in that deed, the settlor has evinced an intention to irrevocably relinquish a beneficial interest. Strictly speaking there was a distinct settlement each time the respondent made a further disposition of property to one of the trusts after its inception but it has not been suggested that the position would have materially differed on those occasions.

[54] Mr Hikaka submitted that the deed in this case was analogous to that settled by Mr Pugachev in *JSC Mezhdunarodniy Promyshlenniy Bank & Ors v Pugachev & Ors*.²⁸ In that case Mr Pugachev was the settlor, protector and a beneficiary of the trust. As protector, he had the power to remove and appoint trustees, to direct the sale of a particular asset, to veto

²⁸ *JSC Mezhdunarodniy Promyshlenniy Bank & Ors v Pugachev & Ors* [2017] EWHC 2426.

the distribution or vesting of trust property, to veto the removal of beneficiaries and to veto any variation of the trust deed or release or revocation of its powers. In that case the Court found that these powers were such that Mr Pugachev had not effectively alienated his beneficial ownership of the assets. It followed that there was no trust.

[55] A similar approach might well have been relied upon in the New Zealand case of *Clayton v Clayton*.²⁹ In the end the Courts in that case arrived at the same result by treating the husband-settlor's bundle of powers as relationship property which could then be divided with the wife under the Property (Relationships) Act 1976 (NZ). Counsel agreed that in this case the result would be the same whether approached in terms of trust invalidity or in terms of a bundle of powers treated as matrimonial property.

[56] Although cases such as *Pugachev* and *Clayton* illustrate the principle, we do not think it profitable to embark on a detailed comparison between this trust deed and the trust deeds in those cases. The ultimate question is whether the powers reserved to this respondent-settlor were inconsistent with an intention to irrevocably relinquish a beneficial interest. This requires careful interpretation of the particular deed in question. The matter is best tested by asking what would have occurred if the respondent had attempted to recover the property which he ostensibly settled on the trust. If a critical step in such an attempt would have required the assent of a truly independent person, or would have been subject to an enforceable fiduciary duty on his part, it could not be said that the purported settlement on the trust was ineffective. Conversely if, on an objective view of the deed, the respondent had retained for himself the uncontrolled power to recover the property it could not be said that he had divested himself of his beneficial ownership of the property. The latter situation might usefully be described as "objective nullity" to distinguish it from "sham". A sham turns on the subjective intent of the parties involved. But in the end what matters is whether there is no valid trust, by whatever route that conclusion might be reached.³⁰

The trust deed in this case

[57] For the Arorangi Trust deed we find cl 14.1(c) to be a useful starting point. It permits the Trustee (the respondent from the outset) to act as such, and to exercise his powers and

²⁹ *Clayton v Clayton* [2009] NZSC 29, [2016] 1 NZLR 551.

³⁰ For further discussion of nomenclature see *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [85] and *Clayton (SC)* above at [123].

discretions notwithstanding that in any matter his interests or duty might conflict with his duty to the Trust Fund or any Beneficiary.

[58] Mr McAnally submitted that in context, cl 14.1(c) should be confined to individual transactions of a commercial nature. We do not think that the plain words of the provision can be read down in that fashion. We are reinforced in that view by two considerations. One is cl 3.2(a) which provides that in cases of doubt the interpretation of the deed is to favour the broadening of the powers, and the restricting of the liabilities, of the Trustee. The other is that the reference to “discretions” as well as “powers” readily extends to discretions affecting distributions to beneficiaries as distinct from mere commercial transactions entered into on behalf of the trust as a whole. For all practical purposes the provision is a denial of the fiduciary duties which would otherwise apply where the Trustee wishes to exercise his powers and discretions in his own favour.³¹

[59] The second preliminary matter is that as the sole Trustee, the respondent could have immediately appointed himself as Consultant under cl 5.1 (as he in fact did). Mr McAnally submitted that he could not have validly done so in that it would be a nonsense to appoint himself in order to give advice to himself. However the giving of advice is by no means the only function of the Consultant. The Consultant was also given various powers with respect to investments (cl 4.1), removal and replacement of trustees (cl 6.2), consent to acceleration of final vesting (cl 9.1) and consent to variation of the trust deed (cl 18.1). Nor was there anything to stop the respondent from giving the advice function purpose by appointing himself Consultant and then appointing an additional Trustee (as he in fact did) or replacing himself as Trustee.

[60] That is the background against which we turn to some of the self-benefit avenues which would have been open to the respondent had he been so minded.

[61] The first is that in his capacity as the sole Trustee the respondent could have made a distribution of capital and/or income to himself under cl 1.1 of the General Terms and Conditions in the Schedule.³² The breach of fiduciary duty which that would otherwise entail is negated by cl 14.1(d).

³¹ For the significance attached to a similar provision in a trust deed see *Clayton* (SC) above at [56].

³² Also relied on in *Clayton* (SC) above at [56].

[62] The second is that in his capacity as the sole Trustee the respondent could have either resettled the trust under cl 12, or varied its terms under cl 18 (the latter with his consent as Consultant), in such a manner as to permit the vesting of all trust property upon himself alone.

[63] The third is that as the appointer identified in cl 10.1, the respondent could have nominated himself as the sole nominated beneficiary in substitution for the existing nominated beneficiaries. Mr McAnally submitted that he could not have done so given that to vest property in a trustee who is also the sole beneficiary collapses the trust. But that is the point of the inquiry. If the respondent had retained to 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.

[64] The final point is that even if he had resigned as Trustee, the respondent would have retained a high level of control in his capacity as Consultant. Some of the powers of the Consultant have already been mentioned. In addition the Consultant retained the important power to remove and replace Trustees (cl 6.2). The power conferred by cl 6.2 was to be exercised by the Consultant "at his absolute discretion and without giving reasons therefore". It was clearly non-fiduciary³³ and in practice represented an important means by which the respondent could have disposed of uncooperative trustees. It is unnecessary for us to assess the significance of that power if it had stood alone. It is one of those powers which might be regarded as an important component of a bundle of rights and powers as matrimonial property. But for present purposes it suffices to say that it adds to the picture of a settlor who has never intended to alienate his beneficial interest for the purpose of the law of trusts.

[65] We are satisfied that the two deeds of trust fail to record an effective alienation of the beneficial interest in the assets in question. The powers retained by the respondent meant that at any time he could have recovered, and still could recover, the property which he had purported to settle on the trusts. The trusts are therefore invalid.

Other grounds for invalidity

[66] Mr Hikaka challenged the validity of the trusts on other grounds. It is sufficient to say that on the factual findings of the Judge the trusts were not shams; and that while the

³³ See further *Pugachev*, above.

provision for absolute non-disclosure to beneficiaries (cl 19.1) may well have been ineffective it would not have invalidated the trusts as a whole.

[67] Given our conclusion that the trusts were invalid, the property which appeared to be that of the trusts was in fact the property of the respondent. It is not contended that in those circumstances it would be anything other than matrimonial property. Nor is there any dispute over the appellant's right to half the value of that property under ss 8 to 15 of the Matrimonial Property Act. The sole remaining dispute concerns the net value of that property.

D: NET VALUE OF THE MATRIMONIAL PROPERTY

[68] The appellant contends that the total value of the matrimonial property is \$8,092,111. This includes the matrimonial home at Arorangi which has a current agreed value of \$2,830,000. The respondent contends that the total value of the matrimonial property is about \$4 million.

[69] In valuing the matrimonial property three issues have particular significance:

- (a) The status of debt of \$3,335,464.73 allegedly owing to the Honk Land Trust.
- (b) The value of the respondent's shares in Solar 3000 Ltd.
- (c) The value of the respondent's interest in the Kuru Club.

Debt to Honk Land Trust

[70] The respondent seeks to deduct from the matrimonial property \$3,335,464.73 for a debt which he says he still owes to the Honk Land Trust. The appellant says that no such debt is owing.

[71] The debt had its origins in an arrangement the respondent had entered into with his partner, Mr Tauber. The arrangement was that the Arorangi Trust, effectively the respondent, would provide management services for their joint business. The entity nominated by Mr Tauber as the vehicle by which he would participate in the venture was the Honk Land Trust. In return for the respondent's management services, the Honk Land Trust was to pay the respondent a form of remuneration. In lieu of cash, the remuneration would take the form of a series of loans from the Honk Land Trust to the respondent. The respondent likened the loan

arrangement to the Macquarie bank model under which employees are advanced a series of loans in return for services provided. He expected that at some point there would be a distribution which would allow the loans to be repaid.

[72] The Commissioner of Inland Revenue and the Taxation Review Authority each concluded that the form in which the respondent was remunerated was nothing more than an income substitute made for the purpose of avoiding tax. Although conclusions for tax purposes have no direct application here, we can see no other sensible explanation for the arrangement. It does not appear to be disputed that the services were provided. One would expect that sooner or later the Honk Land Trust would have to pay for them. The fact that the advances were initially expressed as loans is immaterial if in the long run the respondent expected that "distributions" would be substituted for the "loans". That view is reinforced by the Honk Land Trust's subsequent failure to bring enforcement proceedings to recover the so-called loans.

[73] We conclude that there is no genuine debt owed to the Honk Land Trust. It does not qualify for deduction from the matrimonial property.

Respondent's shares in Solar 3000 Ltd

[74] It is not disputed that the respondent has shares in Solar 3000 Ltd and that they amount to matrimonial property. The appellant says they are worth \$3.3 million. The respondent says they are worth only \$30,544.

[75] In the absence of proper discovery from the respondent, the appellant based its valuation on a draft investor statement which put a projected value of \$10 million on the total share capital after launch of the business. We accept the appellant's contention that the respondent had 33 per cent the total share capital. On that basis the value of his interest would be \$3.333 million.

[76] Mr McAnally submitted that reliance on a draft statement for investors predicting that the share capital would prove to be worth \$10 million dollars was no basis on which to value shares. In the course of argument he appeared to accept that based on projected profits of \$5.8m over 20 years the total share value might well be \$600,000 of which \$180,000 could be attributed to the respondent's shares. Significantly, the respondent produced only the last

page of the final investor statement bearing his signature. The preceding pages of the final document are missing.

[77] We accept that the value assumed by the appellant is speculative and that there is insufficient evidence before the Court on which to carry out a conventional valuation. But the respondent has brought this on himself. Where the relevant documents and information were in his exclusive possession and control it is appropriate to draw adverse inferences against him.³⁴

[78] Doing the best we can on the sparse evidence before us, and bearing in mind the justification for an adverse inference, we adopt \$2 million as the value of the respondent's Solar shares.

Respondent's interest in Kuru Club

[79] It is not disputed that the respondent has an interest in an investment known as the Kuru Club. He embarked on this venture after the separation. The appellant contends that this is matrimonial property worth \$869,166.50. The respondent says that as the property was acquired after separation it does not qualify as matrimonial property at all.

[80] After-acquired assets are subject to a judicial discretion under s 9(4) of the Act. Under that provision it is generally appropriate to trace matrimonial property capital into after-acquired assets by making due allowance for spontaneous increases in the value of the matrimonial property capital, on the one hand, while also giving credit for gains derived from the owner-spouse's entrepreneurial skills and energy, on the other.

[81] In this case the respondent's evidence was that the Webb Family Trust invested about \$350,000 in the venture. Ms Dixon gave evidence that she had invested about \$360,000 and that the respondent had invested more than she did. Relying on Ms Dixon's evidence in preference to that of the respondent, Mr Hikaka speculated that the respondent must have invested at least \$460,000.

[82] Critically, however, Mr Hikaka assumed that the \$460,000 must have emanated from pre-separation matrimonial property. That was refuted by the respondent whose evidence was that the entire investment was made on borrowed funds. Notwithstanding the adverse

³⁴ *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [181] – [187].

inferences to be drawn against the respondent, we are not prepared to assume that any matrimonial property made its way into this particular investment. It will be omitted from the matrimonial property.

E: IMPLEMENTATION OF THE DIVISION

[83] In the normal course the Court would need to arrive at precise values for all relevant assets, to award each party half the total that resulted, to implement that division by allocating specific items of property to each party, and to require the party with the greater share of the allocated property make an equalisation payment to the other party.

[84] In the present case there is no necessity to go through that process on any detailed basis. Through Mr Hikaka, the appellant indicated to us that if sole ownership of the matrimonial home at Arorangi were allocated to her she would forego any claim against other assets in the respondent's possession. Nor did she seek any equalisation payment which might be due to her from the respondent.

[85] That approach is justified. It is common ground that the property sought by the appellant has a value of \$2.83 million. Without descending into further detail we are satisfied that this is less than half the total value of the matrimonial property. It follows that to award the matrimonial home to the appellant would not involve her receipt of more than her half share of the matrimonial property.

RESULT

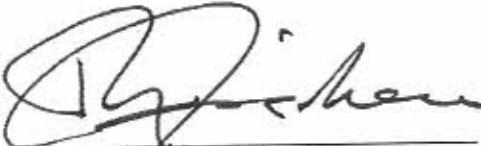
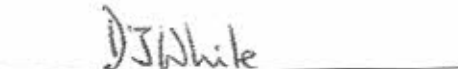

[86] The appeal is allowed. The leasehold interest in the matrimonial home at Arorangi is vested in the appellant. The remainder of the matrimonial property, other than those items reserved to the appellant in the High Court, will remain with the respondent.

[87] The respondent must make a reasonable contribution to the costs of the appellant in both Courts.

[88] Costs in the High Court are to be determined by that Court.

[89] The appellant is to file a memorandum as to costs in this Court. The respondent may file a memorandum in opposition with 10 working days of receipt of the appellant's

memorandum. The appellant will have 5 working days after receipt of any memorandum from the respondent in which to file a memorandum in reply.


Fisher JA
White JA
Grice JA

SCHEDULE SHOWING MATERIAL PROVISIONS FROM THE ARORANGI TRUST DEED

Deed made the 9th day of December 2005

I, **PAUL WEBB** ("the Settlor")

HEREBY SETTLE IN TRUST the sum of ten dollars (\$10.00) and such further monies and/or property (if any) as I may subsequently settle upon this Trust,

AND as the Settlor **I APPOINT** to act as the Trustee of this Trust, **PAUL WEBB** ("the Trustee") upon the terms of trust herein recorded, namely:

2. The Trust is established for the benefit of the following person or persons as Beneficiaries subject to the removal or subsequent replacement of such Beneficiaries in accordance with the provisions of this deed:

PAUL WEBB
SEBASTIAN PAUL WEBB

...

- 3.2 **Interpretation:** In this deed:

- (a) the interpretation of this deed in cases of doubt is to favour the broadening of the powers and the restricting of the liabilities of the Trustee;

...

5. **APPOINTMENT OF CONSULTANT TO TRUSTEE**

- 5.1 To assist the Trustee in the administration and management of the Trust, the Trustee may appoint by letter of appointment a Consultant ("the Consultant") who shall signify his acceptance of the appointment by signing at the foot of the said letter.

The Consultant (if any) shall be empowered to advise the Trustee upon all matters affecting the conduct of the Trust's investments, and upon such further matters as may be elsewhere specified in this deed provided that any such advice shall not be binding on the Trustee.

6. **RETIREMENT AND REMOVAL OF TRUSTEES**

- 6.1 In the event that the Trustee shall withdraw from service as Trustee, or shall die, or for any reason shall become incapacitated to so serve, then but not otherwise, the person to be appointed to replace the then trustee of the Trust shall be determined as the Trustee alone may direct, save and except that in the event of the Trustee's death or mental incapacity without having made a prior determination of a replacement trustee, but not otherwise, the direction for re-appointment of a trustee to the Trust shall be referred to me as Settlor.
- 6.2 Notwithstanding the provisions of subclause 6.1 of this deed, the Consultant (if any) shall have power during the Trust Period at his absolute discretion and without giving reasons therefore by notice in writing given to the Trustee to remove the Trustee and to appoint one or more other persons or companies (wherever resident) to be the replacement trustee or trustees.

...

9. TRUST PERIOD

9.1 The Trust is to continue for a maximum period of 21 years (the Trust Period), and shall be determined and the Trust Fund and all property of the Trust distributed to the nominated beneficiary or beneficiaries not later than upon the expiry of the Trust Period, or in the alternative shall be determined and distributed to the nominated Beneficiary or Beneficiaries at such earlier time as shall be specified upon the request to so determine and distribute made by both the Consultant (if any), and by the nominated Beneficiary or Beneficiaries.

10. NOMINATION AND REMOVAL OF BENEFICIARIES

10.1 The Beneficiaries named in Clause 2 of this deed and any subsequent Beneficiaries shall remain as the Beneficiaries until replaced by any Beneficiary nomination lodged by me with the Trustee. Any such Beneficiary nomination which is legally valid shall, immediately upon being lodged with the Trustee, replace the current Beneficiaries.

...
14. TRUSTEE'S CONFLICT OF INTEREST

14.1 Negation of Conflict

THE Trustee shall be entitled to act as such and to exercise all of the Trustee's powers and discretions notwithstanding that:

...

(c) the interests or duty of the Trustee in any particular matter may conflict with his duty to the Trust Fund or any Beneficiary;

...

18. TRUST DEED MAY BE VARIED

18.1 The Trustee may at any time or times during the Trust Period, with the prior written consent of the Consultant, and without infringing the rule against perpetuities, by deed vary all or any of the provisions of this deed provided that no variation will adversely affect the benefits which have vested in Beneficiaries shall be made.

19. NON DISCLOSURE

19.1 For the avoidance of doubt, it is hereby declared that no Beneficiary hereunder nor any third party shall have any claim, right or entitlement to call for accounts (whether audited or otherwise) from the Trustee in relation to the Trust Fund and the income thereof, or to obtain any information of any nature from the Trustee in relation to the Trust Fund and the income thereof or in relation to the trusts and powers hereof.

Schedule

The following General Terms and Conditions of the Trust shall apply to and govern the conduct of the Trust provided that in the event of any contradiction, or conflict, or other difficulty in interpretation, the provisions of clauses 1 to 20 inclusive of this deed shall take precedence and apply to the exclusion of any provision contained in the Schedule, or implied

or imposed by law, to the extent that the law shall permit me as Settlor and/or the Trustee to contract out of any such implication or imposition.

The General Terms and Conditions under which the Trust is to be conducted are as follows:

1. APPLICATION OF TRUST CAPITAL/INCOME

- 1.1 Until the date for distribution provided in this deed to pay apply or appropriate the whole or any portion of the capital or income of the Trust as the Trustee shall in its uncontrolled discretion think fit in discharge of such debts and obligations of the Trust fund or of the Trustee as may exist from time to time and for or towards the personal use support benefit maintenance education or advancement in life of such of the beneficiaries as may from time to time be living and of any one or more to the exclusion of the other or others as the Trustee in his sole uncontrolled discretion shall think proper without the Trustee being obliged to preserve the income generating potential of the Trust assets, nor to preserve the capital of the Trust.

...

[Signed by Paul Webb as Settlor]

[Signed by Paul Webb as Trustee]