

NOTE: PURSUANT TO S 169 OF THE FAMILY PROCEEDINGS ACT 1980 AND S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE [HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS](http://www.justice.govt.nz/courts/family-court/legislation/restrictions-on-publications).

IN THE SUPREME COURT OF NEW ZEALAND

**SC 23/2015
[2015] NZSC 84**

BETWEEN

MARK ARNOLD CLAYTON
First Applicant

MARK ARNOLD CLAYTON AS
TRUSTEE OF THE VAUGHAN ROAD
PROPERTY TRUST
Second Applicant

BRYAN WILLIAM CHESHIRE AND
MARK ARNOLD CLAYTON AS
TRUSTEES OF THE STACEY
CLAYTON EDUCATION TRUST AND
THE ANNA CLAYTON EDUCATION
TRUST
Third Applicant

MCGLOSKEY NOMINEES LIMITED
AS TRUSTEE OF THE DENARAU
RESORT TRUST
Fourth Applicant

DEBORAH JOAN VAUGHAN AS
TRUSTEE OF THE SOPHIA NO 7
TRUST
Fifth Applicant

CHELMSFORD HOLDINGS LIMITED
AS TRUSTEE OF THE CHELMSFORD
TRUST
Sixth Applicant

AND

MELANIE ANN CLAYTON
Respondent

BETWEEN

MELANIE ANN CLAYTON
Applicant

AND

MARK ARNOLD CLAYTON
First Respondent

MARK ARNOLD CLAYTON AND
BRYAN WILLIAM CHESHIRE AS
TRUSTEES OF THE CLAYMARK
TRUST
Second Respondent

CHELMSFORD HOLDINGS LIMITED
AS TRUSTEE OF THE CHELMSFORD
TRUST
Third Respondent

NEW ZEALAND TRUSTEE SERVICES
LIMITED AS TRUSTEE OF THE
LIGHTER QUAY 5B TRUST
Fourth Respondent

Court: Elias CJ, William Young and Arnold JJ

Counsel: M J McCartney QC for Mark Arnold Clayton
C R Carruthers QC for the Trustees
D A T Chambers QC for Melanie Ann Clayton

Judgment: 18 June 2015

JUDGMENT OF THE COURT

- A** **The applications for leave to appeal are granted in respect of the questions identified in B and C below (*Clayton v Clayton* [2015] NZCA 30). In all other respects, the applications for leave to appeal are dismissed.**
- B** **In relation to the Vaughan Road Property Trust (VRPT):**
- (i) Was the Court of Appeal correct to find that there is no distinction between a sham trust and what the Family Court and the High Court described as an illusory trust?**

(ii) Was the Court of Appeal correct to find that the VRPT was neither a sham trust nor what the Family Court and the High Court described as an illusory trust?

(iii) If so:

a. Was the bundle of rights and powers held by Mr and/or Mrs Clayton under the VRPT Trust Deed “property” for the purposes of the Property (Relationships) Act 1976 (PRA)?

b. Was the Court of Appeal correct to find that the power of appointment under clause 7.1 of the VRPT Trust Deed was “relationship property” for the purposes of the PRA?

c. If so, did the Court of Appeal err in its approach to the valuation of the power?

C In relation to the Claymark Trust, was the Court of appeal correct in its interpretation and application of:

(i) Section 44C of the PRA?

(ii) Section 182 of the Family Proceedings Act 1980?

REASONS

[1] The parties seek leave to appeal on various questions arising out of the Court of Appeal’s decision in *Clayton v Clayton*.¹ Leave is granted in respect of the questions identified above. These reasons deal with the matters on which leave is not granted.

[2] Mr Clayton and the other trustee of the Stacey Clayton Education Trust and the Anna Clayton Education Trust seek leave to appeal against the Court of Appeal’s application of s 44 of the Property (Relationships) Act 1976 to those trusts. Three grounds are identified – the findings (1) that there was a disposition; (2) that it was intended to defeat rights; and (3) that Mrs Clayton was entitled to half the net equity of the trusts.

¹ *Clayton v Clayton* [2015] NZCA 30.

[3] We do not consider that any of the three grounds raises an issue of general or public importance. Rather, they simply involve the application of the section to the particular facts. Given the Family Court, the High Court and the Court of Appeal reached essentially the same view as to the application of s 44, we see no possibility of a substantial miscarriage of justice. Accordingly, the trustees' application for leave to appeal is dismissed.

[4] Leave to appeal is also sought in respect of the application of s 44 to the post-separation trusts, namely the Denarau Resort Trust, the Sophia No 7 Trust and the Chelmsford Trust. Those applications are also dismissed as not raising any issue of general or public importance and involving no appearance of a substantial miscarriage of justice. In light of this conclusion, we need not consider Mrs Clayton's application for leave to appeal in respect of findings in relation to:

- (a) another post-separation trust, the Lighter Quay 5B Trust; and
- (b) advances from the Vaughan Road Property Trust to the Chelmsford Trust;

as that application was contingent on Mr Clayton's application in relation to the post-separation trusts succeeding.

[5] Mr Clayton (in his personal capacity) seeks leave to appeal against the valuation of his business interests. He submits that the Court of Appeal adopted the wrong approach to its appellate function by abdicating the assessment of value to expert accountants, that it overlooked certain factors relevant to the valuation and that it failed to ensure that the ultimate result was just to both parties.

[6] The experts on both sides agreed that the appropriate way of valuing the shares at issue was to determine their market value by reference to the capitalisation of earnings method. In the Court of Appeal, the argument focussed on the calculation of the EBITDA and the multiple, which had also been considered in detail in the Family and High Courts. Given the arguments foreshadowed in Mr Clayton's submissions, which go principally to the detailed calculation of the

valuation, we do not consider that any issue of general or public importance is raised. Nor do we consider that there is any risk of a substantial miscarriage of justice.² Accordingly, the application for leave to appeal against the valuation of the business interests is dismissed.

[7] We make no order for costs.

Solicitors:
Tompkins Wake, Hamilton for Mark Arnold Clayton
Quigg Partners, Wellington for the Trustees
Phillips Hosking, Rotorua for Melanie Ann Clayton

² For the sake of completeness, we acknowledge that Mr Clayton also raised the question whether the Court of Appeal was correct to accept that he had failed to provide relevant material, but we see no significance in this point either.