

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2014-404-294
[2014] NZHC 1450**

IN THE MATTER of the Property (Relationships) Act 1976

BETWEEN PHILLIP CLAUDE TARR
Appellant

AND MIRJANA MARIJA TARR
Respondent

Hearing: 17 June 2014

Appearances: G.L Harrison for the respondent
G M Sandelin for the respondent

Judgment: 26 June 2014

JUDGMENT OF THOMAS J

*This judgment was delivered by me on 26 June 2014 at 12.30 pm
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date:

Solicitors:

Anthony Frankovich, Auckland.
Minter Ellison Rudd Watts, Auckland.

[1] The appellant, Mr Tarr, has appealed against certain findings by Judge de Jong in the Family Court.¹ The respondent, Mrs Tarr, has cross-appealed.

Background

[2] Mr and Mrs Tarr were married on 31 March 1979. They have two children, a son born in August 1982 and a daughter born in June 1988.

[3] Mr and Mrs Tarr separated on 13 April 1993 when their son was 10 years old and their daughter was four years old. Mrs Tarr continued to live at 2/164 Kapa Road with the two children.

[4] During the course of the marriage Mr and Mrs Tarr purchased three relationship properties. The funding of the properties came from bank loans secured by a joint mortgage. The properties are:

- (a) 11-15 Kupe Road (September 1982);
- (b) 174 Kapa Road (in mid 1989); and
- (c) May 2/164 Kapa Road (in May 1997). This became the family home.

[5] Another property was purchased three years after the separation by a company called GEL.

[6] The parties' relationship property issues remained unresolved for 20 years after their separation. The delay in dealing with the property division made it very difficult for the parties to obtain all the relevant evidence, for example copies of bank statements, which would usually be available in cases of this nature. As the Judge noted in the introduction to his decision:

[2] The delay, and lack of evidence in some areas, has made this Court's task even more difficult than it might otherwise be. The parties simply ask this Court to do the best it can in the circumstances.

¹ *Tarr v Tarr* [2014] NZFC 8921.

[7] There are two parts to the appeal, the first being a challenge to the Family Court's factual findings regarding ownership of the shares in GEL. The second is a challenge to the Judge's exercise of discretion in making the award he did. This ground of appeal includes a challenge to a factual finding concerning cash received by Mrs Tarr as rental from the relationship properties. I will therefore consider this aspect of the appeal under the challenge to factual findings.

Family Court judgment

[8] In essence the Family Court Judge found:

- (a) Mrs Tarr's post separation contributions significantly outweighed those of Mr Tarr and she was entitled to compensation as a result;
- (b) Mrs Tarr took sole responsibility for the children and Mr Tarr had a very limited role in their lives;
- (c) Mr Tarr did not make any formal attempt to remedy the limited relationship he had with the children;
- (d) Mr Tarr did not pay child support for the first two years following separation and after that contributed at the minimum level;
- (e) Mrs Tarr took on the difficult role of managing the rental properties without Mr Tarr's support;
- (f) Mrs Tarr assumed this responsibility seriously by taking all reasonable steps to avoid mortgagee action and investing her own separate property to carry out repairs and maintenance when rent from the properties was insufficient;
- (g) Mr Tarr acted in an obstructive manner with regard to Mrs Tarr's management of at least one past tenant;
- (h) Mr Tarr benefited from loan advances from Mrs Tarr and Mrs Tarr received the benefit of a bank loan to buy the GEL property;
- (i) Mrs Tarr gained a benefit from using the family home and Mr Tarr was locked out of receiving his share of the family home until it was sold or otherwise disposed of;

[9] Balancing all factors the Court was satisfied on the balance of probabilities that it was just to make a compensatory award on the basis that Mrs Tarr was entitled

to receive \$151,000 without interest from the relationship property pool. Mr Tarr was therefore directed to pay Mrs Tarr \$75,000 from his half share.

First ground of appeal - factual issues in dispute

[10] I will first deal with the ground of appeal concerning the factual findings of the Judge.

Approach to general appeal

[11] On a general appeal, the appellate court has the responsibility of considering the merits of the case afresh.² In *Austin, Nichols & Co Inc v Stichting Lodestar*, Elias CJ stated that the appellate court must reach its own opinion “even where that opinion is an assessment of fact and degree and entails a value judgment”.³ She continued:⁴

If the appellate Court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

[12] This does not mean that the appellate Judge should be “uninfluenced” by the lower court.⁵ What influence the lower court’s reasoning should have is for the High Court’s assessment. As Elias CJ stated in *Austin, Nichols*:⁶

The High Court Judge was obliged to reconsider the issue. He was entitled to use the reasons of the Assistant Commissioner to assist him in reaching his own conclusion, but the weight he placed on them was a matter for him.

Appeals from the Family Court

[13] Under s 39 of the Property (Relationships) Act 1976 (PRA), s 75 of the District Courts Act 1947 applies to appeals from PRA decisions made in the Family Court. Section 75 provides that appeals are by way of rehearing.⁷

² *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [31].

³ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].

⁴ At [16].

⁵ *Kacem v Bashir*, above n 2, at [31].

⁶ *Austin, Nichols & Co Inc v Stichting Lodestar*, above n 3, at [17].

[14] The Court is not bound to accept the Family Court's findings of fact and can exercise any power or discretion available to the Family Court. In accordance with *Austin, Nichols*, the Court must exercise its own judgement but, where appropriate, the Court may give weight to the findings of the Family Court.⁸

[15] *K v V* concerned an appeal from a Family Court decision on relationship property.⁹ Collins J gave an overview of the legal principles applicable to reviewing a lower court's findings of fact.¹⁰ He stated:

[95] In *R v Munro* the Court of Appeal discussed the extent to which an appellate court should defer to findings of fact on credibility made by a Court at first instance. After discussing some of the difficulties in assessing credibility at first instance, the Court concluded that assessing credibility from a written transcript will not achieve better outcomes. Although credibility assessments are not sacrosanct, there are recognisable advantages in seeing and hearing witnesses in the context of the entire trial. This aspect of *Munro* was affirmed by the Supreme Court in *Owen v R* recognising the advantages that lower courts have in assessing the honesty and reliability of witnesses.

(footnotes omitted)

GEL shares

[16] This ground of appeal relates to the Family Court's findings that Mr Tarr's 50 per cent shareholding in GEL was held by him in trust for Mrs Tarr as separate property. In Mr Harrison's submission the evidence pointing towards that was equivocal and limited. The appellant asks the Court to consider all of the evidence and make its own determination on the basis that focused scrutiny by the Court would lead to a different finding.

[17] GEL was incorporated on 27 February 1996 just under three years after the separation. Mr and Mrs Tarr each subscribed for 500 shares in the company. The Bank of New Zealand would not advance funds for the purchase of a property to be

⁷ See also High Court Rules, r 20.18.

⁸ *K v V* [2012] NZHC 1129 at [37].

⁹ *Ibid.*

¹⁰ At [95]-[98].

rented to a bakery unless each party was a 50/50 shareholder and each signed a personal guarantee.

[18] In Mr Harrison's submission it is seriously in dispute as to whether the formation of GEL and the property purchase was a joint venture and whether Mr Tarr had a beneficial interest in the shares as opposed to a bare legal interest. He contended that the circumstances surrounding the signing of the share transfer did not lead to the conclusion reached in the Family Court.

[19] In Mr Harrison's submission the onus was on Mrs Tarr to show that GEL was separate property, despite it having been formed three years after separation. He said the fact of the venture taking place after separation showed that there was still a degree of *détente* between the parties. That Mr Tarr gave a personal guarantee in respect of the borrowing was evidence of his interest in the property.

[20] Although acknowledging that the Family Court made a general determination that Mrs Tarr was a more reliable witness in the case, Mr Harrison submitted that the Court must seriously question the veracity and reliability of Mrs Tarr's position on the topic of the GEL shares for the following reasons:

- (a) there was no evidence of a declaration of trust;
- (b) Mrs Tarr had worked in a legal office for two years before marrying Mr Tarr and as such should have reasonable knowledge of the importance of record keeping;
- (c) the fact that the alleged declaration of trust referred to in the signed share transfer was unable to be located raised serious questions as to whether it ever existed;
- (d) that someone in Mr Tarr's position would choose to sign a personal guarantee simply on the understanding he was assisting his wife from whom he had been separated for two years defies belief and common

sense. It makes perfect sense if, as Mr Tarr maintained, he was obtaining a legal and beneficial interest in GEL;

- (e) the failure of Mrs Tarr to correct her lawyer's letter as to whether the shares in GEL were relationship property further supports Mr Tarr's position.

[21] Mr Harrison invited the Court to take an analytical and robust approach to the matter. In his submission, the Judge failed to give sufficient weight to the absence of any declaration of trust. That, when coupled with the letter dated 11 April 2003 from the solicitor then acting for Mrs Tarr, put the question beyond doubt in Mr Harrison's submission. That letter was written on instructions from Mrs Tarr seeking to start a dialogue about the division of relationship property. Paragraph 5 of the letter states:

We understand that you jointly own some commercial property in Kapa Road although some of that property is owned through a private company in which you have an equal share holding.

[22] In Mr Harrison's submission, it is not credible that Mrs Tarr would not have corrected the impression created by that paragraph which is clearly that the jointly owned property included that owned by GEL.

[23] Mr Harrison pointed out that Mr Tarr had an explanation as to why he signed the share transfer, being that he was in a new relationship at the time and Mrs Tarr wanted to protect the property being purchased by GEL from any claim by Mr Tarr's new partner. He noted that Mr Tarr had always claimed that the shares were relationship property and that the letter from Mrs Tarr's then solicitor could not be interpreted in any other way.

[24] Mr Harrison said that there was no evidence to support an oral trust and that the transfer document clearly anticipated a written document.

[25] In Mr Sandelin's submission the Family Court was correct in finding that GEL was separate property, relying on the following:

- (a) Mr Tarr signed a shared transfer document transferring the shareholding to Mrs Tarr. The signature was witnessed by a lawyer;
- (b) Mr Tarr's argument that he signed the share transfer as some sort of contracting out document lacks credibility;
- (c) the Family Court Judge made credibility findings and preferred the evidence of Mrs Tarr for stated reasons. Mrs Tarr was considered to be a compelling and forthright witness with an eye for detail. In contrast, Mr Tarr was considered less focused on detail and had great difficulty remembering past events.
- (d) the uncontested evidence was that it was Mrs Tarr's idea to purchase the GEL property;
- (e) the letter from Mrs Tarr's solicitor was general in nature and did not support Mr Tarr's allegation to the extent claimed.

[26] In Mr Sandelin's submission there was evidence of an express trust with certainty of the intention to create the trust, certainty of the subject matter and certainty of the object intended to have the benefit of the trust.

Findings

[27] There is a direct conflict in the evidence which needs to be resolved.

[28] GEL was created three years after the parties had separated. Any property acquired by that company is therefore not automatically deemed relationship property.

[29] On 27 February 1996 GEL was incorporated. Lawyers acted for Mr and Mrs Tarr. One day later on 28 February Mr and Mrs Tarr signed a share transfer document transferring Mr Tarr's shareholding in GEL to Mrs Tarr. Mr and Mrs Tarr's signatures were witnessed by a lawyer. GEL rented the property to tenants who operated a bakery. Mr Tarr had no involvement in the company or the property.

[30] I have reviewed the evidence and make my assessment on the basis of that evidence. I also take into account that the Judge made detailed creditability findings to the effect that he found Mrs Tarr's evidence more reliable than that of Mr Tarr. I am guided by the Judge's assessment in this regard.

[31] There are two main points relied on by the appellant in connection with GEL. The first is that there was no declaration of trust. However, even though it is referred to in the share transfer, the declaration does not have to be a written document.

[32] The second point relied on is the letter from Mrs Tarr's then solicitor. I accept Mrs Tarr's evidence that she did not review the letter before it was sent. Furthermore the letter was written in the context of a preliminary approach to commence discussions about relationship property. The interpretation placed on paragraph 5 of the letter is not the only possible interpretation. Paragraph 5 is somewhat equivocal. It accurately records the position as to ownership of the properties. I agree with the appellant that there would be an assumption on reading paragraph 5 that property owned by GEL was relationship property. However, in the context of the circumstances in which the letter was written, there was no need for specificity.

[33] The weight of the evidence on this issue supports Mrs Tarr's claim. Mr Tarr's allegation that he signed the document as part of signing a number of other documents was shown in cross-examination to be incorrect when he could not identify what other documents those might have been. Mr Tarr alleged that the transfer document was blank when he signed it. However, the suggestion that a solicitor would have witnessed the parties' signatures to a blank document is not credible. I note that Mr Tarr conceded his memory about the transfer document was "hazy" and he originally claimed he did not sign the share transfer document at all but later accepted it was his signature.

[34] The fact that the share transfer was signed the day following the formation of the company strongly supports Mrs Tarr's version of the evidence. Furthermore, there was no logical explanation as to why Mrs Tarr would incorporate GEL if the parties intended to be joint owners of the property. They would simply have

purchased the property in their joint names in the same way as they did in respect of their other investment properties. Indeed the impression which the appellant has tried to create (that there was a certain *détente* between the parties) supports Mrs Tarr's version of events.

[35] For these reasons I agree with the Judge's findings on ownership of the GEL shares.

Income not accounted for

[36] While Mr Tarr accepts that Mrs Tarr filed GST returns for the relationship properties and at times had difficulties in producing income from them, he maintains that much of the income was received by Mrs Tarr in cash and not accounted for. He believes it could reasonably be inferred that at least \$250,000 in cash came into Mrs Tarr's hands in that way. Furthermore, he says a substantial percentage of the claimed sole spending in fact came from partnership property funds that she received following separation.

[37] The appellant placed significant emphasis on what he described as Mrs Tarr's obligation to honestly and transparently account for all the rental income she received following the separation on the basis there was no dispute she was the sole manager of the rental properties.

[38] Mr Harrison submitted that, when cross-examined in the Family Court, Mrs Tarr was unable to account for a great deal of cash she received from tenants of the properties. He said that, in contrast to the property owned by GEL, there were no automatic payments of rent and therefore much of the rental was paid in cash. Mr Harrison had put to Mrs Tarr the proposition that she had pocketed and had failed to account for a great deal of the cash. She did not accept that, maintaining she had accounted for all of the receipts.

[39] In Mr Sandelin's submission, there was no evidence before the Family Court to support Mr Tarr's allegation that Mrs Tarr did not account for cash payments from the tenants. Indeed the Family Court found that Mrs Tarr's bookkeeping and GST

returns appeared to support her position.¹¹ The evidence showed she accounted for rental income and there was on occasion insufficient money from the rental to cover outgoings. This required her to contribute her own funds to maintain the property. Mr Tarr did not provide any documentary evidence to support his assertion that Mrs Tarr retained cash rental payments for her personal use. He did not call any tenants to justify those claims.

Findings

[40] I am not satisfied that there is any substance to the claim that Mrs Tarr did not account for substantial amounts of cash received as rental for the investment properties. There is no evidence of that. It is mere assertion on the part of Mr Tarr. I have reviewed the notes of evidence and am satisfied that Mrs Tarr did not concede there was any cash unaccounted for. She was consistent in her evidence that the cash received was used to pay for outgoings on the properties.

Second ground of appeal - s 18B of the PRA

[41] Section 18B(2) of the PRA provides:

(2) If, during the relevant period, a spouse or partner (party A) has done anything that would have been a contribution to the marriage, civil union, or de facto relationship if the marriage, civil union, or de facto relationship had not ended, the court, if it considers it just, may for the purposes of compensating party A—

- (a) order the other spouse or partner (party B) to pay party A a sum of money;
- (b) order party B to transfer to party A any property, whether the property is relationship property or separate property.

[42] The relevant period is the date between separation and the hearing of the application under the PRA.

[43] Section 18(1) defines contribution as:

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

¹¹ *Tarr v Tarr*, above n 1, at [47].

- (a) the care of—
 - (i) any child of the marriage, civil union, or de facto relationship:
 - (ii) any aged or infirm relative or dependant of either spouse or partner:
 - (b) the management of the household and the performance of household duties:
 - (c) the provision of money, including the earning of income, for the purposes of the marriage, civil union, or de facto relationship:
 - (d) the acquisition or creation of relationship property, including the payment of money for those purposes:
 - (e) the payment of money to maintain or increase the value of—
 - (i) the relationship property or any part of that property; or
 - (ii) the separate property of the other spouse or partner or any part of that property:
 - (f) the performance of work or services in respect of—
 - (i) the relationship property or any part of that property; or
 - (ii) the separate property of the other spouse or partner or any part of that property:
 - (g) the forgoing of a higher standard of living than would otherwise have been available:
 - (h) the giving of assistance or support to the other spouse or partner (whether or not of a material kind), including the giving of assistance or support that—
 - (i) enables the other spouse or partner to acquire qualifications; or
 - (ii) aids the other spouse or partner in the carrying on of his or her occupation or business.
- (2) There is no presumption that a contribution of a monetary nature (whether under subsection (1)(c) or otherwise) is of greater value than a contribution of a non-monetary nature.

[44] Where a party has established a qualifying contribution in accordance with ss 18(1) and 18B(1), pursuant to s 18B(2) the Court has the discretion to award that party compensation if satisfied on the balance of probabilities that it is just to do so.

The Court is required to determine the overall global monetary and non-monetary contribution.¹² Non-monetary contributions are just as relevant as monetary contributions in assessing compensation under s18B. The courts have acknowledged that mathematically exact calculations cannot be achieved and that the evaluation of the relative contributions is likely a matter of general impression.¹³

Approach to appeal from discretion

[45] The fact that a case involves factual evaluation and value judgement does not itself mean the decision is discretionary. For example, in *Kacem v Bashir*, the decision of what was in the best interests of the children did not involve an appeal from a discretionary decision; it was a matter of assessment and judgement.¹⁴

[46] However, in this case the Judge's determination under s 18B regarding compensation for contributions after separation is discretion: if the Court considers it just, it "may" make certain orders.¹⁵

[47] On an appeal against the exercise of discretion, the criteria for a successful appeal are stricter than on a general appeal. The lower court must have:¹⁶

- (a) made an error of law or principle;
- (b) taken into account irrelevant considerations;
- (c) failed to take into account relevant considerations; or
- (d) made a plainly wrong decision.

Appellant's submissions

[48] The appellant accepted the Family Court's summary of principles applicable to the s 18B discretionary adjustment powers but submitted the way in which the

¹² *Williams v Williams* [1980] 1 NZLR 532 (CA).

¹³ *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR at [46].

¹⁴ *Kacem v Bashir*, above n 2, at [32].

¹⁵ Property (Relationships) Act 1976, s 18B(2).

¹⁶ *Kacem v Bashir*, above n 2, at [32] citing *May v May* (1982) 1 NZFLR 165 (CA) at 170 and *Blackstone v Blackstone* [2008] NZCA 312, (2008) PRNZ 40 at [8].

powers were applied was in error. Specifically, the order that Mr Tarr pay \$75,500 by way of post separation contributions was wrong in that it:

- (a) gave insufficient weight to Mrs Tarr’s post separation benefit from the relationship property, particularly her exclusive use and occupation of the family home;
- (b) took no account of the substantial cash received from tenants by Mrs Tarr which was not properly accounted for by her (considered at [40] above);
- (c) did not in general terms do justice to Mr Tarr.

[49] Counsel referred to *Lawrence v Baker*¹⁷ and Gilbert J’s summary at [38] of the approach under s 18B emphasising the obligation on the Court to achieve a “just division” of relationship property.

[50] In the appellant’s submission there was no doubt that each party contributed following the separation towards the care of children by foregoing a high standard of living.

[51] Mr Harrison referred to the High Court decision in *Monks v Monks* which noted that ss 18B and 18C were framed with the aim of ensuring that neither party should benefit, nor be prejudiced, as a result of post separation conduct of the other.¹⁸

[52] In the appellant’s case, while he benefited from being largely freed from post-separation management of the relationship properties and substantial responsibility for the day to day care of the children, he was prejudiced by a clearly limited taxable income and no use of the reasonably substantial property owned by the relationship for 20 years. This is balanced against Mrs Tarr’s benefit in uninterrupted use of the family home and access to substantial post separation income from the rental

¹⁷ *Lawrence v Baker* [2013] NZHC 2378.

¹⁸ *Monks v Monks* [2006] NZFLR 161 (HC).

properties. Her prejudice was responsibility for the children and managing the properties.

[53] Mr Harrison reminded the Court that the parties were apparently content for a long period with the way the properties were managed and the financial relationships. In that context, in his submission, the Family Court decision was not consistent with the need for the Court to do justice. He noted that there was no evidence Mr Tarr acquired either any substantial property or any substantial income.

[54] In Mr Harrison's submission, the Judge noted the fact of Mrs Tarr's occupation of the family home rent free but then it "dropped off the radar." Figures regarding the market rental for the property were not in dispute. Mr Harrison accepted Mr Tarr's obligation to provide a home for his children. On that basis he said the rental that should be attributed to Mrs Tarr's occupation was \$150 a week. That equates to \$187,200 over the period at issue. Mr Harrison emphasised that Mr Tarr had always raised the issue as a shield only and said that the claim for rental would subsume Mrs Tarr's other claims. Mr Harrison pointed out that claiming a weekly rental of \$150 was already a considerable discount from market rental.

[55] Mr Harrison acknowledged the degree of support given by Mr Tarr to Mrs Tarr post separation was modest. In his submission however, Mr Tarr behaved as a responsible parent by paying his assessed child support and allowing his family to remain in the family home, even though it deprived him of access to his capital tied up in it. He noted that Mr Tarr could have applied for a review of his child support payments pursuant to s 104 of the Child Support Act 1991 given Mrs Tarr's occupation of the family home. He made no such application.

[56] In Mr Harrison's submission the Judge lost sight of the potency of Mr Tarr's interest in the matrimonial property and considerable concession in allowing Mrs Tarr to remain there rent free for over 20 years, particularly during the six years or so after the youngest of the two children had turned 19. In his submission, the potentially substantial claim which could have been made by Mr Tarr was devalued by the Family Court.

Respondent's submissions

[57] Mrs Tarr cross-appeals against the finding pursuant to s 18B of the PRA that Mr Tarr is required to pay her \$75,500 without interest from his half of the relationship property by way of compensation for post-separation contributions. She contends that this sum is half the amount that she used from her separate property to improve and maintain the relationship properties post separation. Mrs Tarr seeks further compensation in addition to that awarded in the Family Court as follows:

- (a) \$60,000 in compensation for Mrs Tarr's sole care of the children since separation and for not receiving any other assistance from Mr Tarr (including not receiving child support from 1993-1995) and foregoing a high standard of living as a consequence;
- (b) \$61,477 in compensation for a management fee for Mrs Tarr in managing the rental of the relationship properties; and
- (c) \$12,122.52 in interest on the compensation of award of \$75,500 on the basis this money was effectively lent by Mrs Tarr to Mr Tarr for the purpose of making repairs and maintaining the relationship properties.

[58] Mr Sandelin referred to the Family Court's findings in respect of Mrs Tarr's post separation contributions. In light of that, he submitted that the award of \$75,500 to Mrs Tarr was not just. Mr Sandelin's main criticism was that it was not clear how the Judge came to exercise his discretion.

[59] It is evident that the Family Court took account of Mrs Tarr's use of the family home after the parties separated.¹⁹ However, as Mr Sandelin pointed out, the Court is not required to take a purely arithmetical approach but must generally assess the relative contributions of the parties. He referred to the words of the Family Court Judge in *Lawrence and Baker*, which were upheld by Gilbert J on appeal:²⁰

¹⁹ *Tarr v Tarr*, above n 1, at [49].

²⁰ *Lawrence v Baker*, above n 17, at [39]: Gilbert J saw "no error in that approach".

I decline to make an order for occupational rent. I consider the needs of the children to have a roof over their head and the husband's responsibility to ensure that that occurred extinguishes any right of claim to any adjustment for the wife's use of his capital in the home... If I ordered the wife to pay some form of occupational rent it would be a way of her effectively paying him for what he should have done as part of his responsibility. I consider her devotion to the children and providing for them emotionally and physically rules out any adjustment in the husband's favour.

[60] Adopting this reasoning, Mr Sandelin submitted that Mrs Tarr's sole care for the children negated any adjustment in Mr Tarr's favour. He did not accept that any claim for rental of the residential home would subsume Mrs Tarr's claims. He pointed out that Gilbert J's judgment related to a house of relative luxury whereas the family home in this case was a modest flat above shops. Any period over which Mrs Tarr should be asked to pay a market rent should be about six years given the youngest child turned 19 about six years ago.

[61] A set off of occupational rent would not recognise and address the fact that the Family Court found Mrs Tarr's contributions post separation to be of a nature and quality significantly outweighing those of Mr Tarr.

Management of the relationship property

[62] As well as having sole care of the children, Mrs Tarr also managed the relationship properties. Mr Tarr did not assist at all. Management included dealing with tenants, replacement tenants, paying insurance and rates and carrying out repairs and maintenance. In Mrs Tarr's evidence there were threats of mortgagee sales at various times and she had to cope with the stress and financial worry of that. Despite this, the bank debt on the relationship properties reduced from \$375,000 to \$136,000 as at 30 September 2013, a reduction of \$239,000 which came largely from rental income.

[63] Mr Tarr accepted that, had Mrs Tarr not managed the properties, then a property management company would have had to be employed charging fees at around 8.75 per cent of rental income per annum. Mr Sandelin conceded that the amount claimed in respect of that task, \$61,477, would need to be divided in half to reflect the fact that both parties would have had to pay a management fee if Mrs Tarr had not managed the properties.

[64] Not only did Mr Tarr take no interest or play any active role in the maintenance and management of the relationship properties, there was evidence that on occasion, Mr Tarr acted in a manner contrary to the best interests of the ownership of the relationship properties. The evidence was he encouraged tenants not to pay rent and was obstructive when Mrs Tarr attempted to obtain rental arrears from defaulting tenants. The result of this was that in October 2011 Mrs Tarr applied for and obtained orders in the Family Court that all management of the relationship properties vest in her.

[65] Mrs Tarr's evidence was that she was forced to use her own money obtained from employment, loans from family and inheritance to supplement the rental income to ensure all outgoings on the relationship properties were met. Income from the properties did not always cover the mortgage and other expenses. Mrs Tarr met the deficit from her own resources. Mrs Tarr's evidence was that she spent \$151,000 from her separate property on the outgoings, repairs and maintenance. This caused her hardship. Furthermore, Mrs Tarr's actions prevented a mortgagee sale.

[66] In the respondent's submission the Family Court findings of fact were not reflected in the compensation awarded. The Family Court recognised Mrs Tarr's monetary contribution only when it ordered reimbursement of a half share of the \$151,000 which she used from her separate property to maintain and repair the relationship properties. Interest was not awarded on that sum despite the fact that Mr Tarr effectively had the benefit of that money interest free once it was invested to improve the relationship properties and Mrs Tarr could not invest or use those funds for another purpose. The interest sought is at the prescribed rate under the Judicature Act 1908.

Care of the children

[67] Mrs Tarr has been the sole caregiver for the children since the date of separation. Mr Tarr does not dispute this.

[68] Mrs Tarr described Mr Tarr's role as being disinterested, rarely visiting the children and making arrangements then not fulfilling them. Mr Tarr admitted he could have done more, that the children did not stay with him regularly during the

school term, he did not attend parent teacher interviews, he attended three or four of the children's sports games during their 12 years of schooling and had the children to stay on one or two occasions only during the school holidays over a 15 year period.

[69] Mr Tarr did not pay child support for approximately two years after the date of separation. Mr Sandelin emphasised the enormous burden carried by Mrs Tarr for the two year period. When Mr Tarr did pay child support, it was at the minimum amount required. Mrs Tarr notes that this was despite him appearing to have an income justifying more child support, for example in 2004 he appeared to own a relatively profitable business. In 2004, a BNZ diary note referred to six months' actual figures and six months' projected figures indicating a profit of \$252,634 from that business. Mrs Tarr went on the domestic purposes benefit in mid 2005. Mrs Tarr did not make any application to have Mr Tarr's contribution reviewed. Mr Sandelin accepted that it was relevant to take into account that Mr Tarr had assisted in providing the family home given no rental was paid for it.

[70] Mr Tarr accepted in evidence that during this period he brought a boat worth \$35,000 and four motor vehicles.

[71] Mrs Tarr claims \$60,000 for her sole care of the children since separation, and cited a number of cases in support. In *Chong v Speller*²¹ the High Court upheld a payment of compensation in circumstances where the wife had sole responsibility for the children and the responsibility for the running and maintenance of relationship properties. She had given up a higher standard of living. In that case, the compensation was awarded despite the fact that the husband's contributions included payments of the bulk of the mortgage outgoings, the wife's free use of his interest in the family home and that she used of a substantial share of the rental income for her and the children's benefit.

[72] Counsel referred to *JAH v KAH* which concerned parties who had been separated for 32 years.²² The Court found the wife cared for the children with little non-monetary assistance from the husband. The value of the family home was

²¹ *Chong v Speller* [2005] NZFLR 400 (HC).

²² *JAH v KAH* FC Porirua FAM-2010-091-175, 1 June 2011.

approximately \$280,000 and the Court awarded compensation to the wife of \$40,000.

[73] Counsel also referred to *JA v SNA*.²³ The High Court upheld the Family Court's decision to award four years of post separation care of the child of the relationship at \$15,000. On the basis of that calculation, Mrs Tarr seeks \$60,000. This includes her performance of household duties and foregoing a higher standard of living than would otherwise been available.

[74] Mr Sandelin referred to the fact that the Family Court Judge found Mrs Tarr post-separation contribution "significantly outweighed" that of Mr Tarr. In his submission those are strong words which do not easily sit with the Judge's eventual decision which effectively only gave Mrs Tarr her money back.

[75] Mr Sandelin emphasised that the time period over which this significant contribution took place was over 20 years. Furthermore, in Mr Sandelin's submission, the fact that this case took six years from the date of filing to the current position was largely attributable to Mr Tarr.

[76] Mr Sandelin urged the Court to review the discretion, not as an arithmetical exercise, but by balancing the respective contributions of the parties.

Analysis

[77] I have considered the cases cited by counsel. Of course, each case is defendant upon its own facts. That an award may have been made in another case in broadly similar circumstances as to certain aspects does not mean the Judge made an error in his decision in this case.

[78] The Judge undertook a careful analysis of the evidence to reach his factual conclusions. He reminded himself of the relevant legal principles before considering the parties' submissions. He detailed his factual findings, recording all the issues referred to by counsel in this appeal. Then, taking all those factors into account, he

²³ *JA v SNA* [2008] NZFLR 297 (HC).

concluded that, on the balance of probabilities, it was just to make a compensatory award of \$151,000 from the relationship property pool to Mrs Tarr.

[79] Mrs Tarr had the benefit of residing in the family home rent free for 20 years. When that is balanced against the significant responsibilities undertaken by Mrs Tarr, an award in her favour is clearly justified. What that sum should be is a difficult decision. As the cases emphasise, it is not an arithmetical exercise. It involves taking account of matters readily quantifiable, such as the cost of managing the properties, and other considerations on which it is not easy to place a monetary value, such as prolonged periods of sole childcare.

[80] I can find no error of law in principle by the Judge, no taking account of irrelevant considerations or failure to take into account relevant considerations. I am not satisfied on the evidence before me that he made a plainly wrong decision. An award in Mrs Tarr's favour of \$151,000 from the relationship property in order to achieve justice between the parties was clearly available to the Judge.

[81] I decline to interfere with the Family Court Judge's discretion in respect of the s88B award.

Decision

[82] For the reasons given both the appeal and the cross appeal are dismissed.

[83] As requested by counsel I order that Mrs Tarr has the option, to be exercised within two months from the date of this decision, to acquire the relationship property from Mr Tarr. If that option is exercised, settlement is to take place one month from the date of exercise of the option.

[84] Both parties having been unsuccessful, my inclination is that costs lie where they fall. If there is any issue as to that which the parties are unable to resolve between them, the appellant is to file a memorandum within 28 days of this decision and the respondent is to do likewise 14 days thereafter.

Thomas J