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**IN THE FAMILY COURT
AT NORTH SHORE**

UNDER	"Property (Relationships) Act 1976"
BETWEEN	J G Applicant
AND	JB G Respondent
AND	JB G AND MF AS TRUSTEES OF THE J&J GRANT FAMILY TRUST Second Respondent

Hearing: 14, 15, 16, 17, 18 June 2010

Appearances: Mr M Vickerman for Applicant
Mr W Templeton with
Ms T Chubb for First Respondent
Mr A Gilchrist for Second Respondent

Judgment: 13 July 2010

RESERVED JUDGMENT OF JUDGE LJ RYAN
[Division of relationship proeprty; s 44 / s 44C; bundle of rights; valuation]

Background

[1] The parties commenced a relationship in 1983. There is a dispute as to when that relationship became a “de facto relationship” as defined in the Act. They had one child to their relationship who was born on 3 March 1985. Both parties had been previously married and both brought into this relationship interests and various assets when they commenced living together. The parties married on 17 November 1987 and they physically separated in June 2005. The family home in Cheltenham has been sold and the net sale proceeds divided equally between them. An interest they had in the company Dovine Olives Limited has been divided equally between them resulting from the sale of some real estate owned by that entity. There is a small sum of money (approximately \$60,000) remaining undistributed in a solicitors trust account.

[2] At around the time that the parties purchased their first home together at 1 Oxford Terrace Devonport, a property sharing agreement was drawn up. A copy of the agreement has formed part of the evidence and it appears that it was signed by the applicant (she confirmed that it was her signature on the document) and her signature was witnessed by what appears to be a solicitor. The first respondent also signed the document but his signature was not witnessed. There appear to be two different schedules that may or may not form part of that agreement.

[3] The J&J Grant Family Trust was settled on 17 February 1997 and apart from the former family home and the parties’ interests in Dovine Olives, all other property that existed at the date of the parties’ separation, is effectively owned by the trust. There are two notable exceptions. One is a property owned by the first respondent in College Hill. It forms part of what is called the AWB Sole Trader entity. The other is the yacht Freewind Spirit.

[4] The applicant is asking for various orders the effect of which will be to disestablish the trust structures. She relies on a number of remedies provided in the Act. Specifically she relies on s 44 or s 44C in relation to most if not all of the trust

entities. In the alternative, she asks me to look at all the various entities in which the trust has an interest and asserts that as the trust is controlled by the first respondent I should regard the first respondent as having a bundle of rights attached to the trust entities which can be valued for the purpose of a division of relationship property. Apart from the proceeds of the sale of a property owned by first respondent in Australia she says that any other assets not comprised in the trust entities, are relationship property.

[5] The first respondent says that the trust entities were all seeded from his separate property. He says that there is no remedy therefore available to the applicant utilising either s 44 or s 44C. He says that the real value of the trust entities is quite small and should be regarded as his separate property hence not amenable to being described as a bundle of rights that should form part of the relationship property pool. He also says that the entity known as AWB sole trader is his separate property.

[6] Although in the pleadings it appears that the applicant was seeking compensation under s 15 for economic disparity, that was not pursued during the hearing and no submissions were directed to me in relation to that argument. This leads me to conclude that the applicant does not rely on s 15. Very late in the stage, during a pre-trial telephone conference, Mr Vickerman indicated that he would be pursuing a remedy under s 182 Family Proceedings Act. However at the conclusion of the hearing, he indicated that as the applicant had not been able to obtain an order dissolving the marriage the application under s 182 should be adjourned to await the outcome of this judgment.

Issues

- a) The extent and nature of the relationship property pool.
- b) The trust and its associated entities.
- c) Section 44, s 44C and bundle of rights arguments.

- d) Section 18B – post separation compensation as a result of the first respondent continuing to occupy the family home post-separation.

Burden of Proof

[7] In this proceeding I have not imposed a burden of proof on the First Respondent to establish the separate property nature of any of his interests nor have I imposed any evidential burden on the Applicant to establish the grounds advanced by her. I do so relying upon the authority of *M v B*¹. Here the Court of Appeal said:

The Act is about property rights and entitlements. The Act, and the regulations which have been promulgated pursuant to it, make it clear that, although there is not a fully inquisitorial system, a Court needs only to be satisfied about a state of events which has existed or which exists. Notions of onus of proof fit uncomfortably within this legislative regime.

[8] The Court went on to say that a party may need to provide an evidential basis for the Court to conclude that a certain state of affairs exists. That is different from placing some sort of onus of proof upon that person. The following quotation is of interest:

It is not a situation (such as in a conventional civil proceeding) where an absence of evidence means that an asserting party can be denied relief because there is uncertainty. Such an approach would be contrary to the scheme and legislative framework. . . . The legislative framework requires that the Judge be satisfied of a particular state of affairs based on all the evidence before the Court. . . . Onus will seldom be a relevant consideration.

The relationship property pool.

[9] By the time the parties separated the applicant had purchased in her name a mixed residential/commercial property in Lake Road, Takapuna which is the property in which she currently lives. She also runs from those premises her travel agency known as A Walker's World (AWW). AWW had originally been part of the business operation of Ready Mark Limited, one of the trust entities. The first

¹ [2006] NZFLR 641

respondent accepts that the purchase of the Lake Road property was more likely than not funded from the applicant's separate property. He claims that AWW is relationship property which is not disputed by the applicant.

[10] The first respondent continued to reside in the former family home in Cheltenham until it was sold in April of this year for \$4.5 million. Each party received approximately \$2.2 million from the sale proceeds. Both parties jointly owned shares in a ski lodge in Ohakune. As a result of advances and debts flowing between the various trust entities and the first respondent, the financial statements that form part of the evidence record various assets and liabilities that may or may not be relationship property or relationship liabilities. A summary of these transactions can be found at paragraph [35] below.

[11] It is well settled law that assets owned by a trust fall outside of the umbrella of the Property (Relationships) Act. Those assets can only be accounted for by using s 44 and s44C or by regarding the first respondent's interest in and control of the trust as being a "bundle of rights" to which a value can be attached for relationship property purposes.

[12] It is the applicant's case that the first respondent's interest in AWB sole trader and the yacht Freewind Spirit form part of the relationship property pool. It is agreed that the balance remaining to be distributed between the parties from the sale of the Dovine Olive assets is relationship property and should be divided equally perhaps subject to some adjustment for tax as I understand it.

Freewind Spirit

[13] This yacht is a charter yacht and it is apparent from the evidence that it was built for that purpose. In fact the first respondent ran it as a business although that business never made a profit. It is the first respondent's case that the yacht is not a family chattel because the cost of building it was sourced entirely from his separate property, namely, the proceeds of sale of previous boats that originated from assets owned before the commencement of the parties' relationship, and in part from the proceeds of the sale of a construction company, Embassy Construction Limited,

which he says was also an interest acquired by him prior to meeting the applicant. In addition he says that it is a personal asset as he has always been passionate about sailing. Sailing was never the applicant's passion and therefore the yacht should be regarded as his personal and therefore separate property.

[14] It is very difficult to actually trace the source of funds for the construction of this yacht in any precise way. There is no doubt that in part it was funded by some of the sale proceeds of Embassy Construction Company Limited and in part from the proceeds of the sale of the yacht previously owned by the first respondent. It is not possible on the state of the evidence to say that the entire construction was funded from separate property. I cannot be satisfied, on the balance of probability, that the entire source of funds for the construction of the yacht was derived from the first respondent's separate property

[15] Although the first respondent takes issue with some of the applicant's assertions relating to the use of the yacht, I am satisfied that apart from its use as a charter yacht, this couple and their son used the boat for recreational and family purposes. Whether or not invoices were rendered from the charter business is in my view of no consequence. It is clear that the first respondent gained a great deal of pleasure from sailing and I totally accept that this was his passion and continues to be so. I am satisfied that by running Freewind Spirit as a charter yacht this enabled the first respondent to receive GST refunds in relation to its construction and tax benefits for the losses accumulated in the charter business from year to year. In truth, and I find accordingly, this yacht was not used "wholly or principally for business purposes" as referred to in the definition of family chattels in s 2 of the Act, but rather it was a boat used principally for family purposes but with tax benefits accruing. I do not understand what Mr Templeton meant by submitting that the boat was neither a business asset nor a family chattel but a personal asset of the first respondent. There is no such category of asset in the Act. The yacht is a family chattel.

[16] Section 8(1)(b) provides that family chattels, whenever acquired, are relationship property therefore whether or not the entire cost of construction came

from the first respondent's separate property is irrelevant. I find for these reasons that the yacht is relationship property.

[17] The yacht has been valued as at July 2009. The expert witness who had valued the yacht estimated its current value at between \$180,000 and \$210,000. I agree with Mr Vickerman's submission that there is no evidence that suggests the boat is to be sold. It is going to be retained by the first respondent therefore it is not appropriate to deduct notional GST, taxation and a depreciation figure². However I reject Mr Vickerman's argument that the yacht should be valued as at the date of separation. First the valuer was unable to assess a separation date value and was only forced to do some guess work under cross-examination. More importantly however this yacht is not like a motor vehicle which is used day in and day out and thereby depreciates rapidly. The devaluing of this yacht is occurring due to its age and due to the very nature of the asset which depreciates much more rapidly than some other types. It is clear from the valuer's evidence that something in excess of \$100,000 needs to be spent on the yacht to get it back up to a good standard. It is currently out of Safe Ship Management which means that it cannot be used for charter purposes. There is no reason to depart from s 2G which tells the Court to value assets as at date of hearing. I decline to exercise my discretion to value it at any other date. I fix the value of Freewind Spirit at \$195,000 being a mid-point between the two estimates given by the valuer.

The Marinas

[18] The Applicant claims a share in the marina berths. One or two marina berths were owned by the First Respondent prior to the relationship commencing. The current marina where Freewind Spirit is moored is not one of the two originally owned by the First Respondent. His evidence at page 155 of the notes of evidence is that the marina is leased. There is no evidence of ownership. In the circumstances I am not satisfied on the balance of probability that any of the marina berths are relationship property.

² *Paige v Paige* (1982) 5MPC 114.

AWB Sole Trader

[19] Apart from a series of transactions involving trust entities the only real asset owned by the first respondent trading as AWB Sole Trader, is the property at 89 College Hill Ponsonby. This was transferred to him on 21 April 1984 from his late mother. She had purchased it in 1982 for \$105,000. There is no documentary evidence that establishes any consideration flowing from the first respondent to his late mother. The first respondent was cross-examined at some length as to how that property came to be transferred into his name. His recollection was not clear but an examination of the Notes of Evidence show that it is more likely than not that this property was gifted to the first respondent. The thrust of his evidence was that it was transferred to him. She had bought it for him in the first place to give him a “kick start”. Putting to one side the question of whether the parties were in a de facto relationship as at April 1984, on the face of it the first respondent acquired this property from his mother by way of gift. Applying s 10(1)(a)(iii) and s 10(2), College Hill is not relationship property unless the property has been:

So intermingled with other relationship property that it is unreasonable or impracticable to regard that propertyas separate property.

[20] The applicant argues that College Hill is relationship property for two reasons. The first is that she said it was renovated extensively during the relationship. The second is that it was used as collateral security for a mortgage which was raised to buy another property at 199 Mount Eden Road.

[21] I am not aware of any authority for the proposition that if separate property is used as security for a loan it loses its separate property status. In so far as the extensive renovations are concerned I am satisfied that indeed the property was the subject of building work which was undertaken by the company Embassy Construction Limited. Embassy Construction Limited was a company in which the first respondent had a 40% interest together with his father at the time the parties met and their relationship commenced. It was subsequently sold in 1988. At the time the renovations to the College Hill property were undertaken Embassy Construction

Limited was entirely, to the extent at least of the first respondent's interest in it, his separate property. There is no evidence of any payment being made by the first respondent or the applicant for that matter to Embassy Construction for the renovations to the College Hill property.

[22] In the absence of any clear evidence of the application of relationship property towards the renovations on College Hill, that asset must retain its separate property status. I rule therefore that it does not form part of the relationship property pool.

Mrs Shirley Grant's Evidence

[23] Mr Vickerman argues that I should not take into account the evidence of the late Shirley Grant. He submits that because of Rule 169, Family Court Rules, as he gave notice for cross-examination of the late Mrs Grant and she was not produced, the affidavit cannot be used in evidence without the leave of the Court and he urges me not to grant that leave. He submits that where it is known that a witness is unlikely to be available for the trial his or her deposition may be taken in advance and the failure to do that militates against later receipt of the affidavit.

[24] It appears that the late Mrs Grant was ill for some period of time before her death. The evidence does not go far enough for me to be able to assess the seriousness of her illness and hence her availability to give evidence by way of deposition.

[25] I am going to grant leave for the First Respondent to use her evidence pursuant to Rule 169 and the reason for my doing so is that I do not accept that her evidence is as critical as Mr Vickerman makes it out to be. It simply corroborates the First Respondent's evidence in relation to College Hill and in particular it confirms that there was no consideration paid by the First Respondent for the transfer of that property into his name. Given that the financial records do not disclose any consideration being paid, to a certain extent the late Mrs Grant's evidence is unnecessary. What it does do however is give me some comfort about reaching the conclusion that I do that College Hill is the First Respondent's separate property. I

add that insofar as AWB Sole Trader is concerned, all of the other transactions recorded in the various financial statements form part of the First Respondent's package of rights in the trust entities. My intention is purely to exclude the value of College Hill given my finding that it is the First Respondent's separate property.

Date of valuation

[26] I have decided that the date to value the assets and liabilities in this relationship is to be the date of hearing. My reasons are these: Unlike the situation the Court of Appeal faced in *X v X* [economic disparity]³, when they separated these parties did not control broadly equal property assets at separation. As Robertson J said at paragraph [33] of the judgment:

If the Judge's s 2G order is intended to apply only to assets controlled by each spouse, it is obviously important that the value of the property received by each is about the same.

[27] Remembering that the policy of the Act is to effect a fair and just division of relationship property upon the ending of a relationship, post-separation events have had a very real impact on the nature and extent of the relationship property pool. To disregard post-separation events gives artificiality to the process with the potential to create a serious injustice to one or both of the parties. It is not possible to say as the Court of Appeal did in *X v X* that it is:

Fair and just that the bulk of the relationship property be valued as at the date of separation. Any alternative valuation date is just too difficult and now impractical.⁴

To carry out a hypothetical exercise by valuing the various assets as at separation date, creates difficulties and impracticalities that militate against adopting such an approach.

[28] Section 2G(1) of course provides that the date to value property is to be the date of hearing. The section provides for the Court to exercise a discretion in valuing a property as at another date.

³ [2009] NZFLR 985

⁴ Paragraph [25]

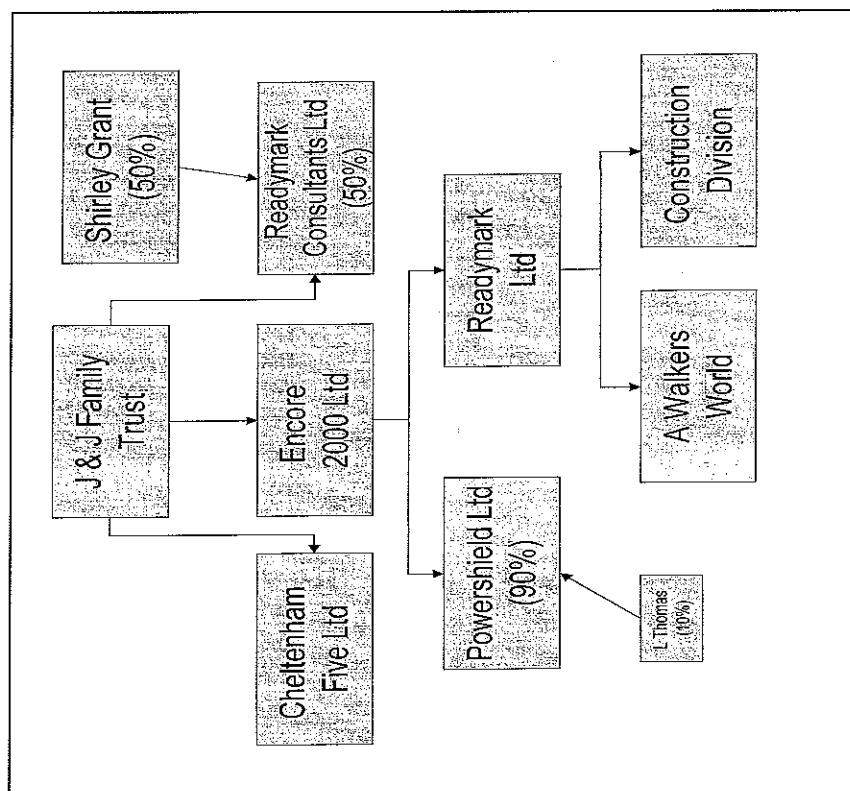
[29] As the Court of Appeal noted in *Walker v Walker*⁵:

Since 1976, the presumption under the Act has been for valuation at date of hearing. The presumption was strengthened following the passage of the Property (Relationships) Amendment Act 2001, which introduced sections 18B and 18C. These new sections have conferred on Courts new powers to grant compensation where contributions have been made after separation or where a party has, since separation, deliberately diminished the value of relationship property.

[30] There is no cogent reason why I should adopt a separation date valuation given the clear guidance provided by the Court of Appeal.

The J&J Grant Family Trust and its entities

[31] Mr Templeton in his closing submissions attached what he referred to as a wiring diagram. I reproduce it below because it sets out in summary form the interconnections between the various, what I refer to as, trust entities.



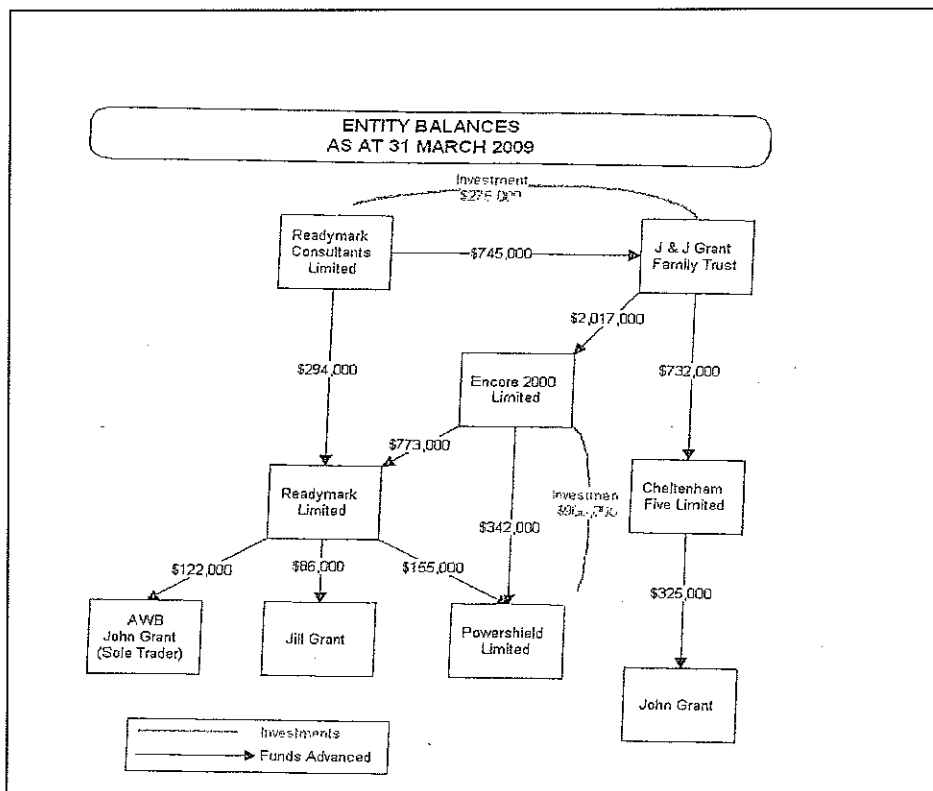
⁵ [2007] NZFLR 772, paragraph [42].

[32] There is an array of inter-entity advance accounts through which cash has been transferred as needs be over an extended period of time. These have been most recently summarised in statements of financial position completed as at 31 March 2009. These transactions have been variously referred to as a “money-go-round” and “glorious conglomeration”.

[33] For reasons that I will elaborate on later, I have decided that the most sensible and practical way of identifying the extent nature and value of the trust entities is to undertake the exercise Mr McLoughlin adopted when he revised his estimates of value in his affidavit of 21 August 2009.

[34] What he did was to eliminate intercompany accounts which he said, and I accept from the evidence, entirely offset each other to produce a nil balance for Readymark Limited, Readymark Consultants Limited, Encore 2000 Limited, Cheltenham Five Limited and the J&J Grant Family Trust. He relegated other entity advance account balances to a secondary level of consideration. That exercise, I agree, simplifies the position as reflected in the annual financial statements. He then removed from consideration a number of entities on the basis that they were either non-trading, dormant or of no value.

[35] Mr McLoughlin also did what Mr Templeton called a wiring diagram and this is set out in his affidavit at paragraph [42]. That is reproduced below:



[36] I accept Mr McLoughlin's evidence that the effect of the movement of funds from one entity to the other when all offset "*largely produce*" a "*zero sum game*". He says, and again I have no reason not to accept this, that the net aggregate result is a negative balance of something like \$35,000.

[37] He identifies in exhibit C to the same affidavit net realisable commercial assets and reaches the view that their total value is \$144,106.00. These are summarised as follows:

a)	Bank and cash	\$ 45,130.00
b)	Trade and sundry receivables	\$ 161,748.00
c)	Fixed assets	\$ 102,847.00
d)	Land and Building (12 Target Court)	\$1,600,000.00

From this he has deducted associated debt:

e)	Trade and sundries payable	\$ 274,585.00
f)	Mortgage advances (12 Target Court)	\$1,500,000.00

[38] This summary excludes the company Powershield which I will discuss separately.

[39] In paragraph [46] of his affidavit Mr McLoughlin identified that when reaching the negative sum of \$35,000 several balances were included which are associated with the parties themselves, and he summarises these in that paragraph. When these separate balances are taken into account there is a net amount owed from various family members, that is Mr Grant himself, a new trust formed by Mr Grant called the John Grant Family Trust, and the applicant. He concludes, and I do not disagree with him, that the sum of money due from those various persons and the

John Grant Trust are unlikely to be settled and he considers that they should be excluded from the assessment of value.

[40] For reasons that I will explain later I find Mr McLoughlin's approach to be practical, sensible, realistic and understandable. His reasoning is professional and logical. He drills down to the essentials and accordingly I find that the trust commercial assets have a net realisable value of \$144,000 excluding the Powershield business.

Powershield

[41] The issue of the value of this company has a direct impact on the value of the bundle of rights the Respondent enjoys in relation to the trust entities. Essentially the dispute comes down to whether I accept Mr Hatten's valuation, he was a chartered accountant engaged by the Applicant, or whether I accept Mr McLoughlin's evidence, he being engaged by the First Respondent. Their valuations are worlds apart. Mr Hatten values Powershield's business at \$5m. His methodology is described as "best guess". Mr McLoughlin values Powershield's business at \$225,000 relying on the management accounts year ending 31 March 2009 using an earnings based methodology. Least it be assumed that I have overlooked that two other valuers estimated a nil value for Powershield, I record that I find Mr McLoughlin's approach to be the more acceptable. Mr Leaning is not as experienced as Mr McLoughlin in valuation methodology and, more importantly, he cannot be regarded as being independent of the first respondent. He prepares financial accounts for a number of the first respondent's businesses. Mr Bathgate was quite inexperienced in the valuation of business entities and he displayed, during cross-examination, a flawed approach to the valuation of AWW. In particular he had failed to ascertain what a likely salary could be expected for a manager of a travel agency such as AWW and thereby did not recognise that a willing but not anxious purchaser would want a better return on any capital investment in the business, than one that simply reflected a relatively poor salary for the position. This was a fundamental error in my judgment and as a result I do not rely on his opinion of the value of either AWW or Powershield.

[42] I regret to say that I find Mr Hatten's approach to the valuation of this company unsustainable, speculative, argumentative and unprofessional. I have never, in over 14 years on the Family Court Bench, had a chartered accountant give evidence to try and persuade me to accept a "best guess" approach to the valuation of a business. This especially in the light of a company that is making a trading loss which appears to be likely to be a continuing state of affairs for some time yet. The only reason that the company has been able to turn a profit has been from foreign exchange gains. Certainly it has not done so from its trading. By its very nature, foreign exchange hedging is speculative and therefore unreliable.

[43] This company is in its early days of developing and marketing a product that enables the monitoring of battery levels in various static locations both directly and remotely. It has in the past received funding from the New Zealand Government for research and development. I am satisfied on the balance of probability that this funding has come to an end and there appears to be no other source of funding from the government readily available. I agree with Mr McLoughlin's observation that the company is undercapitalised and the only way it is going to progress is probably to find someone who is prepared to take on a venture capital investment.

[44] Mr Vickerman argues powerfully in support of the proposition that given the amount of energy, time, effort and money the First Respondent has injected into Powershield, it must have a value and that value is reflected in its product.

[45] Mr McLoughlin as opposed to Mr Hatten has attempted to value that product and in my view he has struck the right balance in fixing the figure he has.

[46] I regret to say that Mr Hatten loses all credibility with me because of his dogged adherence to his "best guess" methodology. It is also notable that notwithstanding having been given the opportunity to rectify double-counting that occurred in his first report, he failed to do so until the day of the hearing. I was unimpressed with Mr Hatten's evidence and I have to say as a result that I prefer Mr McLoughlin's approach, not only to the valuation of Powershield but also to his

approach as to how best assess the value of the First Respondent's bundle of rights in the trust entities.

[47] The correct approach to take to the valuation of Powershield is to be found in paragraph 28 of Mr McLoughlin's affidavit of 21 August 2009. As he says, Powershield struggles to establish itself. It is entirely reliant on shareholder capital to fund accumulated losses that exceed \$1m. It requires significant business development funding and I accept unreservedly his opinion that in this situation the company could not justify an earnings before interest and tax multiple of more than three times. Having regard to the four year forecast set out in exhibit 2 to his affidavit, the company's earnings before interest and tax average a little over \$77,000 per annum upon which basis he opines that a willing but not anxious purchaser would thus pay no more than approximately \$225,000 ($\$77,500 \times 3$) for the business. He concludes that it is unlikely that the present shareholders would sell the business at this price given the company continues to owe its shareholder (Encore 2000 Limited) in excess of \$340,000 and all other lenders \$867,000.

[48] There is also another factor that influences my approach to assessing the value of this company for the purpose of these proceedings. There is something inherently unfair about speculating about the future value of this company should it make the breakthrough in the market that it needs. Such breakthrough can only arise after a significant injection of capital into the business. Even then there will be no guarantees. I am satisfied there will be a considerable effort required to market this company's product overseas. It has serious competition in North America and as I understand it, in Europe. I can see no valid reason why the Applicant should share in the potential value of Powershield at this early stage of its development. She will not be sharing any of the burden surrounding the risks associated with this company's future development. She will not be putting further funds into the company. She will not be bolstering it up, in fact she will have nothing to do with the company. I can see no justification whatsoever, even if there was a professional basis for Mr Hatten's best guess calculation, to attribute any greater value to the Powershield business than that given to it by Mr McLoughlin.

[49] For the purpose of this exercise I fix the value of Powershield business at \$225,000.

Net realisable value

[50] I recognise that taking Mr McLoughlin's approach there has been a reduction in the net residual value of the, what Mr McLoughlin calls, "real" assets since his first valuation contained in his affidavit sworn 31 October 2008. There has been a reduction from a little over \$2m down to \$300,000.

[51] It is important to have regard to why that reduction has occurred in order to justify taking a hearing date valuation. When I say hearing date I mean the nearest date to which accounts have been made available namely 31 March 2009.

[52] As an aside Mr Vickerman criticises any approach that relies on a date other than hearing date or separation date, but I observe that the Court of Appeal in *Walker(supra)* used the date at which the various financial statements had been prepared as the appropriate valuation date even though that date did not actually reflect the hearing date. I take the same approach.

[53] The reduction in value is attributable to these factors:

- A reduction of \$275,000 in the valuation of the Powershield business.
- A reduction in the value of Readymark Consultants Limited from \$85,000 to nil. I accept Mr McLoughlin's evidence that the preferable method of valuation is a maintainable earnings approach. Readymark Consultants Limited has had declining and fluctuating levels of profitability. Based on Mr McLoughlin's review of the MYOB management accounts to the year ending 31 March 2009 it is apparent that there has been a dramatic decline in this company's level of

trading activity to the stage where its net reported profit for the year ending 31 March 2009 was approximately \$3,000. Instructions have been given by the directors to the company's accountant to voluntarily wind up the company. Readymark Consultants Limited has no "real assets".

- Mr McLoughlin's first valuation estimated some \$500,000 able to be recovered from the J & J Grant Family Trust which in turn would receive that sum from Encore 2000 Limited. Encore 2000 Limited's ability to repay the J & J Grant Family Trust this sum of money was entirely dependent on its ability to recover the advance it had made to Readymark Limited and in turn Readymark Limited's ability to repay the debt was dependent upon it realising reported work in progress of \$773,000 odd. Since Mr McLoughlin's first valuation the work in progress was unable to be realised in cash and it was in part carried through to other entities. There is now a little over \$600,000 owed for work in progress and it is readily apparent that it is unlikely this will be recovered. As a result Mr McLoughlin concluded at paragraph 56 of his second affidavit that the underlying net worth which supported, in his first valuation, the possible recovery of the \$500,000 is no longer a reasonable prospect.
- It was also anticipated by Mr McLoughlin in his first valuation that the J & J Grant Family Trust could have expected to recover almost \$1m of its advance to Cheltenham Five. He did explain that this was conditional upon that company's recovery being sustainable given the value of the land and buildings at 12 Target Court, even taking into account the debt secured against the property. The situation has changed somewhat as there has been a slight decline in the value of the Target Court property but of more significance is the increase in the mortgage debt over that property. The mortgage debt of \$995,000 was refinanced with an additional \$505,000 which sum of money has been used to fund in part the various associated entities and to make

an advance to the First Respondent of \$325,000. The result of this is that Cheltenham Five Limited's net equity has reduced significantly. He therefore concludes that the advance of \$731,712 made by the J & J Grant Family Trust as at 31 March 2009 cannot be recovered in full. I accept this analysis.

- I did give consideration to increasing the net residual value of \$300,000 referred to by Mr McLoughlin by the amount of the advance of \$325,348 to the First Respondent to recognise that he received some benefit from the increased borrowings over 12 Target Court. However a perusal of exhibit 3 to Mr McLoughlin's affidavit which sets out the external net assets and related party balances as at 31 March 2009, shows this advance has already been taken into account. It would be wrong to double-count it.

The Property Sharing Agreement

[54] Although somewhat belatedly Mr Templeton asked me to rely on this agreement as a binding contract I conclude that he really is not in a position to do that. He made a concession at a preliminary stage, that the agreement could not be binding on either party given that it failed to comply with the necessary provisions of s 21. Also there is a difficulty created by the existence of two different schedules. It is impossible for me to determine which schedule should have been attached to the signed copy of the agreement presented in evidence.

[55] What the agreement does do however is to give a glimpse into the various properties owned by the parties as at the date it was signed. It certainly does support the First Respondent's contention that almost without exception all of the trust entities have been seeded from his separate property. What this argument fails to recognise however is that throughout this marriage, relationship property has well and truly been intermingled with what might have been regarded as his separate property had it existed outside of the trust umbrella. The First Respondent's earnings from his various entities are relationship property. Most have been invested back

into the various trust entities. Some of these earnings were naturally used in the support of the family. However, it is not as if the Applicant has received no benefit from the First Respondent's exertions and activities during the relationship. They both obviously enjoyed a comfortable lifestyle comprising overseas trips, the construction of a large luxury yacht, sailing and they were able to buy a house on Cheltenham Beach, renovate it extensively and sell it for over \$4m.

Section 44

44 Dispositions may be set aside

(1) Where [the High Court or a District Court or a Family Court] is satisfied that any disposition of property has been made, whether for value or not, by or on behalf of or by direction of or in the interests of any person in order to defeat the claim or rights of any person [(party B)] under this Act, the Court may ... make any order under subsection (2) of this section.

[(1A)The Court may make an order under this section on the application of party B, or (in any proceedings under this Act or otherwise) on its own initiative.]

(2) In any case to which subsection (1) of this section applies, the Court may, subject to subsection (4) of this section,—

- (a) Order that any person to whom the disposition was made and who received the property otherwise than in good faith and for valuable consideration, or his [or her] personal representative, shall transfer the property or any part thereof to such person as the Court directs; or
- (b) Order that any person to whom the disposition was made and who received the property otherwise than in good faith and for adequate consideration, or his [or her] personal representative, shall pay into Court, or to such person as the Court directs, a sum not exceeding the difference between the value of the consideration (if any) and the value of the property; or
- (c) Order that any person who has, otherwise than in good faith and for valuable consideration, received any interest in the property from the person to whom the disposition was so made, or his [or her] personal representative, or any person who received that interest from any such person otherwise than in good faith and for valuable consideration, shall transfer that interest to such person as the Court directs, or shall pay into Court or to such person as the Court directs a sum not exceeding the value of the interest.

(3) For the purposes of giving effect to any order under subsection (2) of this section, the Court may make such further order as it thinks fit.

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

[56] I remind myself that the beneficiaries of the J & J Grant Family Trust include third parties, not just the First Respondent. There are the parties' son Alexander, the First Respondent's daughter, Tessa, his sister and his father.

[57] The second pertinent observation to make has some reference back to the property sharing agreement. I certainly accept Mr Gilchrist's submission that it is clear that the parties always intended to sign the property sharing agreement which was prepared around the time they bought their first house together. They both had separate property at the time and it was clear that they wished to keep that separate.

[58] It was also clear that in forming the J & J Grant Family Trust the First Respondent intended to transfer his various separate property interests into the trust. Mr Vickerman argues that the Applicant simply went along with her role as a trustee and signed trust records for some eight years in a perfunctory manner. That argument is not sustainable in light of the fact that the Applicant is an intelligent, successful business woman. She has shown an ability to run her own travel business, both Cavalier Travel and subsequently AWW. She assisted in Readymark Limited and the Auckland Business Academy enterprise for a period of time. In fact from her own evidence she was instrumental in dragging this business up by its boot straps when it was failing so that a reasonable sale price could be achieved. I reject the submission that she did not know the effect and consequences of the J & J Grant Family Trust and her role in it or the intention behind forming it. As Mr Gilchrist pointed out, she challenged some of the decisions made by the First Respondent where it involved pouring more and more capital into Powershield in the absence of it making any commercial sense. I am satisfied that the applicant was well aware of the trust activities and the intention behind the formation of the trust and she tacitly approved of what was going on..

[59] I agree it is also relevant to note that the First Respondent continued to acquire and/or deal in the trust entities because he viewed the trust as his separate property but did not take the same approach over the Cheltenham Road property, the Oxford Tce home or their interests in Dovine Olives Limited. All of this satisfies me that both parties were aware that the J & J Grant Family Trust was intended to represent dealings, acquisitions and transactions derived from the First Respondent's separate property.

[60] I also accept Mr Gilchrist's submission that the establishment of the trust entities and all the transactions that occurred within it has not created a disadvantage to the Applicant. She was able to run AWW within Readymark Limited and after the separation she continued to run that company as a separate entity outside of the trust.

[61] I further agree, although not now being advanced by Mr Vickerman as an argument, that the evidence falls well short of establishing that the trust was a sham or is the First Respondent's alter ego.

[62] I turn to whether the Applicant can establish that relationship property was disposed of to the family trust in order to defeat her claims. In support of his argument Mr Vickerman referred me to *Regal Castings v Lightbody*⁶ as authority for the proposition that the Court is able to draw an inference of an intention to defeat in certain circumstances. He submits that there is no need for the Applicant to prove a conscious desire to remove the asset from the reach of the Court. It is simply sufficient if at the time of the disposition the Transferor must have known that the Applicant was at risk of losing her entitlement under the Property (Relationships) Act.

[63] The process I intend to adopt is to identify those assets that were transferred into the trust and then ascertain if the Applicant had any entitlement in that asset at the time it was transferred. If she had no entitlement at the date of its transfer, then I cannot see how I can infer any intention on the part of the First Respondent to deprive her of an entitlement she never had.

⁶ [2008] NZSC 87

What were the assets transferred to the Family Trust?

[64] In 1998 Readymark Limited shares were transferred to the trust. At this time the company had a net asset value of a little under \$10,000. Originally this company was Maintenance and Construction Limited which had been incorporated in 1979. The shares owned by the First Respondent in this company were acquired by him prior to the relationship commencing. These shares were clearly the separate property of the First Respondent at the time they were transferred into the trust.

[65] Mr Vickerman argues that the Applicant had a potential claim at that stage pursuant to s 9A. But s 2F(1)(b) makes it clear when determining shares in property under the Act, the date on which the marriage or de facto relationship ended is the relevant date. The argument that as at the date of transfer the Applicant somehow had a claim in those shares pursuant to s 9A must fail.

[66] The shares in Readymark Consultants Limited were transferred to the trust subsequent to the First Respondent acquiring them from the estate of a Wallace Stewart in 1998 for \$13,000. It is possible to infer that relationship property was used to acquire these shares and that this transfer could be regarded therefore as a transfer of relationship property. It appears the balance of the shares in Readymark Consultants Limited that were owned by the First Respondent's late mother were simply transferred without any consideration to the trust. They would not have been relationship property.

[67] Other than these two assets it is difficult to identify amongst the plethora of company documentation, any clear evidence of the transfer of any other assets into the trust that can be identified as relationship property.

[68] I am not prepared on the basis of this evidence to infer that the Respondent by transferring these assets to the trust intended to defeat the Applicant's claims in relationship property. There is a clear distinction between s 44 and s 44C. The latter requires the Court to have regard to the effect of dispositions whereas s 44 looks at the intent behind the transactions.

[69] I cannot accept Mr Vickerman’s argument that because the transfer of Readymark Limited shares and Readymark Consultants Limited’s shares into the J & J Grant Family Trust “*may have*” had the effect of defeating the Applicant’s claim in relationship property, a remedy should be available under s 44.

Section 44C

[70] Because I regard the First Respondent’s interest in the trust entities as a package of rights, I do not intend to deal at length with this claim as I see it as an alternative argument in the event that the first one fails.

Package of Rights

[71] Mr Vickerman urges me to adopt the approach taken by the Court of Appeal in *Walker v Walker*⁷ and find that the First Respondent has a “package of rights” in the trust entities. The facts in *Walker* are quite similar to the situation I am faced with here. In *Walker* a family trust was involved. The parties had discretionary interests under the trust. One of the trustees was a Trustee Company and the husband was a director of that company. He owned shares in the company and he had the power to appoint and remove directors of the Trustee Company. He also had the power to appoint and remove trustees of the trust.

[72] The case turned on the method of valuation of a debt owed from the Family trust to the husband. As in *Walker*, the parties seem to have assumed that the First Respondent is to have the benefit of any monies due to him from the trust entities. Also, similar to the parties in *Walker*, it seems to have been conceded by the Applicant that certain other assets which are related to the debt are to become the First Respondent’s property. In paragraph [48] of its judgment the Court of Appeal referred to those “other assets” as:

- (a) the directorship of the Trustee Company
- (b) the shares of the Trustee Company
- (c) the power to appoint and remove directors of the Trustee Company

⁷ [2007] NZFLR 772

- (d) the power to appoint and remove Trustees of the Trust
- (e) the parties discretionary interests under the Trust.

The Court went on to say:

Those five items of property, plus the debt, formed a very valuable package as together they confer control of the company. The assumption that “the package” was to pass to the husband is confirmed by the draft orders Counsel submitted after the hearing.

[73] In this case the first respondent has control over the trust entities. He has the power to appoint and remove trustees and he has an interest in the trust as a discretionary beneficiary. All of these rights can properly be called a “package of rights” as that phrase was used by the Court of Appeal.

[74] The Court held that the issue of the valuation of the package of rights should not proceed on the assumption that the only willing but not anxious purchaser was to be an independent third party who would immediately seek to liquidate the interests. The Court noted that such an approach ignored the fact that one of the parties themselves may have been prepared to offer more than simply the face value of the debt. The second factor to take into account is to not assume that a value is predicated upon immediate realisation. As the Court said:

A party to the relationship, unlike an independent third party, may not want the debt for its immediate value but rather for its long term potential.

[75] Finally and probably the most relevant to the case before me is the observation that it is wrong to focus on the debt in isolation from the rest of the package. In *Walker* that package had not been valued. In this case taking Mr McLoughlin’s approach I do have a valuation of the trust entities.

[76] Monies are due from various of the trust entities to the First Respondent. As Mr McLoughlin asserts the inter-entity account balances offset each other to produce a negative sum of \$34,941. In paragraph 46 of his second affidavit he provides the details of those account balances and observes that the residual related party balance of \$28,129 is unlikely to be settled and as a result does not take it into account.

[77] Applying that approach to the amended schedule produced by Mr McLoughlin, I conclude that the net residual value of the trust entities is \$369,000. I exclude the \$63,000 deduction as set out in that schedule for the same reason Mr McLoughlin excluded it in his second affidavit. He appears to have overlooked that he had excluded it in his earlier calculation.

[78] I am satisfied that this is the most practical and realistic way of valuing the package of rights being enjoyed now by the First Respondent. It recognises the practicalities of the circumstances applicable to the trust entities and it applies a common-sense approach to the valuation of the package of rights.

[79] I find that the package of rights is relationship property. This is a lengthy relationship. As I have mentioned earlier in this judgment earnings and profits accumulated during the relationship have in part been absorbed into one or more of the trust entities. A simple example can be found by examining the profits made by Readymark Limited and Readymark Consultants Limited throughout the marriage. Where the parties did not receive the direct benefit by way of drawings, advances and the like, those profits and earnings went into the conglomerate. It is impossible now because of the intermingling of relationship property in what might very well have been the First Respondent's separate property, to identify any pure separate property. Another example is that part of the sale proceeds of the Embassy Construction Limited shares that incorporated what was clearly recorded as a salary paid in advance of \$441,000. That component of the sale proceeds of the Embassy shares, must have been relationship property. It related to income earned during the marriage. That too has been intermingled with separate property so that its separate identification is now no longer possible. This case is a very good example of why the legislature enacted s 9A(1).

Section 18B Compensation

[80] Mr Vickerman argues that as the First Respondent remained in occupation of the former family home from the date the Applicant moved out (June 2005) that he should compensate her for her loss of use of the capital tied up in that home, half of

which was hers. The value of the Applicant's share in the former family home was a little over \$2m. Mr Vickerman argues for compensation by way of a notional rent and points to evidence produced by the Applicant which calculates compensation at somewhere between \$85,000 and \$114,000. That assessment is based on a weekly rental of approximately \$850 per week between the date of separation and the date of the sale of the home.

[81] The Court has discretion as to whether or not to award compensation under the provision of s 18B:

18B Compensation for contributions made after separation

(1) In this section, **relevant period**, in relation to a marriage[, civil union,] or de facto relationship, means the period after the marriage[, civil union,] or de facto relationship has ended (other than by the death of 1 of the spouses or [partners]) but before the date of the hearing of an application under this Act by the Court of first instance.

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

(a) order the other spouse or [partner] (**party B**) to pay party A a sum of money;

(b) order party B to transfer to party A any property, whether the property is relationship property or separate property.

(3) In proceedings commenced after the death of 1 of the spouses or [partners], this section is modified by section 86.

[82] In *E v G*⁸ the Court held that where one party makes his or her share of capital in the family home available to the other that can be regarded as a contribution for the purposes of s 18B. Lang J in *C v C*⁹ said this:

The mere fact that one party has made such a contribution is not however sufficient to allow an award to be made under s 18B. As is clear from the passage cited from *E v G*, the Court must also be satisfied that it is just in all the circumstances that such an order be made. That question will require the Court to take into account a variety of factors, many of which will be case specific.

⁸ High Court, Wellington, CIV 2005-484-1895, 18 May 2006 Ronald Young J

⁹ High Court, Auckland, CIV 2007-419-1313, 26 June 2008

[83] In this particular case I have decided to exercise my discretion in favour of an award of compensation for these reasons:

1. It would not have been necessary for the Applicant to borrow funds to acquire the property in Lake Road had she been in possession of the sale proceeds of the former family home.
2. She had to meet the costs of borrowing those funds, the costs of which would not have been necessary had she had the funds available.
3. There was no particularly pressing reason why the family home should not have been sold immediately. I acknowledge that it was the First Respondent's hope that the separation would be temporary and he was hoping for a reconciliation. In fact it was clear from his evidence during the hearing that he would still wish to reconcile with the Applicant. Her demeanour in the courtroom and her attitude in these proceedings show this to be a forlorn hope.
4. Had the Applicant been able to invest her share of the sale proceeds of the home then she probably could have been earning conservatively say 5% per annum which before tax would have amounted to something like \$100,000 per year. I do, in assessing compensation, take into account the fact that the First Respondent maintained the home, ensured it was in a saleable state and apparently expended some money on it. He met the outgoings during the five year period.
5. There was an earlier distribution of the sale proceeds of the Dovine Olives assets from which the applicant benefited.

[84] I agree with the observation of Clifford J in *Pridham v Pridham* where she said:

It is, in my judgment, almost inevitable that one party in a family property dispute will occupy the family home pending resolution and, absent any particular circumstances, that will not by itself make an order for

occupational rent appropriate. That is especially so where, as here, the respondent has paid the outgoing utilities in relation to the family home and the appellant has also had the use of relationship property capital (albeit for a shorter duration).¹⁰

[85] Compensation is not particularly amenable to precise calculation. Taking the above factors into account I intend to err on the side of conservatism and fix compensation payable by the First Respondent to the Applicant in the sum of \$80,000.

A Walkers World

[86] I have referred to the shortcomings in Mr Bathgate's approach to the valuation of this company. Specifically he was unaware that the wages paid by the company related to an employee as opposed to the Applicant. He failed to make enquiries as to what sort of salary might be expected for a person employed as a manager of a similar business as this. I reject an earnings based approach as being the proper way of ascertaining the value of this business as on the 2008 financial statements, this business was trading at a slight loss and taking into account the wages figure included staff wages, the profit to the owner of this business fell far short of the sort of salary a manager may command. Taking a net assets approach on a notional liquidation, there is a net value of approximately \$1600. This is *de minimis* in the circumstances of this case. For the purpose of this proceeding, I find that A Walkers World has no value.

Sunshine Ski Lodge shares

[87] I have been unable to find any valuation of these shares which were acquired jointly by the parties during the marriage. The share ownership entitles them both to use the ski lodge. The first respondent would prefer the applicant to take all the shares. She does not want to. In the absence of any compelling reason (and the first

¹⁰ High Court, Auckland CIV-2009-404-475 9 December 2009

respondent's discomfort is not) I can see no point in not declaring the shares to be owned by the parties as tenants in common in equal shares.

Section 182 Family Proceedings Act

[88] Mr Vickerman sought to adjourn this application given there was no jurisdiction for me to make any orders as at the date of hearing. He wants to preserve the Applicant's rights. There is no strenuous opposition to that proposal from either the First or Second Respondent. Both take the position that s 182 does not apply in any event. I considered whether to dismiss the proceedings for want of jurisdiction but concluded that that may simply lead to an application for a rehearing in the event that a dissolution of marriage is obtained and the Applicant wishes to pursue a remedy under that section and that would simply create extra costs for everyone. I accede therefore to Mr Vickerman's request to adjourn that application to be reviewed in a Registrar's list in two months time. If Mr Vickerman does not indicate on the review that the application should remain alive, then it can be dismissed for want of prosecution.

Orders

[89] I summarise my findings and make orders as follows:

- a) The first respondent is to pay to the applicant the sum of \$362,000 within 60 days of the date of delivery of this judgment. This figure is calculated by taking \$195,000 as the value of Freewind Spirit and \$369,000 as the value of the package of rights to be retained by the first respondent in the trust entities. A half share is \$282,000. In addition the amount of s18B compensation is \$80,000.
- b) All interests in the trust entities however they arise are declared to be the sole and separate property of the first respondent.

c) The first respondent's interest in AWB Sole Trader is declared to be his sole and separate property.

d) The yacht Freewind Spirit and marinas are declared to be the sole and separate property of the first respondent.

e) The applicant's interests in Lake Road, Takapuna and in the business trading as A Walkers World are declared to be her separate property.

f) The shares in the Sunshine Ski Lodge Ohakune are declared to be held by the parties as tenants in common in equal shares.

[90] Leave is reserved to any party to apply on 14 days notice for further orders or directions to better implement this judgment.



L J Ryan
Family Court Judge

Signed 13th July 2010 at 1 am (pm)