

**NOTE: SUBJECT TO RESTRICTION ON PUBLICATION CONTAINED IN
S 35A(1) PROPERTY (RELATIONSHIPS) ACT 1976**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA220/05
[2007] NZCA 30**

BETWEEN	DAVID NOEL WALKER Appellant
AND	MARILYN WALKER Respondent

Hearing: 21 June 2006

Court: Chambers, O'Regan and Arnold JJ

Counsel: A E Hinton QC for Appellant
M J Southwick QC and R C Knight for Respondent

Judgment: 28 February 2007 at 4.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The cross-appeal is dismissed.

C Within 30 working days of the date of this judgment, the appellant must pay to the respondent as her half share of the debt owed by the Walker Family Trust the sum of \$1,137,500, less any part of that sum already paid to her, and subject to other adjustments as may be required to reflect orders made in the Family Court or the High Court or agreements by the parties.

D At the same time as payment is made and consequential on such payment, the appellant and respondent must execute a deed, to which

David Walker Nominees Ltd must also be a party, among the terms of which must be terms to the following effect:

- (a) the respondent renounces and disclaims all her rights and interests under the trust, including, but not limited to:**
 - (i) her status as a discretionary beneficiary;**
 - (ii) her power to appoint and remove discretionary beneficiaries;**
 - (iii) her power to appoint and remove trustees;**
- (b) the respondent resigns as a director of Walker Nominees Limited;**
- (c) the respondent recognises the debt owed by the trust to the appellant as hereafter his separate property.**

E The appellant, as director of David Walker Nominees Limited, must procure that company to execute the deed referred to in order D.

F The following matters should be resolved in the High Court if they remain unresolved:

- (a) the matters referred to at [118]-[119] of the High Court decision dated 14 June 2005;**
- (b) costs in the High Court.**

G The following matters are remitted to the Family Court if they remain unresolved:

- (a) what award of interest, if any, the respondent is entitled to;**
- (b) costs in the Family Court.**

- H** **Order G supersedes the order made at [122] of the High Court decision dated 14 June 2005.**
- I** **The outstanding matters referred to in orders F and G do not affect in any way the parties' obligations to comply, within the time stipulated, with orders C-E.**
- J** **In respect of costs in this court, the appellant must pay to the respondent \$6,000 plus usual disbursements. These are to include disbursements relating to preparation of the case on appeal.**
- K** **Liberty to apply to this court is reserved in respect to any issue relating to the implementation of orders C-E.**
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REASONS OF THE COURT

(Given by Chambers J)

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Debt back from a family trust

[1] The appellant (“the husband”) and the respondent (“the wife”) separated in March 1999 after a long marriage. One aspect of their relationship property affairs remaining unresolved is the value of a debt owed to the husband by a family trust. There is no doubt about the face or book value of that debt: \$2.275 million. But is that its true value? Is the trust good for the money?

[2] The answer to that question may depend in part on the date at which the debt is valued. The husband contended it should be valued at the date of separation. He convinced Judge J M Doogue that was the appropriate date. She found its worth at that time to be only \$857,000. The wife on the other hand contended the debt should have been valued at the date of hearing in the Family Court (May 2004). On appeal, she convinced Priestley J in the High Court that was the correct date. His Honour found at that date the debt was worth its face value of \$2.275 million.

[3] The husband, with leave, has appealed against the High Court decision. He contends the High Court wrongly interfered with Judge Doogue’s exercise of discretion in selecting date of separation as the appropriate date of valuation. He seeks to have her decision restored.

Issues on the appeal

[4] Because of the view we take, there are only three issues we need to resolve on this appeal.

[5] The first is whether a debt back from a family trust to one or both of the partners in a relationship should ever be ascribed less than its face value. The wife contends that it cannot be. The husband disputes that. Our view on this issue is that the wife’s stance is wrong.

[6] The second issue is whether the High Court was justified in reversing the Family Court's decision to value the debt at date of separation rather than date of hearing? We shall be answering that question "yes". The consequence is that the husband's appeal must be dismissed.

[7] In these reasons, we shall also consider a third issue. It is incidental to our substantive reasoning, given the conclusion we have reached on the second issue. The third issue is whether Judge Doogue was right in any event in fixing the value of the debt at date of separation at \$857,000. Before us, the husband contended she was, but the wife contended she was not. Since counsel presented extensive submissions on that topic, we shall express a view, even though such view is not essential to the result to which we have come.

[8] Priestley J also granted the wife leave to cross-appeal. That cross-appeal involved questions as to whether this was an appropriate case in which orders should have been made in the wife's favour under ss 15 and 17 of the Property (Relationships) Act 1976. Ms Southwick QC, for the wife, advised us, however, that, if the appeal failed, the wife would not seek to pursue her cross-appeal. Since the appeal has failed, we can dismiss the cross-appeal by consent.

[9] Before we deal with the three issues arising on this appeal, we shall briefly summarise how the debt arose and the Family Court's and High Court's views on the issues with which we must grapple.

How the debt arose

[10] In 1989, the husband established a company ("the company"). The parties owned the shares in it.

[11] In 1996, the parties settled the Walker Family Trust ("the trust"). Another company, David Walker Nominees Ltd ("the trustee company"), has been the trustee of the trust since its inception. The husband is the sole director of the trustee company. The parties have the power to appoint and remove trustees of the trust.

[12] The debt arose in two stages. First, in November 1996, the husband sold his shareholding in the company to the trust for \$1.2 million. Since the trust had no assets, it promised to pay the consideration on demand. The second stage occurred in 1998. At that time the parties sold a property they owned in Auckland to another company which formed part of the husband's overall business. In due course, through inter-company deals, the details of which do not matter, the consideration for that property ended up being a debt owed by the trust to the husband.

[13] It is not in dispute, therefore, that the \$2.275 million debt represented the sale of two items of relationship property, the first being the husband's shareholding in the company and the second being the parties' jointly owned Auckland property. The wife received nothing for her share in these items of relationship property at the time they were converted into a debt, other than, of course, an inchoate share in the debt itself.

[14] We should note there was another debt in issue in the Family Court, with a face value of \$8,730. This was owed by the company to the husband. We are not concerned on this appeal with the value of that debt. But we mention it because it explains the references in the Family Court and High Court judgments to debts worth \$866,000 (\$857,000 being the value of the debt owed by the trust and \$8,730 owed by the company). When we refer to "the debt", we mean the debt owed by the trust.

The Family Court decision

[15] By the time of the hearing in the Family Court in May 2004, the parties had apparently agreed various issues relating to their relationship property dispute. We cannot be certain exactly what had been agreed as that interim resolution is not recorded in any document before us. What we do know, however, is there were seven issues which the judge was asked to resolve: FC AK FP004/1239-B/99 2 August 2004 at [5]. The first of those was the correct date for the valuation of the debt. It seems throughout to have been acknowledged the debt was relationship property. The fact the parties needed it to be valued is indicative of the fact they envisaged one of them was to acquire it, accounting to the other for half its value. Although not expressly stated (except perhaps in the parties' submissions, which we

have not seen), it seems to have been the joint expectation the husband would acquire the debt and pay out the wife. He was effectively to keep “his” business and everything associated with it. As a consequence of that expectation, the husband has throughout sought to have the debt valued as cheaply as possible, while the wife has argued for face value.

[16] There was and is no dispute that at date of hearing the debt was worth face value. Mrs Hinton QC, for the husband, acknowledged that in her submissions to us. (Incidentally, when in this opinion we say “date of hearing” value with respect to the debt, we actually refer to its value at 30 September 2002, that being the last date on which the parties’ experts had valued the debt prior to the hearing in the Family Court. No point has been taken at any stage as to the variance between September 2002 and the actual date of hearing.) But at date of separation the debt was arguably worth less. The reason was that, at date of separation, the debt, had the husband or the parties sought to enforce it immediately, would not have realised its face value. At that time the underlying value of the trust’s assets was depressed. Following separation, the underlying value of those assets improved. *why?*

[17] Judge Doogue found the value of the debt increased between 1999 and 2002 solely as a result of an increase in the company’s value after separation: at [59]. The increase in value of the company was, she found, directly attributable to the husband’s “skill and labours”: at [61]. This was not a case, the judge found, where the increase in the company’s value could be attributable to “an increase in value of infrastructure or an increase in value of [the company’s] premises or to an external improvement in [the company’s field of] business”: at [62]. The reason she gave for the increase in the company’s value, and hence an increase in the debt’s value, pointed strongly, as a matter of “fairness and equity”, to the debt being valued prior to the beneficial effect of the husband’s post-separation endeavour: at [72].

[18] The judge also found there were subsidiary arguments favouring the husband’s contention that date of separation was the appropriate date of valuation. The first of those subsidiary reasons was the judge’s assessment that the wife’s experts could have reached a reasonable valuation of the company, and hence the debt, “on or shortly after April 2000”: at [71]. Judge Doogue thought the wife, in

seeking to rely on the later valuation date, was seeking to take advantage of her own failure to have the true value of the business and the debt correctly calculated within a reasonable time of separation. Further, the judge considered that the business was the only asset of which the husband had had use since separation and she noted that he had met “heavy outgoings in respect of the other assets and on the family in general”: at [71].

[19] The judge did not say anything specific on what we have identified as the first issue on this appeal. Presumably that reflects the fact both sides had accepted a private debt could have a value different from its face value. (In these reasons, we shall use the shorthand term “private debt” to describe a debt back from a family trust to one or both of the partners in a relationship.) Both parties had called expert evidence as to the value of the loan at both dates.

The High Court decision

[20] Priestley J, in his decision now reported at [2006] NZFLR 768, held that the essential issue on this part of the case was whether the judge had correctly exercised her discretion under s 2G of the Act. That section reads as follows:

2G Date at which value of property to be determined

- (1) For the purposes of this Act, the value of any property to which an application under this Act relates is to be determined as at the date of the hearing of that application by the Court of first instance.
- (2) However, the Court at first instance or, on an appeal the High Court, Court of Appeal, or Supreme Court may, in its discretion, decide that the value of the property is to be determined as at another date.

[21] His Honour concluded Judge Doogue’s decision “to invoke the s 2G(2) discretion was based on an incorrect principle”: at [97]. But what is significant about the section of his judgment where he dealt with the value of the debt back ([86]-[98]) is that His Honour elided the three issues we have identified. There were, as we see it, really three reasons why His Honour rejected Judge Doogue’s \$857,000 valuation:

- (a) Private debts should never be ascribed a value less than face value;

- (b) The proper date of valuation was the date of hearing;
- (c) In any event, quite apart from principle (a), the debt was worth more than \$857,000 at date of separation.

[22] We have some concern as to whether the first proposition really was Priestley J's view. There are passages in the judgment which support a conclusion that His Honour did intend such a blanket rule. Further, His Honour's subsequent judgment granting leave to appeal to this court did specifically raise as an issue "whether the value of a debt owing by a family trust, fixed at book value, ought to be an exception to the general legal principles of valuation in a relationship property context": leave judgment, 22 September 2005 at [12](a). Certainly counsel before us treated the first proposition as established by the judgment, Mrs Hinton submitting it was wrong and Ms Southwick that it was right.

[23] Yet in other parts of the judgment, the judge, when setting out his "propositions in the context of valuing relationship property", referred to the classic case of *Hatrick v Commissioner of Inland Revenue* [1963] NZLR 641 (CA) and said "the valuation of appropriate assets should reflect the *Hatrick* norm of the value at which a willing but not anxious vendor would sell and a willing but not anxious purchaser would buy": [2006] NZFLR 768 at [85]. That seems to suggest that he considered the debt (assuming it came within what he meant by "appropriate assets") should be valued on conventional lines.

[24] A mid-course is suggested by what the judge said at [95]. It is possible that all he meant by the first proposition was that, in the absence of evidence that either party was prepared to permit the debt to be written down, private debts should be accorded their face value for relationship property purposes.

[25] Because counsel treated the judgment as establishing the first proposition, we too shall treat it as so doing, but we caution that this may not be what the judge in fact meant.

[26] Although, as we say, Priestley J's discussion intermingles the three concepts referred to in [21], we think it helpful for our later discussion if we separate out his views for preferring valuation at date of hearing (s 2G(1), as opposed to a s 2G(2) date) from his views as to why private debts should be ascribed face value.

[27] We deal first with His Honour's views on the s 2G point. He considered Judge Doogue's approach contained "various flaws": at [93]. First, he considered it appeared to overlook the undisputed relationship property components of the debt: at [93].

[28] The second reason, which is to an extent merely a variant of the first, was that "the husband's debt from the trust represented valuable consideration flowing from the transfer of valuable items of the relationship property to the trust": at [95]. The items and the debt, His Honour said, had a "causative link with the relationship", citing from Fisher (editor in chief) *Fisher on Matrimonial and Relationship Property* (looseleaf ed) at [16.3].

[29] Thirdly, the judge did not consider the value of the debt had been affected by the husband's post-separation efforts: at [96]. He thought those efforts had merely improved the ability of the trust to meet its obligations to repay, if called upon so to do.

[30] Fourthly, His Honour considered that "the reduced 1999 valuation of the debt" led to an unjust order and an unjust division of relationship property: at [98]. Adopting the 1999 valuation meant the husband, "having diverted relationship property between 1996 and 1998 to the trust for the business, is in a position, at his convenience and for his own purposes, to utilise approximately \$1,842,000 whereas the wife is limited to an entitlement of \$443,000 (\$2.275 million less \$433,000: \$866,000 ÷ 2)": at [98]. The judge thought nothing on the facts justified "such an unequal and unjust division".

[31] On the issue of whether private debts can ever be ascribed a value less than face value, Priestley J thought that, "in a family trust context, there are no sound reasons for the sum of the debt to increase or reduce": at [94]. His Honour

considered it “a ridiculous proposition to suggest that, because the husband’s business had increased in value since the debt was incurred, the value of the debt should increase in tandem”. The upshot of His Honour’s reasoning would seem to be, as Mrs Hinton suggested, that debts owing to individual family members by family trusts or private companies are not to be valued in the same way as debts owed by other entities.

[32] His Honour did not think the fact that the trust’s assets were not in 1999 sufficient to meet the debt had demand for its repayment been made compelled departure “from the normal hearing date or face value valuation”: at [97].

[33] On the third issue, Priestley J did not consider the \$857,000 figure a “fair price”: at [93]. He accepted “a creditor endeavouring to recoup the debt from the trust in 1999 may not have improved on that figure”, but he considered “only an anxious creditor would have forced the trust to liquidate in 1999”. He said neither the husband nor the wife could reasonably have been expected to have adopted an anxious stance since such an approach was clearly in the interests of neither.

[34] Later, he observed there was no “evidence that either party saw a need to demand repayment of the debt in 1999”: at [95]. His Honour did not, however, give a figure of what the debt would have been worth in 1999 in the event of his being wrong on his other two propositions. It is clear, however, he thought it would have been higher than \$857,000 but presumably less than its face value.

Should a debt back from a family trust to one or both of the partners in a relationship ever be ascribed less than its face value?

[35] Mrs Hinton put the first question of law on this appeal in these terms: “Whether the value of a loan made by a party to family trust (or other related entity) is fixed at book value to the effect that the valuation of a loan to a family trust represents an exception to the general principles of valuation in the relationship property context, and, in particular, the approach in *Hatrick v Commissioner of Inland Revenue* [1963] NZLR 641.”

[36] Ms Southwick sought to uphold Priestley J's reasoning on the basis that the loan was "for a fixed sum which remained the same throughout", the transferor in this context (and, by extension, his or her partner) having "the right to claim that static sum".

[37] While we are not sure that Priestley J's reasoning went as far as Mrs Hinton's question of law suggests, we are nonetheless clear that private debts are to be valued in exactly the same way as any other debts. Neither the judge nor Ms Southwick cites any authority to support the view that private debts are not subject to normal valuation principles. An interest-free debt which cannot be met or which can be met only in part will not be worth its face value. It will be worth only what a willing but not anxious buyer would be prepared to pay for it – although, of course, the range of such buyers would include the parties themselves: *Z v Z* [1989] 3 NZLR 413 at 415 (CA). And it is also to be remembered that the buyer of an "on demand" debt will not necessarily be buying the debt with a view to making demand immediately.

[38] We agree the fact the debt is a private debt can lead to complications in valuation. For instance, if a debt owed by a family trust cannot be paid or can be paid only in part, the devaluation of the debt may be compensated for, at least in part, by an increase in value of one party's or both parties' interests in the trust – whether his, her, or their interests as settlor, trustee, appointor, or beneficiary, which interests may be relationship property.

[39] But none of this leads to the proposition that "in a family trust context, there are no sound reasons for the sum of the debt to increase or reduce". If by "the sum of the debt" Priestley J meant its face value, then clearly that will not increase or decrease – but that is a self-evident proposition true of all debts, not just private debts. In a property relationship context, we are not primarily concerned with a debt's face value but rather with its market value. If Priestley J meant that, in a family trust context, a private debt's face value is always to be treated as its market value, then the statement is, with respect, wrong. If the debt is interest-free, then clearly it could never be worth more than face value, but equally clearly it could be worth less. If the debtor trust has to pay interest, then the debt could be worth either more than face value or less. The former could occur in circumstances where the

trust is good for the money and the interest rate is higher than current market rates for an investment of that kind and with that category of risk.

[40] And further, of course, if a debt falls in value because the debtor trust has not the means to repay it, it may rise in value again if the trust's fortunes improve.

[41] On this issue, we find that Judge Doogue was correct to try to establish a value for the debt; she was not bound to assign it its face value.

Was the High Court justified in reversing the Family Court's decision to value the debt at date of separation rather than date of hearing?

[42] 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 ss 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. Section 18B has particular relevance in this case and reads as follows:

18B Compensation for contributions made after separation

(1) In this section, **relevant period**, in relation to a marriage or de facto relationship, means the period after the marriage or de facto relationship has ended (other than by the death of 1 of the spouses or de facto 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 de facto partner (**party A**) has done anything that would have been a contribution to the marriage or de facto relationship if the marriage 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 de facto 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 de facto partners, this section is modified by section 86.

[43] In *Fowler v Wills* [2004] NZFLR 252, this court suggested that situations involving benefits and losses since separation may now often be better dealt with under ss 18B and 18C rather than s 2G:

[24] It is true that this Court has often stressed that the predecessor to s 2G, s 2(2) of the 1976 Act, conferred a very broad power to achieve a fair apportionment between the parties (*Jorna v Jorna* [1982] 1 NZLR 507, 511), and to achieve justice between the parties and a result which is fair to them (*Re Little* [1991] 1 NZLR 135, 137, referring to *Meikle v Meikle* [1979] 1 NZLR 137). The Courts have in particular used the power to allow one partner to take the benefits or losses that that spouse has brought about since the date of separation. Such cases might now be dealt with more directly under the new s 18B on compensation for post-separation contribution and the new s 18C dealing with the opposite situation.

[44] That approach receives academic endorsement in Peart and others *Relationship Property on Death* (2004) at [7.3.4], where it is suggested that ss 18B and 18C were designed to take some of the load off s 2G and should therefore be applied whenever directly relevant.

[45] We are satisfied that Priestley J was right to opt for valuation of the debt at date of hearing, essentially for the reasons he gave.

[46] First, the debt arises from the transfer to the trust of relationship property. This factor weighed heavily with Priestley J. Mrs Hinton submitted the fact that the source of the debt was relationship property was “irrelevant to valuation issues”. In a narrow sense, it is true the valuation of a debt will not be affected by what led to its creation. But the source of the debt can be relevant to the discretionary decision as to the just date for valuation. We agree with Priestley J as to the relevance of this factor.

[47] Secondly, neither party at any stage sought to have the loan called up. It suited both for the loan to remain in place, which was of substantial assistance to the husband in the running of the company. Suppose soon after separation the parties had reached an interim settlement under which they had agreed that the husband would assign one half of the debt to the wife – a reasonable assumption, given the husband’s acknowledgement throughout that the debt is relationship property to a half share of which the wife was entitled. The wife may have called up her half

share – something which would have been very disadvantageous to the husband and “his” business. The husband may have been forced to put the trust in funds in order to allow the wife to be paid in full – which would have meant the wife would have received face value for her half share of the debt much earlier than she has now achieved. Alternatively, the trust may have met the debt only in part. What the wife would then have done is exactly what she has done: she would have waited until the trust was in a position to pay the balance. Either way, she would have ended up in the same position as she achieved under Priestley J’s judgment. The only difference would be as to timing of repayment.

[48] Thirdly, the wife should not suffer because of a perhaps unwise concession on her part. It seems to have been assumed in the Family Court that the debt was to become the husband’s property. Further, the wife seems to have conceded that certain other assets, which were relationship property and which are related to the debt, were to become the husband’s property. Those other assets were:

- (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;
- (d) the power to appoint and remove trustees of the trust;
- (e) the parties’ discretionary interests under the trust.

[49] Indeed, those items of property appear never to have been valued. 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. Had the wife put ownership of the package in issue and offered \$2.275 million for it, as she could easily have done, the husband would have had to match the offer. Indeed, on the evidence, she could have sensibly offered more than \$2.275 million for the package, as the company had by date of hearing restored its profitability and control

Bundle of rights

of the package gave control of the company. The only reason the husband has felt confident about arguing for the lower value of the debt is his assumption that he would be acquiring the package.

[50] Fourthly, the discrepancy in the value of the debt (and the package) between date of separation and date of hearing is not nearly as significant as Judge Doogue thought. She undervalued the debt at date of separation, as we shall be showing in the next section of these reasons. The smaller the discrepancy, the less cause for exercise of the discretion.

[51] Fifthly, we agree with Priestley J that the increase in value of the debt (and the package) was not wholly attributable to the husband's skill and labours. They played a part, but this was not a "one man" company. The company had many employees, all of whom would have contributed to the restoration of profitability. As well, the company benefited from its capital base (which had been contributed by the parties to the relationship) and by the fact the wife had not insisted on repayment of the loan. The wife thereby effectively provided free working capital to the business with no prospect of any equity return and in circumstances where the best return she could have hoped for was the face value of the debt. Further, the husband's undoubted skills in managing the company had been fostered and honed during the marriage, as a direct result of his being freed from most domestic responsibilities by his wife's efforts in that regard. We therefore agree Priestley J was right to reject the principal reason Judge Doogue gave for the exercise of the s 2G discretion.

[52] Finally, in all the circumstances, it was not just for Judge Doogue to exercise the s 2G discretion. It resulted in the wife receiving a disproportionately small share of what the parties had built up together during the marriage.

[53] We have not overlooked *Anae v Fong-Anae* CA270/98 6 May 1999, a decision on which Mrs Hinton strongly relied. In that case, this court did not overturn the trial court's adoption of a "date of separation" valuation of the husband's business. But there were significant factors in that case dictating that such date of valuation was appropriate. First, both husband and wife had separate

businesses, which they operated on their own after separation: at [49]. The wife's business had had to be valued at date of separation, as the judge had found the wife's company accounts post-separation to be "quite unreliable": at [49]. In those circumstances, it made sense for both businesses to be valued at the same date. Further, the trial judge had found that the increase in value in the husband's company post-separation was solely due to the husband's efforts and those of his staff: at [58]-[59]. The present case does not have those features. In any event, as Priestley J held, there are differences between valuing businesses and valuing debts. It is also worth noting that *Anae* was decided prior to the passage of the 2001 Amendment Act.

Was Judge Doogue right in fixing the value of the debt at date of separation at \$857,000?

[54] Part of our justification for valuing the debt at date of hearing was that the discrepancy in the value of the debt (and the package) between date of separation and date of hearing was not nearly as significant as Judge Doogue thought: above at [50]. We shall now briefly explain why we think Judge Doogue undervalued the debt at date of separation.

[55] Her Honour reached the value of \$857,000 in this way. One of the husband's experts had produced a report showing the value of the debt to be \$757,000 at date of separation: Family Court decision at [35]. Later, the husband's experts provided further reports valuing the debt somewhat higher. Following this, the wife's expert, Tony Frankham, produced a report declaring "the net realisable value" to be \$857,000: at [38]. According to Mrs Hinton, the difference between the experts' figures was so minor the husband had agreed Mr Frankham's figure could be used.

[56] Ms Southwick complained that Judge Doogue had misunderstood Mr Frankham's valuation. He had never said, Ms Southwick submitted, the debt was *worth* only \$857,000. All he was saying was this is what could have been realised immediately, had the buyer of the debt sought to enforce it. We agree with Ms Southwick that the judge appears to have erred in thinking that a debt's immediately realisable value is its worth for relationship property purposes.

[57] The underlying (though not explicit) assumption of the judge's valuation was that the buyer was an independent third party (i.e., neither the vendor (the husband) nor the wife), who would seek immediately to have the debt repaid. That is, however, a false assumption.

[58] First, it ignores the fact that the parties themselves may have been prepared to offer more for this debt than an independent third party may have done. See *Z v Z* (above) and *Fisher* at [10.11]. In the present case, neither the husband nor the wife has ever sought to sell the debt to an independent third party. Each seems always to have assumed that one or other of them would take the debt as part of his or her share of the relationship property. Had either suggested sale of the debt to a third party at \$857,000, it is inconceivable the other would not have offered more for it.

[59] Secondly, the assumption is wrong in its predication on immediate realisation. 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.

[60] Thirdly, it is wrong to focus on the debt in isolation from the rest of the package. Clearly, all six items of property forming the package should have been valued on an assumption that they were for sale together. That would be a reasonable assumption in terms of maximising the value of the relationship property, for, as we have said, together they confer control of the company. Had they been valued together and offered for sale together, either the husband or the wife would have offered far more than \$857,000 for the package. The husband would have been very adverse to his future employment being subject to the wife's discretion and control. He would have offered a substantial sum for the package to keep the company under his control. Value to owner

[61] As we have said, it appears from the draft orders the husband is to take this very package. On the evidence available, we cannot say what the package (or the debt component of it) was worth at date of separation. But it seems likely it was worth very much more than the \$857,000 Judge Doogue assessed. It follows Her Honour was not right in her assessment of the value at date of separation.

[62] We reiterate, however, that the views in this section of these reasons are not essential to the reasoning underlying the result to which we have come. In particular, we have not had detailed submissions on the package concept to which we have referred.

Result

[63] The result is the appeal must be dismissed.

[64] We were concerned at the hearing that, seven years after the parties' separation, their relationship property dispute remained unsettled. Left unresolved by the Family Court were issues as to:

- (a) what award of interest, if any, the wife was entitled to;
- (b) costs;
- (c) the value (if any) of a property in Gowing Drive, Meadowbank, owned by the husband and his sister.

[65] Those issues apparently remained unresolved following the High Court hearing. That appeal gave rise to further matters remaining to be settled:

- (a) the matters referred to at [118]-[119] of Priestley J's judgment;
- (b) costs in the High Court.

[66] We thought it desirable to see whether we could resolve all matters between the parties, without remitting the proceeding to either the Family Court or the High Court. Neither counsel had set out what orders they were seeking, apart from the obvious "appeal allowed" or "appeal dismissed", as the case may be. Accordingly, we asked counsel to file a joint memorandum setting out what orders were required to resolve this dispute once and for all, on the assumptions that:

- (a) the appeal and cross-appeal were dismissed; and
- (b) the appeal was allowed and cross-appeal dismissed; and
- (c) the appeal and cross-appeal were allowed. (Obviously, in this case, the dollar amounts of any awards under ss 15 and 17 would have had to be left blank in the memorandum, for insertion by us.)

[67] Unfortunately, the parties were unable to agree on the filing of such a joint memorandum. Counsel filed separate memorandums. From those, it is clear it is a forlorn hope that we might resolve all issues for the parties. The fact there are still outstanding matters is no fault of any of the three courts which have dealt with aspects of this proceeding. The parties have chosen to adopt a rather piecemeal approach which has not enabled any court finally to resolve all outstanding issues.

[68] But we can move matters forward to a considerable extent. This is reflected in orders C-K of this court's judgment. Some of the orders require no explanation, but others do. Here is the explanation, where required.

Order C

Within 30 working days of the date of this judgment, the appellant must pay to the respondent as her half share of the debt owed by the Walker Family Trust the sum of \$1,137,500, less any part of that sum already paid to her, and subject to other adjustments as may be required to reflect orders made in the Family Court or the High Court or agreements by the parties.

[69] It is clear the husband must pay out the wife for her share of the debt. Since the parties agreed its value at date of hearing was \$2.275 million, the wife's share is \$1,137,500. Ms Southwick in her draft orders suggested this sum was subject to a number of adjustments which she detailed: see her draft order 2. Mrs Hinton in her memorandum did not engage specifically with these suggested adjustments. We do not know whether they are agreed or not. Accordingly, all we can say is that the payment of \$1,137,500 is subject to such adjustments as may be necessary to reflect orders made in the Family Court or the High Court or agreements made by the parties. If there is dispute as to the arithmetic, we shall resolve it: see order K.

Order D

At the same time as payment is made and consequential on such payment, the appellant and respondent must execute a deed, to which David Walker Nominees Ltd must also be a party, among the terms of which must be terms to the following effect:

- (a) the respondent renounces and disclaims all her rights and interests under the trust, including, but not limited to:*
 - (i) her status as a discretionary beneficiary;*
 - (ii) her power to appoint and remove discretionary beneficiaries;*
 - (iii) her power to appoint and remove trustees;*
- (b) the respondent resigns as a director of Walker Nominees Limited;*
- (c) the respondent recognises the debt owed by the trust to the appellant as hereafter his separate property.*

[70] This order reflects in substance what Ms Southwick proposed: see her draft order 6. Mrs Hinton seemed to agree with what was proposed: see her letter to Ms Southwick, dated 17 July 2006 (“the 17 July letter”), para 5(b). The intent is that the wife, on receipt of her half share of the debt, will renounce all her interest in the trust and will recognise the debt as thereafter the husband’s separate property. Where the husband finds the money to pay the wife will be entirely a matter for him. The husband’s business and its associated entities will be his solely.

[71] Paragraph (b) is inserted because it featured in Ms Southwick’s draft orders (order 6(c)) and Mrs Hinton’s (the 17 July letter, para 5(b)(iv)). We are not sure where Walker Nominees Ltd fits into the scheme. So far as we have been able to ascertain, it is not referred to in the affidavits, but we may be wrong about that. It is possible that counsel meant David Walker Nominees Ltd, the trustee of the trust. But, so far as we are aware, the wife is not a director of that company. If, however, that is what is intended, no doubt the deed will refer to it rather than Walker Nominees Ltd. There is no need for the parties to trouble this court if that is what they intended.

[72] It may, of course, be necessary for the parties to execute subsidiary documents in order to make the deed fully effective. For instance, depending on the

constitution of (David) Walker Nominees Ltd, the wife may also need to sign a notice of resignation in particular form. That is implicit in order D.

[73] Mrs Hinton wanted any deed to contain a provision that the shares in Hardinge Street Developments Ltd, one of the companies associated with the husband's business, should vest in the husband. That is not a topic Ms Southwick touched on or responded to. At present, the shares in that company are owned by the husband. It is common ground these shares have no value. Presumably, therefore, the wife will agree to this provision being included in the deed. It is consistent with the parties' overall intent. But if there is dispute about this, we shall resolve it.

Order F

The following matters are remitted to the High Court if they remain unresolved:

- (a) the matters referred to at [118]-[119] of the High Court decision dated 14 June 2005;*
- (b) costs in the High Court.*

[74] Priestley J said:

[118] On 11 May 2005 I issued a Minute asking counsel to confirm the impression I had by the conclusion of the hearing that the following matters had been resolved and would not require further attention:

- (a) The husband's bank account of \$2000 to be taken into account.
- (b) Adjustments for post-separation payments made by the husband in respect of the Mountain Road property and in particular the standard adjustments relating to mortgage interest and principal.

[119] Although my notes and recollection suggested these matters had been resolved by counsel I sought confirmation. The husband's counsel has not been able to reply and apparently was still seeking instructions. In those circumstances these aspects of the appeal are adjourned, although I suspect counsel will be able to file a joint memorandum confirming no further hearing is required. If not counsel are directed to advise me.

[75] We do not know whether those matters remain unresolved. If they do, Priestley J should resolve them. We heard no submissions about them.

Order G

The following matters are remitted to the Family Court if they remain unresolved:

- (a) what award of interest, if any, the respondent is entitled to;*
- (b) costs in the Family Court.*

[76] These two matters were left unresolved in the Family Court: at [5], [111]-[112], and [116].

[77] In their post-hearing submissions, both counsel in effect suggested we should resolve the question of interest. Ms Southwick made oblique reference to it in her draft order 5, where she suggested: “Interest at the rate of will be paid to the Respondent from the date of .” Mrs Hinton in the 17 July letter also suggested we resolve it: see para 3(a)(i).

[78] That is quite impossible. We do not have the benefit of either the Family Court’s or the High Court’s views on the matter. Neither counsel addressed us on the topic in their written submissions, and only the most passing reference was made to the topic orally, after we raised what orders the parties wanted us to make. Even now, Ms Southwick has not suggested the sum on which interest should be paid, the rate, or the date from which interest should run. Judge Doogue clearly thought the question of interest should reflect “assignment of responsibility for delay in this litigation”: at [111]. She is in a much better position than us to make this assessment.

[79] In her draft orders, Ms Southwick indicated that, if the wife received half the debt at face value, she would not pursue the “unresolved issues” in the Family Court: draft order 3. We are not sure whether this was meant to include costs. Presumably it was intended to cover the outstanding issue relating to Gowing Drive: see Family Court decision at [113]-[115]. Given the wife’s concession, the Gowing Drive issue should be considered resolved. The leave reserved to the parties to adduce further evidence concerning this property and its value is revoked. This property will be the husband’s to the exclusion of the wife.

Order H

Order G supersedes the order made at [122] of the High Court decision dated 14 June 2005.

[80] Priestley J ordered:

[122] The proceeding (with the exception of the matter adjourned in para [119]) is remitted to the Family Court at Auckland to enable appropriate orders to be made which reflect this Court's decision that the debt owing to the husband of \$2.284 million is to be ascribed that figure as its proper value and to be divided equally between the parties.

[81] We have accepted His Honour's valuation of the debt and the fact that each party was entitled to a half share. (The latter has never been in dispute.) But we have ourselves resolved the consequential orders flowing from that finding: see orders C through E. Accordingly, there is no longer any need to remit that question to the Family Court. The only matters to be remitted to the Family Court are those set out in order G.

Order J

In respect of costs in this court, the appellant must pay to the respondent \$6,000 plus usual disbursements. These are to include disbursements relating to preparation of the case on appeal.

[82] The wife is entitled to recover as a disbursement the cost of preparing the case on appeal. Among the many matters on which these parties have failed to co-operate sensibly was the task of preparing the case on appeal. The husband's legal advisers did prepare a case, but it was incomplete and did not comply with the relevant rules of court. The wife's legal advisers had to redo the whole job: it was their case on appeal which we all used at the hearing and have used subsequently. In those circumstances, the wife should be able to recover the costs she incurred in preparing the case.

An order we have not made

[83] At the hearing before us, Mrs Hinton advised that, if we upheld Priestley J's valuation of the debt, the husband would want to pursue an application under s 18B for an order compensating him for his post-separation labour and skills, leading to an improvement in the value of the debt by date of hearing.

[84] Mrs Hinton pursued this topic, albeit obliquely, in her post-hearing correspondence with Ms Southwick. In the 17 July letter, para 3(b), she advised that, if the wife prevailed on the debt valuation issue, the husband would "pursue the more complicated s 18B adjustment", which, she complained, was not reflected in Ms Southwick's draft orders. Ms Southwick responded to this by email dated 26 July 2006:

"I cannot possibly agree to the suggestion you seem to be making about referring the matter back to the Family Court re s 18B – indeed I could not even understand that suggestion".

[85] It is too late for the husband to raise this issue now, for the following reasons.

[86] First, it does not appear to have been argued in the Family Court as a fallback argument in the event the husband's "date of separation" argument failed. A s 18B argument was raised: see Family Court decision at [102]-[106]. The particular contribution for which the husband now seeks compensation was not raised then, either in his affidavit or as part of his counsel's submissions.

[87] Secondly, the argument was not run (as a fallback) on the High Court appeal. Although we have not seen the parties' submissions in the High Court, it is inconceivable Priestley J would not have dealt with a s 18B argument had it been run, given his finding that s 2G required a "date of hearing" valuation.

[88] Thirdly, there is no mention of a 18B as a ground of appeal in the High Court decision granting leave to appeal to this court: 22 September 2005.

[89] Fourthly, s 18B is not mentioned as a ground of appeal in the husband's notice of appeal. Nor is it referred to (as an alternative order) in that section of the

notice of appeal where the husband set out “the judgment [he sought] from the Court of Appeal”.

[90] Fifthly, s 18B was not mentioned at all in Mrs Hinton’s written submissions.

[91] It would be grossly unfair for the husband to raise this fallback argument for the first time now, more than seven years after the parties separated and the wife commenced her proceeding in the Family Court. There must come an end to this litigation so that the parties can get on with their lives. The wife has made concessions (eg, with respect to Gowing Drive) in an attempt to get finality. If we were to permit this late run by the husband, no doubt the wife would be justified in withdrawing her concessions.

[92] We further observe that the s 18B claim would have been weak in any event. This is not a case where we have confirmed a “date of hearing” valuation solely because that is the default position under the Act. Part of the reasoning reflects our assessment, in common with Priestley J’s, that the increase in value of the debt was only partly attributable to the husband’s skill and labour, for which he was satisfactorily remunerated in any event by the company. We also think it is possible that the wife has been “under-compensated” by her counsel’s decision to focus solely on the value of the debt as opposed to the package.

[93] The husband cannot now raise this s 18B issue in the Family Court.

Postscript: preparing a case on appeal

[94] We desire to add something for the guidance of lawyers required to prepare a case on appeal in cases which at first instance, by the relevant rules of court, proceeded by way of affidavit and cross-examination. In this case, the case on appeal prepared by the wife’s legal advisers proved very difficult for the panel to use as it was illogically ordered and inadequately indexed. (The husband’s case suffered from similar defects – and others.) The difficulties we encountered in this case are proving to be quite common in cases where the first instance trial has proceeded by way of affidavit evidence.

[95] The case on appeal should be in three sections:

- Section A: the pleadings, the decision(s) under appeal, other associated and relevant documents
- Section B: the affidavits (stripped of their exhibits) and the cross-examination
- Section C: the exhibits.

[96] Each volume of the case should be preceded by a full index to the entire case.

[97] The section B volume(s) should follow the order in which witnesses/deponents were cross-examined. The witness's affidavit(s) come first: if more than one, the earliest in time first. They will then be followed by that witness's supplementary examination in chief (if any), cross-examination (if any), and re-examination (if any). That pattern is repeated for each witness in turn. The affidavits of deponents not required for cross-examination should be inserted in the section B volume(s) in an appropriate place. Where, in an affidavit, the deponent has produced an exhibit, the preparer of the case on appeal should insert in the margin a cross-reference to where in the section C volume(s) that document can be found. Similar cross-references should be provided to any exhibits produced during oral evidence.

[98] The section B index should include every witness and, in relation to him or her, the page number(s) at which his or her affidavit(s) begin and the page numbers at which supplementary evidence in chief, cross-examination, and re-examination begin.

[99] Only exhibits relevant to issues on the appeal need be included in the section C volume(s). The relevant exhibits, regardless of who produced them, should be arranged in a logical order, which will normally be chronological. That is to say, the order of presentation in the case on appeal will not necessarily follow the order in which the exhibits appear in any particular affidavit. In the index, the following information must appear with respect to each exhibit:

Date, brief description of exhibit, witness producing exhibit, cross-reference to page number where exhibit produced.

[100] Thus by way of example:

20/12/02	Letter AB to CD	AB	2/77
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[In this example, the letter will have been produced by AB in his evidence appearing at volume 2 of the case, at page 77.]

[101] If cases on appeal are prepared in this way, it is much easier for counsel and the members of the bench during hearings and for the members of the bench post-hearing to find documents in which they are interested. The bench can also have the section B and section C volumes open at the same time, so that they can be reading the evidence in one volume while scanning the exhibits referred to in that evidence in the other.

[102] Because this approach to case preparation was not followed here, we wasted much time struggling to track down documents, which were not indexed and which were scattered as exhibits to affidavits throughout the case on appeal.

[103] In future, a successful appellant can expect his or her full costs and disbursements for case preparation only if the above procedure is followed. Of course, it goes without saying that the other requirements of r 40 of the Court of Appeal (Civil) Rules 2005 must also be complied with.

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