NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION PLEASE SEE HTTP:/WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2012-404-006468
[2013] NZHC 1241

BETWEEN	M L SIMPSON Appellant
AND	A S JOHNSON Respondent
AND	A C STONES AND M L SIMPSON Respondents to Cross-appeal

Hearing: 9 April 2013

Appearances: G M Cameron for the Appellant and Respondents to Cross-appeal
A Fisher and S Ambler for the Respondent

Judgment: 29 May 2013

RESERVED JUDGMENT OF GILBERT J

This judgment was delivered by me on 29 May 2013 at 4.00 pm
Pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date:

Introduction

[1] The Appellant and the Respondent have been married to each other twice. A key issue in the appeal is whether, following dissolution of their second marriage, their property should be divided in accordance with an agreement entered into by them in contemplation of their first marriage.

[2] Another central issue addressed in this judgment concerns the valuation of the Appellant's life interest in a residential property owned by his family trust. The Appellant contends that the valuation of his life interest, assuming a normal life expectancy in accordance with standard mortality tables, was not appropriate in this case because of his medical condition.

Background

[3] At the time of their first marriage on 3 April 1987, Mr Simpson[1] owned a house in Epsom and a bach at Whangamata. Both properties were mortgage free. He was a principal in a professional practice in Manurewa. Ms Johnson, who is a music teacher, owned a car and a piano and was a beneficiary under her parents' trust.

[4] On 3 April 1987, in contemplation of their marriage that day, Mr Simpson and Ms Johnson entered into an agreement under s 21 of the Matrimonial Property Act 1976, contracting out of the property sharing regime prescribed by the Act.

[5] Mr Simpson and Ms Johnson separated in January 1989 and their marriage was dissolved on 15 March 1991. They divided their property in accordance with the s 21 agreement.

[6] In late 1989, Mr Simpson entered into a de facto relationship with Ms Lane.[2] Mr Simpson and Ms Lane had two children during the course of their relationship.

---

[1] This is not the Appellant's real name. Pseudonyms have been used for the Appellant and the Respondent throughout this judgment to comply with ss 11B to 11D of the Family Courts Act 1980 because the judgment refers to persons under the age of 18 years. The pseudonyms have also been used to protect the private medical information traversed in the judgment relating to the Appellant.

[2] This is also a pseudonym and is used for the same reasons.

Their first child was born in 1991 and their second in 1994. This relationship ended in November 1997.

[7] By this time, there had been three significant changes in the property owned by Mr Simpson.

[8] First, in late 1989, Mr Simpson purchased a half share of the premises in Manurewa from which his practice was conducted.

[9] Second, on 25 May 1995, Mr Simpson created a lease for life in his favour in respect of the Epsom and Whangamata properties for an annual rental of $1, if demanded. On 6 September 1996, Mr Simpson transferred the reversion to his family trust, which he had created in February 1994. The beneficiaries of the trust included Mr Simpson and his children, but excluded Ms Lane and Ms Johnson.

[10] The third significant change was that the trustees of Mr Simpson's trust, as owners of the Epsom property, subdivided it into two lots in 1997 and built a new house on lot 2, being the smaller, rear site. Mr Simpson occupied this house pursuant to his lifetime lease. The trustees initially leased lot 1, on which the original house was situated, to third party tenants but then sold it in 2002.

[11] The net result was that whereas, at the time of the first marriage, Mr Simpson owned the unencumbered freehold estate in the entire Epsom property and the bach at Whangamata, he now held only leases for life over the new house on the subdivided rear site in Epsom and the Whangamata bach. He also held a half share of the Manurewa property and was a beneficiary of the trust that owned the reversion in the Epsom and Whangamata properties.

[12] Mr Simpson and Ms Johnson reconciled in 1998 and remarried on 28 November that year. They did not enter into a new agreement contracting out of the provisions of the Act. Mr Simpson claims that he understood that the original agreement continued to apply. Ms Johnson claims that she understood that it would not apply.

[13] Following their remarriage, the parties lived in the new house in Epsom and enjoyed holidays at the Whangamata bach. Ms Johnson resigned from her position as a senior teacher at a secondary school when their daughter was born in September 1999. Mr Simpson retired two months later, at the age of 50.

[14] The parties lived partly off rent paid to Mr Simpson in respect of the Manurewa property and payments made to him by the trust as distributions or loan repayments. Ms Johnson also contributed financially by working as a private tutor, relief teacher and as a cleaner. In about 2000 she also sold her townhouse in Glenfield and contributed the net proceeds, amounting to approximately $20,000, to the marriage partnership. The Judge in the Family Court found that the parties contributed equally to the marriage, financially and in other ways.

[15] The new house in Epsom turned out to be defective and had to be re-clad in 2004 or 2005. The repairs were funded by the trust with some contribution from the original building contractors. At the same time the trust funded the addition of two bedrooms, a sitting room and bathroom facilities above the garage. The parties supplemented their income from board paid by foreign students who lived in this accommodation.

[16] Mr Simpson and Ms Johnson separated on 3 July 2009.

[17] The parties were unable to agree how their property should be divided following the termination of their second marriage. In particular, Ms Johnson disputed Mr Simpson's contention that their property should be divided in accordance with the agreement they had entered into in contemplation of their first marriage.

The Appeal

[18] In a decision dated 4 October 2012, Judge Fleming made the following findings which are the subject of this appeal:

(a) the agreement dated 3 April 1987, made in contemplation of the first marriage, did not apply to the division of property following the termination of the second marriage;

(b) even if the agreement did apply, it should be set aside under s 21J of the Property (Relationships) Act 1976 because giving effect to the agreement would cause serious injustice;

(c) the value of Mr Simpson's life interest in the Epsom property was $875,000;

(d) Ms Johnson was entitled to compensation of $20,000 under s 17 of the Act for sustaining Mr Simpson's life interest in the bach at Whangamata;

(e) Ms Johnson was entitled to a half share of the rent notionally payable for the Epsom property during the period Mr Simpson had exclusive occupation of it; and

(f) Ms Johnson was entitled to receive compensation of $15,000 pursuant to s 18B of the Act for caring for their daughter on her own for the three years since separation.

[19] Mr Simpson also appeals against Judge Fleming's costs decision dated 13 December 2012 directing Mr Simpson to pay costs to Ms Johnson on a 2B basis reduced by 15 per cent to take account of Ms Johnson's unsuccessful constructive trust claim against the trust.

[20] Ms Johnson cross-appeals against the Judge's rejection of her alternative claim against the trustees of Mr Simpson's family trust based on constructive trust. This cross-appeal is pursued only in the event that I find that the s 21 agreement regulates the division of the parties' property following the second marriage.

Does the agreement apply?

[21] Mr Cameron submits that the agreement entered into in contemplation of the parties' first marriage applies to the division of their property following the termination of their second marriage. He relies, in particular, on cl 6 of the agreement which provides:

> THIS agreement shall be binding on the parties in all circumstances in which property rights would without this agreement be determined under or affected by the Matrimonial Property Act 1976. Without prejudice to the foregoing the operation of this agreement shall not be affected by the bankruptcy, the taking of property in execution by creditors, the parties living apart (whether on one or more occasions and whether pursuant to any separation agreement or separation order or not), reconciliation or dissolution of marriage between the parties. This agreement shall not be binding in the event of the death of one of the parties except to the extent reserved by Section 5 of the Matrimonial Property Act 1976.

[22] Mr Cameron submits that the words "in all circumstances" mean exactly that. He notes that the parties specifically provided that the agreement should apply in all circumstances, including separation, reconciliation or dissolution of marriage.

[23] The Judge rejected this argument and found that the agreement did not apply to the second marriage. She dealt with this at [16] of her judgment:

> In my view the agreement signed in 1987 prior to the parties first marriage does not apply to their second marriage notwithstanding the agreement itself provides it is binding on them "in all circumstances". It was clearly not contemplated at the time the agreement was signed that they would separate, live apart for nine years or so, divorce, remarry and have a child. Despite Mr Simpson's evidence to the contrary, I do not believe either he or Ms Johnson thought the agreement would apply to their second marriage. Ms Johnson said there was no discussion about the agreement prior to the second marriage and I generally preferred her evidence where there was a conflict because Mr Simpson had obvious difficulties in accurate recall.

Analysis

[24] The agreement must be construed, like any other agreement, by interpreting the words used in the light of the facts and circumstances within the parties' mutual contemplation at the time the agreement was entered into, including the relevant legislative context. The parties understood that their intended marriage on 3 April 1987 would result in their property becoming subject to the sharing regime in

the Matrimonial Property Act. They entered into the agreement to avoid this. The first two recitals to the agreement state:

> WHEREAS the parties contemplate marriage to each other and desire that property directly or indirectly produced by their joint efforts during their marriage partnership should be shared as matrimonial property under the general principles of the Matrimonial Property Act 1976 but also desire that property not so produced by the marriage partnership should not be shared as matrimonial property but should in each case be retained by the existing owner.
>
> AND WHEREAS the parties recognise that property which they already own before their marriage or which they may at any time after their marriage acquire from third parties by gift, trust, succession or survivorship is not and will not be produced by their marriage partnership and should not be shared as matrimonial property.

[25] The marriage referred to by the parties in these recitals, and in the operative provisions of the agreement giving effect to them, was the marriage entered into on 3 April 1987. For example, the parties provided that all property owned by the intended husband or the intended wife at the date of "the marriage" would remain the separate property of the husband or the wife notwithstanding the marriage. Similarly all property acquired during the course of "the marriage", would remain the property of the husband or the wife depending on who acquired it. Family chattels, excluding motor vehicles, caravans, trailers and boats, acquired after the date of "the marriage" were to be matrimonial property.

[26] The parties did not contemplate, let alone make provision for, any second or subsequent marriage to each other. The words "in all circumstances" in cl 6 mean that the agreement was to apply to the division of the parties' property in all circumstances following termination of the marriage contemplated by the agreement and notwithstanding any separation, reconciliation or dissolution of that marriage.

[27] The parties divided their property in accordance with the agreement following dissolution of their first marriage. The agreement had no ongoing effect following that division.

[28] By the time of the second marriage, more than seven years after their first marriage had been dissolved, the parties' circumstances, including their respective financial positions, had changed significantly. The parties did not attempt to revive

the operation of the earlier agreement for the purposes of their second marriage. The Judge accepted Ms Johnson's evidence that Mr Simpson told her that she would not have to sign any agreement this time because he was prepared to "do things differently" and now had a family trust.

[29] For these reasons, I agree with the Judge that the agreement dated 3 April 1987, entered into in contemplation of the first marriage, applied only to that marriage and did not regulate the division of their property following the breakdown of their second marriage.

Should the agreement be set aside?

[30] In view of my conclusion on the first issue, it is not necessary for me to consider whether the agreement should be set aside under s 21J of the Act on the grounds that serious injustice would result if it is given effect.

Did the Judge err in her assessment of the value Mr Simpson's life interest in the Epsom property?

[31] The Judge was presented with widely differing views as to the value of Mr Simpson's life interest in the Epsom property, ranging from $210,000 to $875,000.

Valuation evidence

[32] Gordon Edginton, a registered valuer, calculated the value of the life interest as being $240,000 at the date of separation in July 2009. He arrived at this figure using a discounted cashflow approach. Mr Edginton assumed that Mr Simpson had a life expectancy of only five years because of his medical condition, to which I shall refer below. He assessed the market rental at the date of separation as being $1,100 per week or $57,200 per annum. He deducted annual outgoings of $5,285 because he understood that Mr Simpson was obliged to meet these under the lease. He assumed that rentals would rise at the rate of 4.5 per cent per annum and outgoings at

the rate of 5 per cent per annum. He then applied a before tax discount rate of 6 per cent per annum to arrive at the value at separation date.

[33] Evan Gamby, another registered valuer, supported Mr Edginton's approach. He calculated the net rental as at separation date to be $50,000 per annum. Applying a discount rate of 6 per cent per annum, Mr Gamby calculated the value of the life interest as $210,000 assuming a life expectancy for Mr Simpson of five years from the date of separation, up to $573,500 if an increased life expectancy of 20 years was assumed.

[34] Peter Davies, an actuary, assessed the value of the life interest at $875,000. Rather than calculating the present day value of the future rent payable for the property, Mr Davies' approach was to calculate the value of the reversion and deduct it from the market value of the property to derive the value of the life interest. Mr Davies relied on a valuation prepared by Anthony Gardner, a registered valuer, who assessed the market value of the property at the date of the hearing as being $1.575 million.

[35] Mr Davies' methodology was as follows. First, he assessed the probability that Mr Simpson will die in each year, over the next 53 years, based on a mortality table commonly used by actuaries when assessing average population mortality in New Zealand. He then applied that probability to Mr Gardner's assessment of the value of the property which he discounted to present day value using an after tax discount rate of 5 per cent per annum. The aggregate of the sums so produced for each year gave the value of the reversion. Mr Davies then deducted this value from the market value of the property to derive the value of the life interest.

[36] The critical assumptions made by Mr Davies for the purposes of his calculations were:

(a) the market value of the property is $1.575 million;

(b) Mr Simpson's life expectancy is 17 years based on the United Kingdom PA(90) mortality table for males, but rated down by four

years. In other words, Mr Davies assumes that Mr Simpson will live four years longer than the average male on this table. Mr Davies said that this is a common assumption when assessing New Zealand's average population mortality;

(c) the Epsom property will not increase in value over the 53 year period that Mr Simpson may theoretically live, based on the mortality table; and

(d) the appropriate discount rate is 7.5 per cent per annum, being an after tax rate of 5 per cent per annum.

Valuation methodology

[37] The Judge accepted Mr Davies' assessment that Mr Simpson's life interest in the Epsom property at the date of hearing was worth $875,000. One of the reasons given by the Judge for rejecting the discounted cashflow analyses undertaken by the valuers based on market rents was the difficulty of predicting future rental levels. However, I do not consider that this is a sound reason for rejecting the valuers' approach in favour of Mr Davies' actuarial approach. Both methodologies require an assessment of future value. The discounted cashflow analysis requires an assessment of the future market rent for the property whereas Mr Davies' approach requires an assessment of the future value of the property. These assessments of future value are equally difficult.

[38] The Judge also considered that the discounted cashflow analysis failed to recognise the benefits of the life interest that she listed at [46] of her judgment:

- Entitlement to reside in a house of choice and in this case the property has been home for many years.
- Having the effective right to remain in the home of choice throughout your lifetime and never being forced to move.
- Having the ability to move to alternative accommodation if you so choose, and to another property of choice.

The Judge said that these benefits are not taken into account when calculating the market rent for the property.

[39] I agree with the Judge that when assessing market value, all hypothetical market participants must be considered, including the parties themselves. It follows that any special interest Mr Simpson may have in occupying the house will reflect in value. However, I consider that this factor is relevant, not only to the value of the house but also when assessing the market rent for it. In any event, it appears that none of the experts had particular regard to this factor in their valuations. I note that, for reasons explained later in this judgment, Mr Simpson was not able to live in the property at the date of the hearing. He has not done so since being admitted to hospital in November 2011. For these reasons, I do not consider that the particular benefits that may accrue to Mr Simpson through being able to live in the house provide a valid reason for preferring one valuation approach over the other. As the Judge said, both approaches should yield a similar outcome if the same assumptions are adopted.

[40] Further, the lease does not confer the third benefit listed by the Judge and quoted above. The lease was entered into in May 1995 when the parties contemplated subdividing the property, selling lot 1 and constructing a new house on lot 2. The lease accordingly provided:

> That in the event of a sale or a subdivision of this property and the purchase of any other replacement residential property, the lessee will be entitled to transfer his rights to the life interest in this property to any new residential property, and retain all his rights and obligations as set out above and the lessor shall then own the remainder of that property only.

This provision enabled the trustees to proceed with the subdivision and subsequent sale of lot 1 but it does not confer any right on Mr Simpson as lessee to compel the trustees to purchase any other property and make it available for his occupation.

Life expectancy

[41] The most significant issue dividing the experts was not valuation methodology but rather Mr Simpson's life expectancy. Mr Davies assumed that Mr Simpson has a life expectancy of 17 years, equivalent to the average 63 year old

New Zealand male, whereas the valuers assumed a life expectancy of only five years from the date of separation in July 2009 based on the available medical evidence.

[42] Despite the medical evidence and Mr Davies' acknowledgement that Mr Simpson has a reduced life expectancy, the Judge was not prepared to fix the value of Mr Simpson's life interest on this basis. She accepted Mr Davies' view that only a terminal condition should displace the mortality tables. The Judge said:

> [41] Obviously it is not possible to predict any persons date of death hence the use of mortality tables. The evidence falls well short of establishing a life expectancy of five years (as at July 2009) or two years as at the present time, or any other precise date.
>
> [42] I accept the only principled basis upon which to calculate Mr Simpson's life expectancy is by reference to the life expectancy table – that is the life expectancy of a further 17 years.

[43] Ms Fisher argues that recourse to the mortality tables was appropriate for the reasons given by Mr Davies in his evidence:

> Actuaries tend to take quite a broad approach to life expectancy in any assessment involving relationship property. It is, from my experience, very rare for the valuation to take account of a specific health condition. The underlying principle is, in my view, that one party should not be unduly penalised due to the health condition of the other party. By accepting this approach, the Courts would be implicitly agreeing, for example, that the wife of a heavy-smoking pensioner should receive the same relationship property settlement as the wife of a non-smoking pensioner, even though the two pensioners have quite different life expectancies.

[44] I do not accept the underlying principle suggested by Mr Davies. It is not a question of penalising either party; it is a matter of making an appropriate assessment of the value of the property interest so that a just division can be achieved.

[45] In the normal run of cases it is appropriate to assess the value of a life interest having regard to mortality tables. However, where the medical evidence establishes that a person has a substantially reduced life expectancy, adherence to the tables would be inappropriate and likely to result in an unjust division of property. The fact that it is not possible to determine the precise length of someone's life is not a sufficient reason to rely solely on normal mortality tables. The Court is required to

make the best assessment it can notwithstanding that the available evidence may be imprecise.

[46] Mr Cameron submits that this is an exceptional case and that normal mortality tables should not have been applied. He relies on the available medical evidence which indicates that Mr Simpson has a substantially reduced life expectancy.

[47] Mr Simpson has smoked heavily all his adult life; between 20 and 40 cigarettes per day for the last 40 years. He is also a chronic alcoholic. He was admitted to hospital on five separate occasions in 2011 for various conditions relating to his alcohol abuse, including alcoholic hepatitis and Wernicke's encephalopathy.[3]

[48] Dr Toby Rose, a gastroenterologist and hepatologist, reported on 29 September 2011 that Mr Simpson's admissions to Auckland Hospital for episodes of alcohol induced hepatitis indicated that his life expectancy would be much more limited than the average. Dr Rose had not seen Mr Simpson for over three years and therefore based his opinion on the conditions suffered by Mr Simpson as disclosed in his medical records. He stated:

> There is considerable data telling us that people with episodes of alcoholic hepatitis have a very limited life expectancy in the order of one to two years in many cases if they continue drinking and a few years longer if they are able to discontinue drinking and remain "dry". The presence of Wernicke's Encephalopathy is also another poor prognostic factor associated with need for high levels of outside assistance and care and associated with poor long term survival. It would be completely inappropriate to apply actuarial life expectancy tables in [Mr Simpson's] case based upon the average life expectancy of a 63 year old with a severe debilitating disease with well documented limited life expectancy.

[49] Mr Simpson was admitted to Auckland City Hospital on 19 November 2011, having been found in a comatose state on his bedroom floor. He was placed under the care of Dr John Henley who diagnosed him with alcoholic hepatitis, Wernicke's encephalopathy and Korsakoff's psychosis.[4] Dr Henley reported on

---

[3] A disease affecting various organs in the body and causing confusion, loss of muscle coordination (ataxia) and impaired vision.

[4] A neurological disorder resulting from damage to areas of the brain caused by chronic alcohol abuse.

24 November 2011 that Mr Simpson was, at that stage, unable to participate in any legal forum because of the considerable cognitive impairment that had resulted from his alcohol abuse.

[50] Mr Simpson was transferred from Auckland City Hospital to the outpatient rehabilitation service, Rehab Plus, on 8 December 2011. Dr Samir Anwar, a consultant in rehabilitation medicine at Rehab Plus, reported on 24 January 2012 that Mr Simpson's alcohol abuse had resulted in significant cognitive deficits and had left him physically quite ataxic and uncoordinated. He was assessed as having a very high risk of falling and, at that stage, required the use of a wheelchair.

[51] Mr Simpson was discharged from Rehab Plus and admitted to the Laura Fergusson rehabilitation centre in Auckland on 14 March 2012 where he remained until 5 June 2012. His discharge report on that date notes that he was able to walk with the aid of a walking frame but was not able to live independently. He was therefore discharged to the Epsom South Retirement Home. At the time of the hearing, Mr Simpson was living at this retirement home and was drinking approximately one bottle of wine every night.

[52] It is obviously not possible to establish how long Mr Simpson will live. However, Dr Rose stated that there is considerable data establishing that people with episodes of alcoholic hepatitis have a very limited life expectancy in the order of one to two years if they continue drinking. If they are able to stop drinking, they can be expected to live a few years longer. There was no contrary medical evidence.

[53] In these circumstances, and with great respect to the experienced Judge, I consider that she erred in accepting Mr Davies' valuation based on normal life expectancy in this case. The uncontradicted medical evidence indicates that Mr Simpson's life expectancy is substantially less than that of the average 63 year old New Zealand male.

Symptoms include loss of memory and an inability to form new memories.

Stigma

[54] Mr Cameron submits that the Judge ought to have recognised a discount from Mr Gardner's valuation because the house is a remediated monolithically clad house. However, the valuers were unable to provide any evidence demonstrating that such a discount is applied in the market to reflect this factor. I am therefore not persuaded that the Judge made any error in finding that no discount should be applied in this case.

Assessment of value of the life interest

[55] Having reached the conclusion that the Judge erred in assessing the value of Mr Simpson's life interest in the Epsom property, I must now make my own assessment of that value based on the evidence that was presented in the Family Court.

[56] For the reasons I have given, Mr Davies' valuation of $875,000 must be discounted to reflect the fact that Mr Simpson clearly does not have a normal life expectancy. In my view, his valuation is additionally overstated because he assumes that the Epsom property will not increase in value over the 53 year period covered by the mortality table whereas he calculates the present day value of the residual interest over this period using an after tax discount rate of 5 per cent per annum.

[57] The significance of the zero property inflation assumption is illustrated by an alternative calculation prepared by Mr Davies where he assumed property inflation of 2.5 per cent per annum over the relevant period. This had the effect of substantially increasing the value of the reversion and reducing the value of the life interest. This calculation was based on an earlier valuation of the property at $1.25 million. Assuming 2.5 per cent per annum property inflation but applying the same discount rate, Mr Davies calculated the value of the reversion as being $812,511. Deducting this figure from the present day value of the property, Mr Davies derived the value of the life interest as being $452,489. On the other hand, assuming that property inflation will be zero, the value of the reversion

decreased from $812,511 to $544,946 and the life interest correspondingly increased from $452,489 to $720,054.

[58] Mr Davies did not produce calculations based on the increased valuation at $1.575 million but the effect on the value of the life interest would have been similarly substantial if property inflation at the rate of 2.5 per cent per annum had been assumed instead of zero inflation over the relevant period. This would have resulted in the value of the life interest decreasing from $875,000 to a figure closer to $550,000. This is before any discount is applied for the reduced life expectancy. If Mr Simpson's life expectancy is only half of the average 63 year old New Zealand male, Mr Davies' valuation would reduce to an amount closer to $300,000.

[59] On the other hand, I consider that Mr Edginton's valuation is too conservative because it assumes a life expectancy of only five years from the date of separation in July 2009, whereas the evidence relates to life expectancy assessed by the medical practitioners in late 2011. Further, I do not consider that it was appropriate to deduct outgoings from the future rental stream. The lease does not require Mr Simpson, as lessee, to meet these outgoings. This factor would increase Mr Edginton's valuation from $240,000 to an amount closer to $265,000.

[60] Mr Gamby provided a range of values including $210,000 assuming a five year life expectancy, or $368,000 if a 10 year life expectancy was assumed. I consider that Mr Gamby's calculations are also understated because he deducted estimated outgoings of $7,200 from his assessment of annual gross rental of $57,200. His calculation is also made as at mid-2009. The standard mortality table indicates that the average 63 year old New Zealand male has a life expectancy of 17 years. If Mr Simpson's life expectancy is half of this, Mr Gamby's valuation would be closer to $300,000, adjusting for the outgoings.

[61] It is not possible to place a precise value on Mr Simpson's life interest in the Epsom property. It is necessary to take a broad and robust approach taking into account all relevant considerations and contingencies. On this basis, and taking into account all of the evidence I have referred to, I consider that an appropriate value of Mr Simpson's life interest in the Epsom property at the date of the hearing in the

Family Court is $300,000, not $875,000 as found by the Judge. I consider that this valuation would achieve a just division of this asset between the parties.

Did the Judge err in finding that Ms Johnson was entitled to compensation of $20,000 for sustaining the bach?

[62] The Judge ordered Mr Simpson to pay compensation of $20,000 to Ms Johnson on the basis that she had helped sustain the life interest in the Whangamata bach. Section 17 of the Act relevantly provides:

> (1) This section applies if the separate property of 1 spouse or partner (party A) has been sustained by –
>
> ...
>
> (b) the actions of the other spouse or partner (party B).
>
> (2) If this section applies, the Court may –
>
> ...
>
> (b) order (party A) to pay (party B) a sum of money as compensation.

[63] Section 17 requires a two stage enquiry.[5] The first stage is to determine whether separate property has been sustained. The second stage is to consider how to exercise the discretion to adjust the parties' financial positions.

[64] The Judge found that the life interest in the bach had been sustained by Ms Johnson's actions and that her financial contribution overall was important and necessary. In particular, the Judge noted that Ms Johnson had worked hard outside the home, teaching piano, cleaning office premises and undertaking relief teaching. She had also contributed by assisting with general maintenance of the bach including making curtains, painting and attending to the garden and lawns. The Judge concluded:

> Overall in all the circumstances I am satisfied that Ms Johnson has by her actions, sustained the value of the life interest in the bach in more than a minor way. However when assessing what compensation should be paid I take into account the level of the contribution which is at the lower end but more than minor, and the enjoyment the family generally derived from having access to a holiday home over the course of the relationship. In all

[5] *Hebberd v Hebberd* [1992] 3 NZLR 517 (CA).

> the circumstances of this marriage I am satisfied the appropriate compensation is $20,000.

[65] Mr Cameron argues that the Judge failed to recognise that the separate property that needed to be sustained to justify compensation was the life interest in the bach. He also submits that the Judge misapplied the correct test of causation, namely whether Ms Johnson's actions enabled the separate property to be kept up or kept going in the sense of ensuring its continued existence or value.

[66] I am not persuaded that the Judge made any such error. I agree with the Judge's reasons for finding that Ms Johnson assisted in maintaining the value of the life interest in the bach. I consider that the modest award of compensation to reflect this was justified and appropriate in all of the circumstances of this case.

Did the Judge err in finding that Ms Johnson was entitled to occupation rent?

[67] I do not need to consider this ground of appeal because it was contingent on Mr Simpson succeeding in establishing that the life interest in the Epsom property was his separate property because the s 21 agreement applied and should not be set aside under s 21J(4) of the Act.

Did the Judge err in finding that Ms Johnson was entitled to compensation for caring for their daughter?

[68] Section 18B of the Act empowers the Court to direct the payment of compensation by one spouse to another to recognise contributions that would have been contributions to the marriage had it not ended, from the time it ended to the date of the hearing. The Judge ordered Mr Simpson to pay compensation to Ms Johnson of $15,000 pursuant to this section in recognition of her contribution in caring for their daughter during this three year period.

[69] Mr Cameron's primary criticism of this award is that it does not take into account Mr Simpson's contribution as a trustee of the trust which has made payments towards their daughter's private school education. He also submits that the award was inappropriate because the contribution did not relate to property.

[70] In my view, there is nothing in s 18B of the Act to indicate that the legislature intended to confine qualifying contributions to those relating to property. Instead, the contributions covered by the section include any contribution that would have been classed as a contribution to the marriage had it not ended.

[71] The financial contribution made by the trust cannot be regarded as a contribution by Mr Simpson. His assets and income have not been depleted by the payments made by the trust. On the other hand, it is clear that Ms Johnson has made considerable personal sacrifices to provide the best possible opportunities for her daughter. Ms Johnson has struggled financially as a result and is living in unsatisfactory accommodation at her sister's house where she shares a bedroom with her daughter. She has provided all of the practical and emotional support needed by her daughter with little support from Mr Simpson. I consider that the Judge was justified in making this modest award.

Did the Judge err in her costs decision?

[72] Ms Johnson succeeded against Mr Simpson in the Family Court and was entitled to an award of costs against Mr Simpson. However, Ms Johnson failed in her constructive trust claim against the trustees of the trust. The trust was therefore entitled to costs against her. The Judge dealt with this by applying an offset and reducing the costs payable by Mr Simpson by 15 per cent.

[73] I accept Mr Cameron's submission that this was unprincipled because all parties had to be treated separately for costs purposes. However, the result was that the costs payable by Mr Simpson were inappropriately reduced and the trustees did not receive the award of costs to which they were entitled from Ms Johnson. Mr Simpson is therefore not able to complain about the way costs were dealt with. Only the trustees could complain.

[74] The trustees have not appealed against the costs award; only Mr Simpson has. It follows that Mr Simpson's appeal from the costs decision must be dismissed.

Cross-appeal

[75] Ms Johnson cross-appealed against the trustees of the trust but this does not need to be considered because it was only raised to meet the possibility that the s 21 agreement was held to apply. This agreement does not apply and accordingly the cross-appeal can be dismissed.

Result

[76] The appeal against the judgment of the Family Court dated 4 October 2012 is allowed in part.

[77] I fix the value of Mr Simpson's life interest in the Epsom property at the date of the hearing in the Family Court at $300,000. This figure is to be substituted for the figure of $875,000 determined by the Family Court.

[78] The cross-appeal against this judgment is dismissed.

[79] The appeal against the costs decision dated 13 December 2012 is dismissed.

[80] Mr Simpson is entitled to costs on the appeal calculated on a 2B basis.

[81] I reserve leave to the parties to make any further application that may be required to implement these orders.

M.A. Gilbert J

M A Gilbert J