

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

**CIV-2014-470-193
[2016] NZHC 2064**

BETWEEN

DAVID ANTHONY DA SILVA
Plaintiff

AND

DENISE ANDREA DA SILVA
First Defendant

SPICERS ROTORUA TRUSTEE
COMPANY LIMITED, HAMERTONS
TRUSTEE SERVICES LIMITED and
DENISE ANDREA DA SILVA as trustees
of the DUZUS FAMILY TRUST
Second Defendants

AWAKERI HOLDINGS LIMITED
Third Defendant

Hearing: 18 - 22 and 29 April 2016

Appearances: H A Cull QC and A C Evetts for Plaintiff
A H Brown and P M McMeeken for First and Third Defendants
K G Davenport QC, C V Walsh and AAM Kershaw for Second
Defendants

Judgment: 1 September 2016

JUDGMENT OF PETERS J

This judgment was delivered by Justice Peters on 1 September 2016 at 4 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:

[1] This judgment determines disputes between the Plaintiff, Mr da Silva, and each of the Defendants.

[2] Mr da Silva and the First Defendant, Mrs da Silva, were married for more than 25 years. They separated in 2012 and their marriage was dissolved in 2014.

[3] The Second Defendants are the trustees of the Duzus Family Trust (“trustees” and “trust”).¹ The trust was settled by Mrs da Silva’s mother, Mrs Julianne Perris, in September 2000. Mrs da Silva and the five (now adult) children (“children”) of Mr and Mrs da Silva’s marriage are beneficiaries of the trust, as was Mrs Perris until her death in 2004. Mr da Silva is not and never has been a beneficiary.

[4] The trust’s sole asset of consequence is the shares in the Third Defendant (“AHL”). AHL’s principal asset is commercial property in the Bay of Plenty.

[5] Mr da Silva pleads five causes of action in which he seeks the following:

- (a) orders specifying his share in his and Mrs da Silva’s relationship property; specifying his share in the value of property held by the trustees and AHL (he seeks a 50 per cent share); and determining claims for adjustment and compensation pursuant to ss 8(e) and (ee), 9A, 10, 15, 15A and 18 and/or ss 17, 44, 44C and 44D Property (Relationships) Act 1976 (“PRA”);
- (b) relief pursuant to s 182 Family Proceedings Act 1980 (“FPA”) on the basis the trust is a “post-nuptial settlement”;
- (c) an order, essentially a declaration, that the trustees hold their assets, including the shares in AHL, on constructive trust as to a 50 per cent share for Mr da Silva;
- (d) equitable estoppel, on the basis of representations said to have been made by Mrs Perris to Mr da Silva and his reliance thereon; and

¹ “Duzus” as in “Does Us”.

(e) unjust enrichment/unconscionability.

Background

[6] Mr and Mrs da Silva lived in a de facto relationship from 1986, were married in May 1988, separated in May 2012 and their marriage was dissolved in July 2014. Together they were/are directors and shareholders of David da Silva Automotive Services Limited (“DASL”). Mr da Silva worked in this business, generating a modest income which was applied to support the family. From time to time, Mrs da Silva worked as a kindergarten teacher. It is agreed that the shares in DASL are relationship property, but there is a dispute as to their value.

AHL

[7] From about 1976, Mrs Perris and her partner, Eric Magee, operated a service station on what is now AHL’s land. They incorporated AHL in 1976 and built it up by their efforts. Over time, AHL acquired the land, and an adjacent title or titles, on which the service station and other businesses are situated, including DASL. The rent these businesses pay to AHL presently exceeds \$170,000 gross (excluding GST) per annum.

[8] Mr Magee died in 1997. To retain AHL, Mrs Perris settled a claim brought by Mr Magee’s children, leaving her as AHL’s sole director and shareholder.

Trust

[9] Mrs Perris settled the trust in September 2000. She had two long-standing advisers in the Bay of Plenty. These were Mr Ian Henderson, a chartered accountant and a partner in a firm I shall refer to as “BDO”, and Mr William Jones, a solicitor in Hamertons.

[10] Mr Jones and Mr Henderson, who retired in 2009, both swore affidavits in the proceedings and gave evidence before me. At the time he gave evidence, Mr Henderson had difficulty recalling some events. That limited the cross-examination that counsel for the Plaintiff could usefully undertake. I shall bear that in mind to the extent that Mr Henderson’s evidence is controversial.

[11] The gist of Mr Henderson's and Mr Jones' evidence was that Mrs Perris was still relatively young when Mr Magee died and she settled the trust to protect her assets from any future claim. She also wished to make provision for her daughter, Mrs da Silva, and her grandchildren. Mrs da Silva was Mrs Perris's only surviving child, her other child having died many years earlier. Mr Henderson's evidence was that Mrs Perris was "an extremely capable and practical businesswoman who worked very hard to create the assets which went into the [trust]".²

[12] The first trustees of the trust were Mrs Perris, Spicers Rotorua Trustee Company Limited and Hamertons Trustee Services Limited ("trustee companies").

AHL share capital

[13] At the time Mrs Perris settled the trust, AHL restructured its share capital so that it had 1,000 "A" shares carrying the right to vote, and 19,000 "B" shares which, amongst other things, carried the right to receive dividends. Mrs Perris owned both parcels until 31 March 2001, when she sold the B shares to the trustees for \$675,000.³ The resulting debt owed by the trustees to Mrs Perris ("B share debt"), and how that debt has been treated, is a matter of controversy between the parties.

Memorandum of wishes

[14] On 3 April 2003 and as settlor of the trust, Mrs Perris executed a memorandum of wishes.⁴ Amongst other things, Mrs Perris expressed the wish that the trustees pay Mrs da Silva an allowance of an amount to be in their discretion but sufficient to enable her to maintain a reasonable standard of living; that the trustees apply funds to advance the children's education and training; and that the trustees lend, rather than distribute, funds to the children if they wished to assist the children to purchase an asset. Lastly, Mrs Perris wished the trustees to wind up the trust and distribute the capital and any accumulated income to Mrs da Silva if the capital were so diminished that the trustees were unable to provide benefits to the discretionary beneficiaries. At present the trust assets are valued at approximately \$2 million.

² Supplementary Affidavit of I B Henderson sworn 28 October 2015 at [7].

³ Share Valuation dated 19 September 2000.

⁴ Memorandum of Wishes dated 3 April 2003.

[15] Mrs Perris discovered that she was terminally ill in early 2004. She died on 18 July 2004. She appointed Mr da Silva an alternate director of AHL shortly before she died. As I have said, part of Mr da Silva's case is based on representations that he contends Mrs Perris made to him prior to her death.

Will

[16] Mr Henderson, Mr Jones and Mrs da Silva were the executors and trustees of Mrs Perris's will ("executors").⁵ By her will and for reasons addressed below, Mrs Perris assigned the B share debt to the trustees. Mrs Perris also directed the executors to transfer the residue of her estate, which included the A shares in AHL, to the trustees. Accordingly, the effect of the will was that the trustees held the B share debt and the A and B shares in AHL.

Subsequent events

[17] Following Mrs Perris's death:

- (a) Mr and Mrs da Silva were appointed directors of AHL;
- (b) subject to what is said below, the trustees were AHL's shareholders;
- (c) Mrs da Silva was appointed as a trustee in December 2005; and
- (d) Mr da Silva was removed as a director of AHL in October 2013.

[18] Mr da Silva attended to much of the day to day management of AHL's affairs. He oversaw and negotiated rent reviews, renewals of lease, the payment of rent and outgoings, compliance with the terms of leases, general maintenance of the properties and so on. Mr da Silva would keep Mr Jones informed as required. Mr Jones would give any advice and prepare any legal documents necessary.

[19] After Mrs Perris's death, most of AHL's net income was paid to or drawn by Mr and Mrs da Silva, and so the trust received minimal income. Mr and

⁵ References below to "the trustees" are to the trustees of the trust and not of the will trust.

Mrs da Silva applied the funds to expenses such as sums due to the bank under the mortgage secured against the family home and in respect of a rental property referred to below, and costs associated with the children and their activities. The sums paid are recorded in AHL's financial statements as salary, drawings and advances and in the trust's financial statements as advances, largely to Mrs da Silva. Mrs da Silva contends that such debt as she has to AHL and the trust is relationship debt. That is not correct for reasons given later in this judgment.

First cause of action – Relationship property

[20] Under this cause of action it is necessary to determine:

- (a) the value of DASL;
- (b) whether a loss incurred on the sale of a rental property owned by Mr and Mrs da Silva is relationship debt;
- (c) post-separation adjustments in respect of outgoings on the family home and the rental property, and occupation rent from Mr da Silva in respect of the family home;
- (d) the extent, if any, to which Mr da Silva has a right to share in the assets of the trust or increases in the value thereof; and
- (e) whether there have been dispositions of property for the purposes of ss 44 and 44C PRA.

David da Silva Automotive Services Limited

[21] There are two issues as to the valuation of the shares in DASL.

[22] The first is the date at which the shares should be valued. Mr da Silva's expert witness, Mr Dobson, valued the shares on the basis of DASL's performance to 31 March 2013. Mrs da Silva submits that the valuation should include DASL's increased turnover and profit in the years ended 31 March 2014 and 2015.

[23] The second issue is whether the shares should be valued on the basis that DASL has a lease of its site from AHL.

[24] As to the first issue, I am satisfied that the shares should be valued on the basis of DASL's performance to 31 March 2013 and that the results thereafter should be disregarded. As the parties were separated by then, DASL's improved performance derives from Mr da Silva's efforts alone.

[25] However, the shares must be valued as if DASL had a lease of its site on usual commercial terms. Although DASL's lease terminated on 30 September 2006, Mr da Silva could easily have arranged a further lease whilst a director of AHL. In any event, AHL has since offered, and DASL has accepted, a lease.

[26] On this basis, there is no dispute that the value of the shares in DASL is to be taken as \$68,000 as of 31 March 2013.

Rental property

[27] In May 2006, Mr and Mrs da Silva purchased 242A King Street, Whakatane ("242A") for approximately \$347,000. They borrowed \$350,000 from the BNZ to finance the purchase.

[28] The parties sold 242A in 2015, but at a loss. Mr da Silva's case is that he and Mrs da Silva held the property on trust for AHL and that AHL or the trust should bear the loss on sale.

[29] The Defendants submit that 242A was relationship property and that Mr and Mrs da Silva must bear the loss on resale.

[30] 242A was next door to Mr and Mrs da Silva's family home at 244A King Street, and in close proximity to the home of Mr da Silva's mother at 244B King Street. Mr and Mrs da Silva purchased 242A when it came on the market, to ensure that it was not developed in a way that diminished the enjoyment of their home or to the home of Mr da Silva's mother.

[31] After consulting Mr Jones, Mr and Mrs da Silva executed an agreement to purchase 242A. The purchaser on the agreement was shown as “AHL or nominee” and Mr and Mrs da Silva executed the agreement in their capacity as directors of AHL. Funds drawn from AHL were used to pay the deposit due to the vendor.

[32] Mr Henderson advised Mr and Mrs da Silva to purchase the property in their own names, as it was expected that the rent derived from 242A would be less than the costs of holding the property. If the property were in their own names and beneficially owned by them, Mr and Mrs da Silva were entitled to claim a deduction in respect of the annual loss against their personal income tax.

[33] This appears from a contemporaneous file note of Mr Henderson’s which states:⁶

New Note – Date: 02/05/2006

Phone call from David da Silva re purchase of house on adjacent section to their home. To borrow \$347,0000 [sic] to 100% finance the deal. Rental income \$120,000 [sic].

Best finance deal is from BNZ, will also refinance [New Zealand Guardian Trust] Loan at 7.4% against current 9.45%, no penalties for early repayment as floating loan.

WHO TO OWN PROP? Holdings, Laqc, or personally. Decided on personally, cheapest and best option.

To proceed on above basis. Ian Henderson - 02/05/2006 - 10.41 am

[34] A BNZ file note dated 17 May 2006 states:⁷

PURPOSE / BACKGROUND

Denise and David have had their offer of \$347k for the purchase of [242A] accepted. Sale and Purchase Agreement provided with settlement on 26/5/06. The S & P Agreement is in the name of their commercial property holding company – [AHL] which is incorrect as their accountant has advised them to purchase the property in their personal name. Discussed this with solicitor who has since confirmed that property will be purchased in the name of Dave & Denise.

⁶ File Note of I B Henderson dated 2 May 2006.

⁷ BNZ Bank note re loan dated 17 May 2006.

[35] In addition, Mr Jones' evidence was that, as a trustee, he would not have considered 242A a suitable acquisition for AHL. AHL owns commercial properties. Such dwellings as there are on AHL's land are associated with retail tenancies.

[36] On or about 25 May 2006, as directors of AHL, Mr and Mrs da Silva nominated themselves as purchasers of 242A.⁸ The sale and purchase was then settled, the title registered in Mr and Mrs da Silva's names and from then on they claimed the deduction to which I have referred. Indeed, Mr da Silva claimed the deduction up to and including the year ended 31 March 2015.

[37] In support of his case that 242A was beneficially owned by AHL, Mr da Silva gave evidence that AHL paid the outgoings on the property, including payments to service the BNZ's loan. This is not correct. AHL deposited funds into Mr and Mrs da Silva's joint "02" account at the BNZ. Mr and Mrs da Silva paid the outgoings from this account. AHL treated its payments to the account as drawings by, or funds advanced to, Mrs da Silva.

[38] I am satisfied that the parties made an informed decision to purchase 242A in their own names. They were only entitled to claim deductions for the annual shortfall if they were the beneficial owners, and by claiming those deductions they made representations to the Inland Revenue Department to that effect. They are not able to resile from that position now. Even if I were persuaded otherwise, it would be a condition of granting relief that they file fresh returns with the Department, which might attract interest costs and possibly penalties.

[39] Counsel for Mr da Silva drew my attention to the fact that AHL paid the deposit and that, in reporting on the transaction, Hamertons addressed their letter, invoice and trust account statement to AHL c/- Mr and Mrs da Silva. Nothing turns on the payment of the deposit because Mr and Mrs da Silva had access to AHL's funds and, in any event, they repaid AHL when they drew down the loan from the BNZ. Nor does anything turn on the fact that Hamertons addressed their reporting documents to AHL.

⁸ Deed of Nomination dated 25 May 2006.

[40] For these reasons, I am satisfied that the rental property was relationship property and that the parties are required to bear an equal share of the loss.

Post-separation adjustments

[41] Mrs da Silva seeks post-separation adjustments in respect of:

- (a) outgoings, including mortgage payments, on the family home and rental property; and
- (b) occupation rent from Mr da Silva as he, with one of the children, has occupied the family home.

[42] The outgoings referred to in (a) above must be shared equally. Mr da Silva is also required to pay rent on the family home for his period of occupation. There was no satisfactory evidence before me as to the rent due but I expect it would be modest, having regard to the rent paid on the rental property. I reserve leave to apply on both matters if the parties are unable to agree.

Claims pursuant to ss 10(2)/9A(2)/17 PRA

[43] Mr da Silva seeks a share in the assets of the trust pursuant to ss 10(2), alternatively 9A(2), alternatively 17 PRA.

[44] The effect of s 10 PRA is that property acquired as a beneficiary of a trust settled by a third person is separate property unless it has been “so intermingled with other relationship property that it is unreasonable or impracticable to regard [it] as separate property”.⁹

[45] Section 9A(2) provides that an increase in the value of separate property attributable directly or indirectly, in whole or in part, to the actions of the non-owning spouse is relationship property. Mr da Silva’s claim pursuant to s 9A(2) assumes he has failed under s 10.

⁹ Property (Relationships) Act 1976, s 10(2).

[46] The claim under s 17 is a further alternative. Section 17 would permit the Court to compensate Mr da Silva if the assets of the trust were Mrs da Silva's separate property and he had sustained that property by his actions.¹⁰

[47] The Defendants oppose the claims that Mr da Silva makes under these provisions. Their first objection, which I accept, is that Mrs da Silva's "interest" in the trust, such as it is, is not "property" within the meaning of the PRA. Section 2 PRA defines property as follows:

property includes—

- (a) real property:
- (b) personal property:
- (c) any estate or interest in any real property or personal property:
- (d) any debt or any thing in action:
- (e) any other right or interest.

[48] Mrs da Silva and her children are discretionary beneficiaries of the trust, as is any trust of which Mrs da Silva or the children are themselves beneficiaries.

[49] By cl 11, on vesting day, the trustees hold the capital and income of the trust fund for Mrs da Silva if she is alive and for her surviving children if she is not.

[50] The vesting day provided for in the trust deed is September 2080, unless the trustees fix an earlier date.¹¹

[51] The power of appointment of new trustees is vested in the executors, Mrs da Silva, Mr Henderson and Mr Jones. The trustees are required to act unanimously. Although no minimum number of trustees is specified in the deed, if she was ever the sole trustee, Mrs da Silva would be precluded by cl 10 from making a distribution to herself.¹²

[52] Counsel for Mr da Silva referred me to the Supreme Court's decision in *Clayton v Clayton*.¹³ In that case, the Court held that the powers conferred on Mr Clayton under the Vaughan Road Property Trust were so extensive and unfettered

¹⁰ Section 17.

¹¹ Deed of Trust dated 6 September 2000, cl 1(c).

¹² At cl 24.

¹³ *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551.

that they constituted a right or interest and so were property for the purposes of the PRA.

[53] I accept the submission for the Defendants, however, that this case is different to that in *Clayton*. Mrs da Silva cannot exercise unfettered control of the trust fund. Further, as a trustee, she has fiduciary obligations to all beneficiaries. I do not consider her interest in the trust is property for the purposes of the PRA. It follows that it is unnecessary to address Mr da Silva's claims pursuant to the provisions to which I have referred.

Sections 44 and 44C PRA

[54] Mr da Silva's claims pursuant to s 44 PRA, alternatively s 44C, concern first, the A shares in AHL and secondly, the B share debt.

A shares

[55] As a result of what I am satisfied was an error, Mrs da Silva was incorrectly recorded in the Companies Office online records as the owner of the A shares from 10 September 2004 until December 2005. The records show that the A shares were then transferred from her name to the trustees in December 2005 to correct the error.

[56] Mr da Silva submits that the December 2005 transfer of the A shares from Mrs da Silva to the trustees was a disposition for the purposes of s 44, alternatively s 44C PRA.

[57] I do not accept this submission for the reasons below.

[58] Mrs da Silva came to be recorded as the owner of the A shares in the following circumstances.

[59] On 10 September 2004, an employee of BDO effected an online transfer of the A shares directly from Mrs Perris's name to Mrs da Silva's. Neither Mr Henderson nor the employee concerned can recall the background to the transfer

but, in any event, the transfer must have been in error given the terms of the will. Mrs da Silva's evidence, which I accept, is that she knew nothing of the transfer.

[60] Mr Jones obtained probate of Mrs Perris's will on 31 August 2004. He met Mr Henderson on 2 September 2004 and, amongst other things, his file note records that he was to prepare a transmission of the A shares to the executors and a transfer from the executors to the trustees. The note also records that the trustees would appoint Mr and Mrs da Silva as directors of AHL on receipt of the A (voting) shares.¹⁴

[61] Mr Jones sent the necessary transmission and transfer to Mr Henderson for execution on 28 September 2004. Another letter from Mr Jones to Mr Henderson, dated 1 November 2004, encloses the documents and asks Mr Henderson to record the transfer of the A shares in AHL's share register.

[62] In the course of the following year the executors decided that Mrs da Silva should be appointed a trustee. On 19 December 2005, Mr Jones sent Mr Henderson a deed of Mrs da Silva's appointment, and a transfer of the A and B shares to the new trustees, that is Mrs da Silva and the trustee companies.

[63] By this time, Mr Jones had become aware that the online records for AHL showed that Mrs da Silva owned the A shares, a matter to which he referred in his letter to Mr Henderson.¹⁵ The Companies Office documents included in the agreed bundle then show the transfer of the A shares from Mrs da Silva to the trustee companies and then, consequent upon Mrs da Silva's appointment, a transfer of the A and B shares to the three trustees.

[64] Accordingly, by December 2005, the error had been rectified.

[65] I accept counsel for Mr da Silva's submission that the error was compounded by the fact that the "Directory" section of AHL's financial statements recorded that Mrs da Silva was the owner of "1,000 ordinary shares" in the years ended 31 March 2005 to 2007 inclusive. Nothing turns on these matters, however.

¹⁴ File Note of W H Jones dated 2 September 2004.

¹⁵ Letter Hamertons to BDO Spicers dated 19 December 2005.

[66] Sections 44(1) and 44C(1) PRA provide:

44 Dispositions may be set aside

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

44C Compensation for property disposed of to trust

- (1) This section applies if the court is satisfied—
- (a) that, since the marriage, the civil union, or the de facto relationship began, either or both spouses or partners have disposed of relationship property to a trust; and
 - (b) that the disposition has the effect of defeating the claim or rights of one of the spouses or partners; and
 - (c) that the disposition is not one to which section 44 applies.

[67] To obtain relief under s 44, Mr da Silva must establish a disposition of property made in, say, the interests of Mrs da Silva in order to defeat a claim by Mr da Silva under the PRA. However, even if the December 2005 transfer of the A shares from Mrs da Silva to the trustees were a disposition of property within the meaning of s 44(1), it was not undertaken to defeat a claim by Mr da Silva. It was undertaken to correct a mistake in the execution of Mrs Perris's will. The claim in respect of the A shares under s 44 fails accordingly.

[68] To succeed under s 44C, Mr da Silva would first have to establish that the A shares were "relationship property" whilst Mrs da Silva was recorded as the owner of them. I do not consider they were relationship property. Mrs da Silva did not at any time have the beneficial interest in the A shares, as they had been wrongly transferred to her.

B share debt

[69] I turn now to Mr da Silva's claim in respect of the B share debt. That claim is to the effect that the debt became relationship property as a result of its treatment in the trust's financial statements following Mrs Perris's death.

[70] I do not accept this submission for the reasons set out below.

[71] In her will, Mrs Perris assigned the B share debt to the trustees. Mr Jones' evidence as to why Mrs Perris's will provided for assignment, rather than forgiveness, of the B share debt was as follows. In about 2003 when the will was prepared, some legal practitioners thought that a straightforward forgiveness of debt might be subject to the accruals rules in the income tax legislation. To avoid this, it became common to have the testator or testatrix assign to the debtor, rather than forgive it and the debt would thereby be discharged.

[72] The treatment of the B share debt is also marked by error on the part of the professional advisors.

[73] The trust's financial statements for the year ended 31 March 2004 record that the trustees were indebted to Mrs Perris in the sum \$587,533. Mrs Perris died in the financial year ended 31 March 2005. For reasons not explained, the trust statements for that year show that the trustees were indebted to *Mrs da Silva* in the sum of \$414,245 when in fact by her will Mrs Perris had assigned the debt to the trustees. Although the amount varied, the sum continued to be shown as a liability of the trustees to Mrs da Silva until the year ended 31 March 2013. As counsel for Mr da Silva submitted, the debt simply "disappears" from the financial statements altogether in the years ended 31 March 2014 and 2015, and there is no real dispute that was due to the present litigation.

[74] Mr da Silva's case is that the debt recorded as owed by the trustees to Mrs da Silva is relationship property, and that he is entitled to a half share.

[75] Mrs da Silva's evidence was that she did not read the financial statements, and that she did not understand them. Mr Jones' evidence was that he did not review the financial statements in detail, trusting BDO to prepare them. To the extent that Mr Jones knew how the debt was being treated, his evidence was that he considered it erroneous but he did not pursue the matter until Mr and Mrs da Silva separated and litigation was threatened. The trust's financial statements were not signed by the trustees, nor were they audited.

[76] As I have said, I am not persuaded that Mr da Silva has a claim to relief in respect of the debt under ss 44 or 44C.

[77] The B share debt was never Mrs da Silva's property. The trustees did not turn their minds to the issue or resolve to make a distribution of the amount of the debt to Mrs da Silva. However the debt may have been "removed" from the trust's financial statements, it was not to defeat a claim by Mr da Silva as required by s 44 but to correct a longstanding error.

[78] Section 44C requires a disposition of "relationship property" to a trust. The short answer on this point is that the debt was never relationship property. It was not Mrs da Silva's property, let alone relationship property.

Post-nuptial settlement – s 182 Family Proceedings Act 1980

[79] Section 182 FPA permits the Court, on dissolution of marriage, to make orders as to the application of property settled by way of a post-nuptial settlement, whether for the benefit of the children or a party to the marriage, such as Mr da Silva.

[80] Section 182 FPA provides:

182 Court may make orders as to settled property, etc

- (1) On, or within a reasonable time after, the making of an order under Part 4 of this Act or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963, a Family Court may inquire into the existence of ... any ante-nuptial or post-nuptial settlement made on the parties, and may make such orders with reference to the application of the whole or any part of any property settled or the variation of the terms of any such ... settlement, either for the benefit of the children of the marriage ... or of the parties to the marriage ... as the court thinks fit.

...

- (3) In the exercise of its discretion under this section, the court may take into account the circumstances of the parties and any change in those circumstances since the date of the ... settlement and any other matters which the court considers relevant.

...

[81] Mr da Silva pleads that the settlement of the trust was a post-nuptial settlement for the purposes of s 182 and that further settlements were made, including the transfer of the A shares and the B share debt from Mrs da Silva to the trustees; the acquisition of the rental property; and payments said to have been made on behalf of the trust in respect of trust outgoings from relationship property bank accounts.

[82] I have already addressed the matters of the A shares, the B share debt and the rental property. I do not propose to say anything more about them.

[83] As to payments of relationship property to the trust, Mr Lyne, an expert accountant who gave evidence for Mrs da Silva and AHL, considered that any such payments were reimbursed. Mrs Judith Stanway, the accountant at BDO who took over from Mr Henderson following his retirement, gave evidence to the same effect.

[84] In any event, the significant issue is whether the trust is a post-nuptial settlement for the purposes of s 182. The Supreme Court addressed this issue recently, in *Clayton v Clayton*.¹⁶

[85] Counsel for the trustees referred me to the following paragraphs of the majority's judgment in that case:¹⁷

[33] The Court of Appeal in *Ward* went on to say that to come within the term "settlement" as used in s 182, any arrangement must be one that "makes some form of continuing provision for both or either of the parties to a marriage in their capacity as spouses, with or without provision for their children". It was also made clear that discretionary family trusts can be settlements for the purposes of s 182. Further, property acquired by a trust after it is settled can also come within the definition of settlement. This is because the settlement is "the trust itself and any trust property (whenever acquired) must be part of the settlement".

[34] We agree with the analysis of the Court of Appeal in *Ward*. We add that we see the requirement that the settlement be for both or either of the parties "in their capacity as spouses" as meaning only that there must be a connection or proximity between the settlement and the marriage. Where there is a family trust (whether discretionary or otherwise) set up during the currency of a marriage with either or both parties to the marriage as

¹⁶ *Clayton v Clayton* [2016] NZSC 30, [2016] 1 NZLR 590.

¹⁷ At [33] and [34] (footnotes omitted).

beneficiaries, there will almost inevitably be that connection. As Lord Penzance said in *Worsley v Worsley*:

The Court would have a great difficulty in saying that any deed which is a settlement of property, made after marriage, and on the parties to the marriage, is not a post-nuptial settlement.

[86] I also refer to the judgment of the Chief Justice:¹⁸

[114] It may be accepted that not every trust in which discretionary beneficiaries include the parties to a marriage may amount to a nuptial settlement for the purposes of s 182. The settlement must be one it is possible to characterise as one “made on the parties” to a marriage or on either of them by reference to the marriage. Residuary or subsidiary interest may be insufficient if the focus of the settlement is not with the parties to the marriage. In cases where the husband and wife are simply within a wide class of possible beneficiaries from whom the trustees can select, it may be that the settlement is not referable to their marriage and is not properly to be treated as a nuptial settlement on them as parties to the marriage. That is not, however, the present case.

[87] It is apparent from these passages that, for the purposes of s 182, there must be a connection or proximity between the settlement and the marriage.

[88] I do not consider that such connection or proximity exists in this case. Mrs Perris established the trust for the benefit of herself, Mrs da Silva and the children. Mr da Silva was not included as a beneficiary, although he and Mrs da Silva had been married for some 14 years at the date the trust was settled. The only conclusion to be drawn is that Mrs Perris made a deliberate decision not to include Mr da Silva as a beneficiary. Nor did Mrs Perris appoint Mr da Silva or Mrs da Silva as a trustee. Mrs da Silva was only appointed after Mrs Perris’s death.

[89] Moreover, pursuant to cl 13 of the trust deed, the trustees have power to add a person to the class of discretionary beneficiaries. Mrs Perris and the other trustees prior to her death had the power to add Mr da Silva as a discretionary beneficiary if they wished. They did not do so.

[90] For these reasons, I am satisfied that the trust was not a post-nuptial settlement for the purposes of s 182 FPA.

¹⁸ *Clayton v Clayton*, above n 16, at [114].

[91] If I am wrong in this, I would exercise my discretion against granting relief to Mr da Silva. Mrs Perris intended to protect her assets for herself, her daughter and grandchildren. If instead of settling the shares in AHL on trust Mrs Perris had left them to Mrs da Silva, they would be Mrs da Silva's separate property pursuant to s 10 PRA. Accordingly, there is no unfairness in declining relief.

Constructive trust

[92] Mr da Silva contends that the trustees hold 50 per cent of their assets on constructive trust for him.

[93] To establish this claim, Mr da Silva must prove that he made a contribution to the assets of the trust that exceeded the benefit he received; that he had reason to expect an interest in them; that his expectation was reasonable in the circumstances; and that the trustees should reasonably expect to yield an interest to him.¹⁹

[94] I have already referred to the work that Mr da Silva undertook for AHL. Although the trustees do not dispute that Mr da Silva did so, I accept their submission that the remuneration and benefits Mr da Silva has received from AHL and the trust substantially exceed the value of his contribution.

[95] In cross-examination, Mr da Silva estimated that he spent approximately eight hours per week attending to AHL affairs. At the hourly rate of \$70 he charges in his automotive business, this would entitle Mr da Silva to remuneration of, say, \$30,000 per annum.

[96] Mr Lyne's evidence was that a property manager employed to attend to the matters undertaken by Mr da Silva would charge a fee of up to six per cent of rents received. In AHL's case, this would mean an annual payment of, say, \$10,000. Mr Lyne estimated that the fee would have been up to \$72,000 in total in the financial years ended 31 March 2005 to 31 March 2012 inclusive.

[97] Mr Lyne also gave evidence that Mr da Silva's attendances would not have increased the value of AHL's land or the value of the shares in AHL to the trust. The

¹⁹ *Lankow v Rose* [1995] 1 NZLR 277 (CA) at 289 – 294.

value of the shares in AHL reflects the value of the land it owns, which increases with inflation in land prices.

[98] Mr da Silva also relied on the fact that he and Mrs da Silva guaranteed, up to \$200,000, repayment of a loan made by the BNZ to AHL. AHL applied the loan to repay a debt from another lender. Mr Jones' evidence, however, was that Mr da Silva arranged the financing of his own volition and was willing to give the guarantee to secure the BNZ's loan advance.

[99] As to the remuneration and benefits that Mr and Mrs da Silva received, their net drawings from AHL and the trust vastly exceeded the sum that would have been payable to Mr da Silva, even if allowed at the rate in [95], which would appear grossly excessive having regard to Mr Lyne's evidence as to the sum payable to a professional property manager. Mrs Stanway's evidence was that the drawings up to and including 2012 were approximately \$540,000. Mr Lyne also reviewed the drawings over a shorter period, being 1 April 2009 to 31 March 2012 and calculated they were approximately \$300,000.

[100] It is clear from this that the benefits Mr da Silva received substantially exceed the contribution he made. The claim fails accordingly.

[101] That said, I do not consider that Mrs da Silva can recover any of these amounts, or additional sums recorded as "debt" owed by her or Mr da Silva to AHL or the trust. Mrs Stanway's evidence was that Mr da Silva instructed BDO to attribute as much as possible to Mrs da Silva as drawings, but without suffering adverse tax consequences, and that is why the balance was shown as debt. In reality, however, the sum was taken as drawings, however presented in the financial statements.

[102] Also the sums were applied for purposes for which the trustees might have distributed funds to Mrs da Silva and the children in accordance with the provisions of the trust deed. As Mrs Stanway said in evidence, and as she advised, AHL should have been allowed to declare a dividend to the trustees, so that they could have made distributions in the usual way. Regardless the debt recorded in the financial

statements is more a product of accounting than anything else. It is not relationship debt and Mr da Silva is not required to repay any part of it.

Equitable estoppel/unjust enrichment/unconscionability

[103] In advancing these causes of action Mr da Silva relies on representations that Mrs Perris made to him after her illness was diagnosed. Mrs Perris said to Mr da Silva “you are not in the trust but you can be added later on” and, at the time she appointed him her alternate director of AHL, Mrs Perris said to Mr da Silva “it’s yours now, look after it”.

[104] The statement that Mr da Silva was not a beneficiary but could be added (assuming that was what Mrs Perris meant) was true. He was not a beneficiary but he might have been added as a beneficiary by the trustees.

[105] It is also clear from file notes of Mr Jones that there was subsequent discussion of Mr da Silva being appointed a trustee of the trust, as occurred with Mrs da Silva. However Mr Jones’ evidence was that this would not have been his suggestion but rather Mr or Mrs da Silva’s.

[106] Mr da Silva’s case is that he relied on Mrs Perris’s representations in carrying out the work he did for AHL. He also gave evidence that he cancelled an AMP Superannuation Plan in reliance on the representations, shortly before or after Mrs Perris’s death. Although there was evidence that Mr da Silva did cancel the plan in mid-2004, the plan itself was modest with a value of approximately \$5,000. Also the connection between the representation and cancellation is tenuous. It is not clear why one should lead to the other.

[107] In any event I accept the submission of counsel for the trustees that Mr da Silva has been fully remunerated for such work as he undertook for AHL. In the circumstances it is not inequitable or unconscionable to deny him an interest in the trust assets. These claims fail accordingly.

Result

[108] The loss incurred on the rental property is relationship debt.

[109] The value of the shares in DASL is \$68,000.

[110] The parties are required to bear an equal share of all outgoings on the rental property and the family home. Mr da Silva is required to pay rent for the period he has occupied the family home.

[111] No adjustments are required in respect of debts due to AHL or the trustees of the Duzus Family Trust.

[112] All other claims by Mr da Silva fail.

[113] There is leave to apply.

[114] I make no order as to costs pending receipt of submissions, if the parties are unable to agree.

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Peters J

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