IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

DP NO's 19/2016 & 25/2016

IN THE MATTER	of the Sections 23 and 25 of the Matrimonial Property Act 1976 of New Zealand (as that Act applies in the Cook Islands by virtue of the Matrimonial Property Act 1991-92)
AND	
IN THE MATTER	of Applications for Custody, Access and Maintenance
BETWEEN	**ROSEMARY JULIA WEBB** of Rarotonga, Teacher Aide
	Applicant
AND	**PAUL WEBB** of Rarotonga, Businessman
	Respondent

Hearing Date: 8 to 10 May 2017

Counsel: Messrs I Hikaka & B Marshall for Applicant
Mr S McAnally for Respondent

Judgment: 23 August 2017

JUDGMENT OF THE HONOURABLE JUSTICE DAME JUDITH POTTER

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Introduction

[1] This proceeding arises out of an 11-year marriage between the applicant Rosemary Webb and the respondent Paul Webb which ended in separation in April 2016. Bethany, a child of the marriage, was born in December 2006. Matters relating to the custody and access of Bethany have been agreed by the parties and made the subject of Court orders. Issues concerning matrimonial property and maintenance are the subject of this judgment.

Matrimonial Property Legislation

[2] New Zealand's Matrimonial Property Act 1976, as enacted, is incorporated into Cook Islands law, with necessary modification, by the Matrimonial Property Act 1991-92 (the Act). The New Zealand Matrimonial Property Act 1976 has subsequently been amended and is now called the Property (Relationships) Act 1976 (NZ). These amendments have not been reflected in the Act. While there is little in the way of Cook Islands authority relevant to this proceeding[1], New Zealand case law and commentary provides relevant and helpful guidance.

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[1] No Cook Islands authority was referred to me by counsel and my own research has uncovered no relevant Cook Islands cases.

Factual Background

[3] Mr and Mrs Webb, who are both New Zealand citizens, were in their thirties when they first met in January 2005. They became engaged shortly after and, on 2 December 2005, they married in Auckland, New Zealand.

[4] Throughout their relationship and marriage, the parties enjoyed a high standard of living almost entirely funded by Mr Webb. Mrs Webb has had, at all relevant times, limited income and assets of her own. In contrast, Mr Webb has worked as an entrepreneur and has derived income, including, at times, very good income, from several companies and trusts associated with his ventures. Of particular note is the involvement of Mr Webb and his business partner, Mr Andrew Tauber, in an extensive range of companies known as the "Honk Group". The related Honk Land Trust was a significant source of funding for the parties' lifestyle.

[5] On 9 December 2005, seven days after the parties' wedding, Mr Webb settled the Arorangi Trust for the benefit of himself and his son from a previous marriage, Sebastian. Mr Tauber also became involved with the trust shortly after. Further details about the Arorangi Trust are set out below. For present purposes, however, it need only be said that on 24 February 2006, Mr Webb in his capacity as trustee acquired a leasehold interest in a large property at Arorangi, Rarotonga (the Arorangi Property).

[6] Mr and Mrs Webb lived in Auckland for the first eight years of their marriage. On 4 December 2006, their daughter, Bethany, was born. The parties' home in Auckland and many of the chattels used during this period of the marriage were owned by the Yogi Trust, which had been established in 2002 (before the parties' relationship) for the primary benefit of Mr Webb and Sebastian.

[7] In the meantime, Mr Webb continued to work as an entrepreneur, managing his business affairs and assets through a complex structure of companies, trusts, and transactions between them. As general background, it is relevant to note that Mr Webb had been declared bankrupt in 2000 and discharged in 2004. From 2011, Mr Webb and his related business entities became subject to scrutiny from the New Zealand Inland Revenue Department.

[8] In August 2013, the family left Auckland and moved to the Cook Islands, where they took up residence at the Arorangi Property. They lived there together until their separation on 7 April 2016.

[9] Soon after the separation, on 19 May 2016, a Mr Leslie Ellison settled the Webb Family Trust. Mr Webb and Ms Brenda Dixon, with whom Mr Webb had formed a relationship, were named as the trustees. Shares in a company called Solar 3000 Ltd, which were previously held by the trustees of the Arorangi Trust, were transferred to the Webb Family Trust.

[10] Mr Webb and Ms Dixon have since returned to Auckland, where they live in the parties' former family home in Arney Road, Remuera. Mrs Webb remains at the Arorangi property with Bethany, of whom Mrs Webb currently has sole custody by agreement.

[11] Unfortunately, disputes between Mr and Mrs Webb became increasingly fraught and confrontational. Orders for occupation of, and for restraint on dealings with, the Arorangi property and for non-molestation have been made in favour of Mrs Webb. On 1 August 2016, Williams J (now CJ) in the High Court at Rarotonga ordered Mr Webb to pay maintenance in respect of Mrs Webb and Bethany. However, that maintenance is now in substantial arrears. Having few assets of her own, Mrs Webb commenced employment as a teacher aide in Rarotonga, but is otherwise struggling to support Bethany and maintain the Arorangi property.

Property at issue

[12] Mrs Webb applies for the division of matrimonial property. Much of the property that is subject to Mrs Webb's application does not appear to be held by Mr Webb personally, but is held by trusts that are closely linked with him. Indeed, according to Mr Webb the matrimonial property actually available for division is negligible, if anything.

[13] Extensive affidavit evidence has been filed. The financial records and information provided by Mr Webb as to the labyrinthine structure of his business affairs were unfortunately disorganised and incomplete. In short, however, the parties' positions in respect of the disputed items of property are as follows:

a) *The Arorangi Property*: Mrs Webb says this is the matrimonial home, and has a value of $2.83 million. Mr Webb, however, although accepting the valuation,

says the property is held by the Arorangi Trust and so does not fall for classification. Mrs Webb also claims for $51,000 rental income received in respect of the property over 57 weeks since separation.

b) *The Terepai Arihii property:* This is a half interest in a property that adjoins the Arorangi Property. Mrs Webb says it is also matrimonial property, worth $75,000. But Mr Webb says it is held by the Arorangi Trust.

c) *Bank accounts in the name of the Arorangi Trust*: Mrs Webb claims that Arorangi Trust bank accounts with a value of $90,966 are matrimonial property. Mr Webb, however, says they belong to the Arorangi Trust and are not matrimonial property.

d) *Artwork:* Mrs Webb claims several pieces of artwork are matrimonial property, said to worth a total of $260,000. Mr Webb, however, says the art is owned by the Yogi Trust and is not matrimonial property.

e) *Shares in Solar 3000 Ltd:* Mrs Webb estimates that the matrimonial property component of the shares in this solar-power company is worth $3,333,333. Mr Webb, however, says that the shares are not matrimonial property because they are owned by the Webb Family Trust, this being the case since the transfer of the shares from the Arorangi Trust.

f) *Shares in Fleet Lease Ltd:* Mrs Webb estimates that the matrimonial property component of the shares in this rental-car business is worth $391,350. But Mr Webb says that the shares are not matrimonial property because they are owned by the Webb Family Trust. Further, the company was not incorporated until 26 May 2016, after the date of separation.

g) *Shares in Kuru Investments Ltd*: Mrs Webb estimates that the matrimonial property component of the shares in this hotel-development business is worth at least $869,166.50. Mr Webb, however, says that the shares are not matrimonial property because they are owned by the Webb Family Trust. Further, the company was not incorporated until 19 May 2016, after the date of separation.

h) *Other chattels:* Mrs Webb claims that a "Nissan Leaf G" car and a boat at Aitutaki are matrimonial property. Mr Webb says that the boat is owned by the Arorangi Trust. His position as to the car is not clear.

An outline of the parties' submissions

[14] Mrs Webb submits that the Arorangi Trust and the Webb Family Trust are invalid, and that Mr Webb personally retains their assets by operation of a resulting trust.[2] In summary, Mrs Webb challenges the trusts' validity on the following grounds:

a) The Arorangi Trust and the Webb Family Trust are invalid because they lack the "irreducible core" of obligations necessary for a trust to exist. More particularly, they are said to lack the obligation for trustees to be accountable to the beneficiaries.

b) Alternatively, the Arorangi Trust and the Webb Family Trust are invalid because they are shams; or because the settlors never intended to relinquish control over the beneficial interest in the assets.

c) The Webb Family Trust is invalid because it lacks certainty of objects.[3]

[15] Mr Webb maintains that the trusts are valid and that there are no grounds to set them, or any of the relevant dispositions to or from them, aside. Moreover, Mr McAnally for Mr Webb, submits that even if the trusts are invalid, and their assets are matrimonial property, then Mr Webb's personal debts and tax liability are to be deducted from the value of the assets under s 20(5) and (7) of the Act. The debts owed by the Arorangi Trust are said to comprise "loans" which the Arorangi Trust received from the Honk Land Trust, and Mr Webb's tax liability. The tax debt said to be owed to the New Zealand Inland Revenue Department totals

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2 Counsel for Mrs Webb had also submitted that the trusts' powers of appointment fell within the definition of "property" in terms of s 2 of the Act as per the New Zealand Supreme Court's decision in *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551. However, this ground was abandoned in closing submissions.

3 If the challenges to the Arorangi Trust are successful but the challenges to the Webb Family Trust are not, the applicant submits that the transfers of property to the Webb Family Trust should be set aside under s 44 of the Act. This provision allows the Court to set aside dispositions of property that are made in order to defeat a matrimonial property claim.

approximately $24 million. This includes "core tax debt" of $4,435,466.66 and $19,426,840.30 in interest and penalties. If Mr McAnally is correct on this point, the result would be that the pool of matrimonial property is wholly diminished, leaving nothing to be divided.

Some further details about the trusts

[16] Before addressing the parties' submissions, it is necessary to set out further details about the terms and dealings of the Arorangi Trust and the Webb Family Trust. At the hearing, Mr Webb gave evidence as to these matters, particularly in relation to the trusts' administration and their overall connections with his personal business ventures.

[17] Unfortunately, however, this evidence has not provided a clear or reliable picture of the trusts' operations and dealings. Much of Mr Webb's evidence was vague, evasive and, at times, contradictory. Even the documentary evidence as to the trusts' administration and subject matter contained disappointing gaps.[4] This has made the task of identifying the relevant facts, transactions, and property relating to the trusts regrettably difficult.

[18] Mrs Webb presented as an honest witness. She gave careful evidence but she had little knowledge or understanding of Mr Webb's complex business affairs or of the various trusts and their operations.

The Arorangi Trust's terms and obligations

[19] The relevant terms of the Arorangi Trust, as settled on 9 December 2005, are as follows:

a) The initial capital settled by Mr Webb was $10, although the deed expressly directs the trustee to complete the purchase of the Arorangi property. The trust is established to run for a period of 21 years, which is the number of years remaining on the lease for the Arorangi property.

b) The sole trustee listed in the deed is Mr Webb. He and his son, Sebastian, are the only named beneficiaries.

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[4] Mr Webb explained that some of the gaps in relation to the Arorangi Trust's dealings were due to the fact that the Arorangi Trust's records before 2013 were kept by the Honk Group of companies.

c) The powers and discretions of the trustee are provided for in a schedule to the trust deed which does not appear to have been provided in evidence.

d) That settlor (Mr Webb) has the power to replace beneficiaries. Otherwise, however, there is no express power for appointing or removing further beneficiaries.

e) A notable aspect of the Arorangi Trust is the power (but not obligation) for the trustee to appoint a "consultant". The consultant (if any) is entitled to advise the trustee, but the trustee is not obligated to accept its advice. Other than retirement, there is no mechanism for having the consultant removed.

f) Significantly, the consultant also has the absolute discretion to remove the trustee and appoint one or more other persons or companies as replacement trustees.

g) Although the trustee has the power to unilaterally vary the trust deed (so long as the interests of the beneficiaries are not adversely affected), the consultant's prior written consent must be obtained for this to occur.

h) Significant in Mrs Webb's attempts to challenge the trust is clause 19.1, which purports to limit the beneficiaries' rights to receive trust information. This clause will be discussed in further detail below.

[20] On 20 December 2005, eleven days after the Arorangi Trust was settled, a further deed was executed by which Mr Webb (as trustee) nominated himself and Mr Tauber, as joint consultants. The consultants then purported to appoint Mr Tauber as an additional trustee, and nominate his children as "additional beneficiaries". Counsel for Mr Webb responsibly acknowledged that these appointments may be invalid given they occurred in a manner contrary to the trust deed.

[21] Around that time, Mr Webb obtained approval from the Cook Islands Development Investment Authority for the Arorangi Trust to purchase the Arorangi property. On 24 February 2006, Mr Webb, in his capacity as trustee of the Arorangi Trust, accordingly acquired the leasehold interest in the land. The purchase was financed by an "advancement" from the

Honk Land Trust, which is a trust connected to the Honk Group of companies. Indeed, Mr Webb has deposed that the consultant position was included in the trust deed to "give some sort of legal status to the Honk/Tauber interest in [the Arorangi property's] acquisition." Mr Webb was a beneficiary of the Honk Land Trust at the time.[5]

[22] In 2006, the Arorangi Trust also purchased the Terepai Arihii property, this being the abovementioned piece of land which adjoins the Arorangi property. This purchase was also financed by an "advancement" from the Honk Land Trust, when the purchase settled in 2008.

[23] By 2013, Mr Webb and Mr Tauber's business relationship had soured and Mr Webb's involvement with the Honk Group of companies came to an end. In March 2014, the Honk Land Trust formally demanded that the Arorangi trustees repay the outstanding advances, the sum claimed being approximately $4,561,496.99.[6]

[24] By August 2014, however, Mr Webb and Mr Tauber appeared to have negotiated a compromise in respect of the demand. The Honk Land Trust agreed to suspend interest and other repayments for three years as of 1 April 2014, so long as the Arorangi Trust made part repayment of $620,000 by November 2014 (which was done on 31 October 2014 from the proceeds of sale of a property known as the "Gee" property at Arorangi then owned by the Arorangi Trust). The Honk Land Trust also agreed to advance the Arorangi Trust a further $348,000, so it could pursue further business opportunities in the meantime.

[25] Mr Hikaka advanced three possible scenarios in respect of the "advances" from the Honk Land Trust to the Arorangi Trust:

a) the sums were advances that were never intended to be repaid, and as such, are not debts to be taken into account when valuing the matrimonial property under the Act;

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[5] Mr Webb's other family trust, the Yogi Trust, was also heavily indebted to the Honk Land Trust at the time, and remained so at all relevant times.

[6] An earlier demand for a similar amount had been made in March 2013. It appears, however, that no action was taken in respect of it. Mr Webb claimed in evidence that the amount owed to the Honk Land Trust was $3,569,477. The March 2015 balance sheet of the Honk Land Trust shows the balance owing as 1,335,464.73. The Honk Land Trust also made formal demands against the Yogi Trust in March 2013 and 2014, for repayment of $2,400,254.77 and $2,502,336.25, respectively.

b) if the sums were loans, they were repaid in the compromise of October 2014, and so are not relevant to the valuation of matrimonial property under the Act; or

c) if the loans are still outstanding, their real value is no more than $1,335,464.73;[7]

[26] The compromise detailed above suggests that the second or third scenarios are most likely to be correct. But given the conclusions reached below in respect of Mr Webb's tax liability to the New Zealand Inland Revenue Department, the status of the loans from the Honk Land Trust, if that is what they were, cannot affect the outcome of Mrs Webb's application. This matter, therefore, requires no further consideration.

[27] In November 2014, Mr Tauber formally ceased his involvement with the Arorangi Trust. He retired as a trustee and consultant, and he and his children were also removed as beneficiaries.

[28] Also relevant to this proceeding is the Arorangi Trust's involvement with Solar 3000 Ltd. Mr Webb was involved in incorporating this company in February 2014 as a business venture that would import and sell solar panels and equipment in the Cook Islands. While the Arorangi Trust originally held a significant portion of the company's shares, there is conflicting evidence as to the extent of this shareholding. The portions alleged range from 33.33 per cent to 50 per cent. Whatever the case, in May 2016, the Arorangi Trust transferred its shares in the company to the newly settled Webb Family Trust.

[29] On 6 February 2017, Mr Webb, in his capacities as trustee and consultant, purported to appoint Ms Dixon and a Mr Brett Riley as additional trustees of the Arorangi Trust. He also purported to add the parties' daughter, Bethany, as a beneficiary.

[30] As with Mr Webb's evidence in general, his evidence as to the current assets and liabilities of the Arorangi Trust was unreliable and contradictory. Although I question the reliability of this claim, Mr Webb says that, as of February 2017, the assets of the Arorangi Trust are:

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[7] The amount shown in the balance sheet of the Honk Land Trust as at March 2015

a) The leasehold of the Arorangi Property, which Mrs Webb estimates to be worth $2,830,000;

b) The interest in the Terepai Arihii Property, which is estimated as being worth $75,000; and

c) A loan to Solar 3000 Ltd of $130,996.91.

[31] Mr Webb also claims that the Arorangi Trust's outstanding debt to the Honk Land Trust is currently $3,569,447. If these claims are correct, the value of the Arorangi Trust's liabilities currently exceeds the assets.

The Webb Family Trust terms and obligations

[32] The Webb Family Trust was settled by a Mr Leslie Ellison on 19 May 2016, after the parties' separation. The key terms of the trust deed are as follows:

a) Mr Webb and Ms Dixon are named as the trustees.

b) Clause 2 of the deed, which forms the basis of Mrs Webb's challenge to the trust on the ground of certainty of objects, lists the beneficiaries of the trust as follows:

> PAUL WEBB
> SEBASTIAN PAUL WEBB
> BETHANY ROSEMARY WEBB
> DISCRENCERNY BENEFICERIES [sic]

c) The deed provides that the trustees shall endeavour to purchase and retain:

i) The Arorangi Property;

ii) The Arorangi Trust's shares in Solar 3000 Ltd;

iii) A 50 per cent shareholding in Kuru Club Investments Ltd;

iv) A 75 per cent shareholding in Fleet Lease Ltd; and

v) Upon the request of the consultant, 50 per cent of the shares in a new entity "to be established with Leslie Ellison".

d) The terms of the deed as to the appointment and retirement of a consultant, the retirement and removal of trustees, and the replacement of beneficiaries, are identical to those in the Arorangi Trust deed.

e) Clause 19.1 of the trust deed, which purports to limit the beneficiaries' rights to receive trust information, is identical to clause 19.1 of the Arorangi Trust deed. This clause is significant to Mrs Webb's attempts to challenge the trust.

[33] On the same day the Webb Family Trust was settled, the trustees resolved that Mr Webb would be appointed as the Trust's consultant.

[34] As with Mr Webb's evidence surrounding the Arorangi Trust, the evidence is unclear and unreliable and it has been difficult to discern the true state of the assets held by the Webb Family Trust. As I best apprehend the situation, however, the trust's current assets and liabilities are as follows:

a) The Webb Family Trust holds the shares in Solar 3000 Ltd, however many, that were originally held by the Arorangi Trust.

b) The Webb Family Trust owns 75 per cent of the shares in Fleet Lease Ltd, a rental-car business that was incorporated on 26 May 2016.

c) The trust has some uncertain interest in the hotel-development company Kuru Investments Ltd. This company was incorporated on 13 May 2016, with Mr Webb and Ms Dixon each subscribing as 50 per cent shareholders. Apparently, however, both Mr Webb and Ms Dixon consider their shares to be held for the Webb Family Trust.

[35] Also relevant is that around May or June 2016, the Arorangi Trust loaned Kuru Investments Ltd sums totalling $142,791.18. Moreover, the evidence indicates that many of the vehicles owed by Fleet Lease Ltd were previously owned or leased by the Arorangi Trust.

The irreducible-core submission

[36] Turning then to address the substantive issues, Mrs Webb first challenges the validity of the Arorangi and Webb Family Trusts on the basis that they both lack the "irreducible core" of obligations necessary for there to be a valid trust. For both trusts, this is said to be due to clauses in the trust deed that purport to limit beneficiaries' rights to "call for accounts" or "obtain any information of any nature" from the trustees. Save for minor typographical corrections, both clauses are identical:

> **19. NON DISCLOSURE**
>
> 19.1 For the avoidance of doubt, it is hereby declared that no Beneficiary hereunder nor any third party shall have any claim, right or entitlement to call for accounts (whether audited or otherwise) from the Trustee in relation to the Trust Fund and the income thereof, or to obtain any information of any nature from the Trustee in relation to the Trust Fund and the income thereof or in relation to the trusts and powers itself.

[37] In short, Mr Hikaka's submission is that a trustee's "duty to account" to beneficiaries is one of the fundamental obligations of a trustee. He says that if trustees do not have that obligation (or if beneficiaries do not have the corresponding right to call a trustee to account), then no trust exists. Mr Hikaka therefore submits that no trusts exist because each clause "expressly removes any right of the beneficiary to call the trustees to account", and in doing so "also removes the ability of the Court to require the trustees to provide documents under the Court's supervisory jurisdiction."

[38] Before engaging with this submission, it is necessary to clarify what is meant by the "duty to account", as the term can have a number of different meanings in the context of trust administration. Most narrowly, it can refer to a trustee's duty to produce or disclose "accounts", in the sense of financial information about the trust property and transactions. A broader, perhaps related, meaning refers to the duty of trustees to be "accountable", to keep beneficiaries up to date about a trust's operation and the trustees' ongoing discharge of their duties. In a third sense, the duty to account means a trustee's duty to be "accountable for their stewardship", to pay to the trust estate, assets which have either been lost, or profits which have been gained, through the trustee's breach of fiduciary duty.[8]

[8] Lord Millett of Foscote "Equity's place in the law of commerce" (1998) 114 LQR 214.

[39] Considering these different possible meanings, it is apparent that when the clauses purport to remove beneficiaries' "claim, right or entitlement to call for accounts" they are purporting to affect the duty in the first sense, being the duty to produce financial information. This is indicated by the heading of the clause ("Non-disclosure"), the parenthetical clarification ("whether audited or otherwise"), and the relatively narrow focus of restriction ("in relation to the Trust Fund and the income"). Therefore, the following discussion will concern only this sense of the "duty to account".

[40] The starting point is the English Court of Appeal decision *Armitage v Nurse,* where Millet LJ's delivered his well-known dictum as to the existence of an "irreducible core" of trust obligations:[9]

> … there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts.

[41] At issue in that case was a trust deed that excluded trustees' liability for any loss or damage, from any cause whatsoever "unless such loss or damage shall be caused by his own actual fraud". The Court held, however, that this clause did not invalidate the trust. The trustees were still faced with the duty to perform the trust honestly and in good faith for the benefit of the beneficiaries, which was held to be the minimum necessary to give substance to trusts. The Court did not discuss the extent to which the duty to account was part of the "irreducible core".

[42] Counsel relies on dicta from the New Zealand High Court decision *Foreman v Kingstone*, which noted that the trustees' duty to account is a "fundamental" one.[10] That case concerned a beneficiary's claim to access trust documents. In that context, the High Court said that the trustees' duty to account was "fundamental", and that beneficiaries had a corresponding, "fundamental right" to receive that information.

> [82] … A trust creates fiduciary obligations on trustees who owe duties to beneficiaries, and beneficiaries have correlative rights. A fundamental duty of trustees is to account to beneficiaries for the administration of the trust. …
>
> …

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[9] *Armitage v Nurse* [1998] Ch 241 (CA) at 253.
[10] *Foreman v Kingstone* [2004] 1 NZLR 841 (HC).

> [93] The fundamental duty of the trustees is to be accountable to all beneficiaries. That cannot be compromised by a settlor's desire for confidentiality in relation to his and the trust's personal and financial affairs unless there exist exceptional circumstances that outweigh the right of the beneficiaries to be informed.
>
> …
>
> [97] Beneficiaries are entitled to receive information which will enable them to ensure the accountability of the trustees in terms of the trust deed. They are entitled to have the trust property properly managed and to have the trustees account for their management. They are entitled to receive trust accounts … This goes well beyond the right to be "considered" by the trustees which, in the defendants' submission, is the extent of entitlement of a discretionary beneficiary.
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> [98] These are fundamental rights of beneficiaries. They are not absolute rights which arise from documents or information being categorised as "core trust documentation". They will be subject to the discretion of the Court in its supervisory jurisdiction when trustees seek directions, or beneficiaries seek relief against refusal by trustees to disclose.

[43] Mr Hikaka notes that in the recent decision *Erceg v Erceg,* the New Zealand Supreme Court affirmed *Foreman v Kingstone*, at least insofar as the approach it took to the disclosure of trust documents.[11] As part of its discussion, the Supreme Court quoted the above passages from *Foreman* without disapproval.[12] But although counsel had submitted to the Supreme Court that the duty to account was a "fundamental" one, the Supreme Court did not comment on that aspect.

[44] A submission very similar to Mr Hikaka's was considered by the Hong Kong Court of Final Appeal in *Tam Mei Kam v HSBC International Trustee Ltd.*[13] Significantly, Lord Millett was a member of the panel who heard this case. The confidentiality clause at issue was wider than cl 19.1 in that it not only allowed the trustee to withhold all information from beneficiaries, it also provided that the trustee had no obligation to disclose the existence of trust to them.[14] It was submitted that this clause was void, and that it left the beneficiaries with no enforceable rights against the trustee, therefore eroding the "irreducible core" and invalidating the trust.

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11 *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320.

12 See [36]-[38]. The Supreme Court preferred to describe the so-called "presumption of disclosure" as "an expectation that basic trust information will be disclosed to a close beneficiary who wants it" - at [62].

13 *Tam Mei Kam v HSBC International Trustee Ltd* [2011] HKCFA 34, (2011) 14 HKCFAR 512.

14 The clause is cited in full in the Court of Appeal decision *Estate of Mui Yim Fong* [2014] HKLRD 69 at [61].

[45] The Court rejected these submissions.[15] The correctness of Millet LJ's "irreducible core" dictum was affirmed, but the Court observed that it was never intended to apply to a clause limiting discretionary beneficiaries' access to trust documents:

> [43] In *Armitage v Nurse*, Millett LJ's *dictum* was made in the context of considering a clause in the trust which purported to exempt the trustees from liability for constructive and equitable fraud. This statement is of course correct since it would be contrary to the basic concept of a trust if the trustee were to owe no obligation at all to the beneficiaries or under absolutely no duty to account to the beneficiary for breach or indeed any default. But this is not the situation in the present case. Nor was Millett LJ's *dictum* intended to apply to the present situation.

[46] The Court went on to observe that the trust deed imposed the necessary trust obligations on the trustees and that, in any event, the courts would always have supervisory jurisdiction over a trust:

> [44] The trust deed in the present case clearly established a valid trust which was originally intended to be an *inter vivos* trust. There are provisions which impose enforceable obligations on the Trustee towards both the settlor (the Deceased) and the beneficiaries. There is no question of the Trustee having no duty to be accountable to the settlor or those beneficiaries who have a vested interest in the Trust Fund after an exercise of the Trustee's discretionary powers in their favour. In any event, as Lord Walker of Gestingthorpe said in *Schmidt v Rosewood Trust Ltd*, the court always has a supervisory jurisdiction over a trust:[16]
>
> > It is fundamental to the law of trusts that the court has jurisdiction to supervise and if appropriate intervene in the administration of a trust, including a discretionary trust.

[47] The Court concluded that even if it were to find that the confidentiality clause was void (a matter on which it expressed no conclusion), it would not follow that the entire trust would be infected and hence invalid. The Court noted, in construing the trust deed and seeking to give effect to the settlor's intention, it would not readily hold that that whole trust was invalid.[17]

[48] I agree with this reasoning. On any objective assessment, both the Arorangi Trust and the Webb Family Trust deeds establish trusts and impose fiduciary obligations on the trustees. The instruments do not purport to abrogate the trustees' core duties of honesty and good faith.

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[15] Chan PJ wrote the judgment of the Court, which Lord Millett joined.

[16] *Schmidt v Rosewood Trust* [2003] UKPC 26, [2003] 2 AC 709 at 724.

[17] At [45].

[49] In no way, however, does this confinement of the “irreducible core” diminish the force of the comments from *Foreman v Kingstone,* on which counsel relied. The duty of trustees to account to beneficiaries is indeed “fundamental” because the flow of information from trustees to beneficiaries underpins the beneficiaries’ ability to enforce the core obligations of honesty and good faith. Without such information, beneficiaries have no means to assess whether trustees are properly carrying out their duties. And although clause 19.1 appears to impede the beneficiaries’ right to obtain or call for trust accounts “from the Trustee”, it does not oust or purport to affect the court’s inherent jurisdiction to facilitate that flow of information by ensuring that trust accounts are disclosed where appropriate.[18] Moreover, the court’s more general jurisdiction to supervise and intervene in the trusts’ administration is, and must be, similarly left unaffected.

[50] In short, the Court’s supervisory jurisdiction ensures the beneficiaries will not be starved for information about the trusts’ financial dealings to which they are entitled. The beneficiaries retain their right to receive trust information, although not from the trustees directly. The clause does not prevent beneficiaries from requesting information and invoking the intervention of the Court in its supervisory jurisdiction if access to that information is unreasonably withheld. The trustees are not left to operate without accountability, and the “irreducible core” of honesty and good faith still applies to them. It follows that clauses 19.1 of the trust deeds do not invalidate the trusts.

The certainty of intention/sham trust submissions

The Arorangi Trust

[51] I first deal with the challenge to the Arorangi Trust. Mr Hikaka’s submission here was initially expressed as two separate points. First, he argued that the settlor never intended to relinquish control over the beneficial interest in the trust property. Second, it was separately submitted that the Arorangi Trust documentation was a sham. These points were, however, somewhat merged during closing submissions. In short, Mr Hikaka submitted that there was no intention to create the Arorangi Trust as Mr Webb and Mr Tauber really intended to retain control of the assets.

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[18] See *Erceg v Erceg* [2017] NZSC 28, [2017] 1 NZLR 320.

[52] In my view, this is essentially a sham allegation. A settlor's actual state of mind is not taken into account when establishing certainty of intention to create a trust.[19] In the absence of some other good reason, such as an arguable sham allegation, there is no ground for the court to examine the subjective intentions behind a trust deed.[20] While it is true that equity looks to substance rather than form, this maxim alone does not warrant departure from the fundamental principle that legal instruments and transactions should, in the normal run of things, be understood objectively. As the New Zealand Court of Appeal noted in *Official Assignee v Wilson*, to do otherwise would risk undermining the key principle of commercial certainty:[21]

> [52] The principle that an arguable allegation of a sham trust legitimates examination of subjective intention, and not simply the objective intention as evinced by the "trust" documentation, is consistent with the proposition that courts will not wantonly interfere in ostensibly valid commercial transactions. In the context of trusts, where a transaction objectively appears to be a trust, it will be held out to be a trust, even if it is unclear whether the settlor actually intended for there to be a trust. A court will only look behind a transaction's ostensible validity if there is good reason to do so, and "good reason" is a high threshold, since a premium is placed on commercial certainty

[53] Turning then to the legal test for a sham, this was defined by the New Zealand Supreme Court in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue:*[22]

> In essence, a sham is a pretence. … A document will be a sham when it does not evidence the true common intention of the parties. They either intend to create different rights and obligations from those evidenced by the document or they do not intend to create any rights or obligations, whether of the kind evidenced by the document or at all.

[54] It is well accepted that this doctrine applies in the context of trusts: a trust deed will be a sham if both the settlor and trustee did not actually intend to create the rights and obligations of a trust.[23] Some kind of shamming intention is also required; a mere absence of objective certainty as to the settlor's intentions is not enough.[24] And although the focus is directed to the parties' intentions at the time the trust deed was effected, subsequent conduct can be taken into

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19 *Twinsectra v Yardley* [2002] UKHL 12, [2002] 2 AC 164 at [71]; *Official Assignee v Wilson* [2008] 3 NZLR 45 (CA); *Byrnes v Kendle* [2011] HCA 26, (2011) 243 CLR 253.

20 Aside from sham allegations, there might be "good reason" to examine the parties' subjective intentions where matters such as undue influence, duress, rectification, non est factum or illegality are raised.

21 *Official Assignee v Wilson* [2008] 3 NZLR 45 (CA), per Robertson and O'Regan JJ.

22 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289 at [33].

23 *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [113]-[114]; *Vervoort v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807 at [25]-[26].

24 *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [64]-[66];

account if it helps indicate what was truly intended at that time.[25] As Mr McAnally noted, a sham is not indicated by the mere fact that a trustee is ignorant of their duties, or that a single person (whether a non-trustee or a co-trustee) has de facto control over the trust.[26]

[55] I also record that Mr Hikaka did not base his submissions on the more controversial "emerging sham" or "illusory trust" doctrines. Rather, he submitted that the following matters indicate that, from the Arorangi Trust's inception, Mr Webb and Mr Tauber actually intended to retain control of the assets personally, rather than create the trust:

a) The trusts were run in a cavalier manner. Mr Webb is said to have drawn money from the trust accounts at will, including a withdrawal of $20,000, without records and without consideration. Trust property is said to have been disposed of similarly. Although Mr Webb claims these payments were for services rendered to him, Mr Hikaka noted that there were no invoices indicating this.

b) The lack of trust record keeping and minutes. Mr Hikaka noted that no accounts, ledgers or financial statements were discovered, and that this lack of record keeping is consistent with personal ownership of accounts. Mr Webb is also said to have assumed loans and obligations in respect of the trust in a cavalier manner, without formal or clear records of these. In his evidence, however, Mr Webb said that prior to 2013 the Arorangi Trust records were kept within the Honk Group of companies.

c) Mr Tauber expressed a desire to retain his ability to sell the Arorangi Trust property to repay his own interests.

[56] On any account, it is clear Mr Webb operated the Arorangi Trust in a cavalier fashion. At times, he exercised de facto control over the assets, perhaps using the trust as his alter ego. The record keeping is poor; and even if these records were maintained by the Honk Group before 2013, trust records from after this time are patchy and less than coherent.

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[25] *Official Assignee v Wilson* [2008] 3 NZLR 45 (CA) at [26] and [108]; *KA No.4 Trustee Ltd v FMA* [2012] NZCA 370 at [46].

[26] *Vervoort v Forrest* [2016] NZCA 375, [2016] 3 NZLR 807 at [28]. See also ***Jessica Palmer*** "Dealing with the Emerging Popularity of Sham Trusts" [2007] NZ Law Rev 81 at 89.

[57] But it remains the case that the sham must go back to the time of the trust deed's execution. Even if I treat these facts in a way most favourable to Mrs Webb, I do not consider they are sufficiently strong or cogent to warrant the extreme conclusion that Mr Webb intended the Arorangi Trust deed to be a sham at the time of its execution in 2005.[27] Though the evidence causes some disquiet, it cannot be said that it is sufficient to indicate that Mr Webb (as settlor and trustee) actually intended that the Arorangi Trust would not operate as a trust at all, but would instead be a "pretence", a vehicle by which Mr Webb could control and conceal his personal use of the trust's assets.

[58] Indeed, I agree with Mr McAnally's contention that, at least to the extent that subsequent conduct can be considered as indicating Mr Webb's intentions at the time of settlement, the bulk of the evidence indicates Mr Webb actually intended to create a trust with the Arorangi Trust documents:

a) Although the Arorangi Trust was run in a cavalier manner, it has continually been used to conduct business. Since its settlement, the Arorangi Trust has continued to acquire, own and dispose of assets.

b) As circumstances have required, there have been periodic changes to the Trust's beneficiaries and trustees. This is consistent with an intention to create a trust.

c) Mr Webb is commercially experienced and was familiar with the use of trust structures as a way to protect assets. The evidence does not indicate Mr Webb was seeking to deceive anyone as to the nature of the trust documents, and he was not cross-examined on this basis.

d) Very soon after the trust was settled, Mr Tauber was added as a trustee and his children were added as beneficiaries. Mr Tauber was also added as a consultant of the trust in order to "give some sort of legal status to the Honk/Tauber interest in the [Arorangi property's] acquisition." These actions, which I accept were done in furtherance of the trust's special relationship with the Honk Land Trust, are not consistent with Mr Webb actually intending to retain beneficial

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[27] *Official Assignee v Wilson* [2008] 3 NZLR 45 (CA) at [77]; *Clayton v Clayton* [2015] NZCA 30, [2015] 3 NZLR 293 at [69].

ownership of the assets in question. They indicate Mr Webb's legitimate business intention behind the settlement of the trust.

[59] Accordingly I do not accept Mrs Webb's submission that the Arorangi Trust was a sham.

The Webb Family Trust

[60] Mr Hikaka relies on the following matters to support a submission that the Webb Family Trust is a sham:

a) Ms Dixon has demonstrated serious ignorance of what was required of a trustee.

b) Ms Dixon did not pay proper attention to the running of the trust.

c) Broadly, the same issues in respect of Mr Webb and the Arorangi Trust apply to his role as trustee of the Webb Family Trust.

[61] As noted above, however, Ms Dixon's naivety as to her duties as a trustee does not, in and of itself, indicate the trust was a sham. Nor does her apparent inattention to the Trust's operation, lead to this conclusion. It cannot be said that these matters, even when considered cumulatively, are sufficient to indicate that Mr Ellison (as settlor) and Mr Webb and Ms Dixon (as trustees) actually intended that the Webb Family Trust would not operate as a trust at all, but would instead be a vehicle by which Mr Webb could control and conceal his personal use of the trust's assets.

[62] Accordingly, Mrs Webb's contention that the Webb Family Trust is a sham does not succeed.

The certainty of objects submission

[63] Mrs Webb challenges the Webb Family Trust for lacking certainty of objects. This submission is based on the sloppy drafting in clause 2 of trust deed. Set out in full, the clause provides:

> 2. The Trust is established for the benefit of the following person or persons as Beneficiaries subject to the removal or subsequent replacement of such Beneficiaries in accordance with the provisions of this deed;
>
> PAUL WEBB
> SEBASTIAN PAUL WEBB
> BETHANY ROSEMARY WEBB
> DISCRENCERNY BENEFICERIES [sic]

[64] Mr Hikaka says the reference to "discrencerny beneficiaries" means the trust has no certainty of objects. He says the term refers to an undefined class of beneficiaries and, even assuming it was meant to read "discretionary beneficiaries", as it appears to intend, the term is still uncertain. This is because it is the equivalent of saying "the beneficiaries of the trust shall be the beneficiaries of the trust"; such a tautology being obviously uncertain as a matter of law.

[65] Indeed, it is correct that a valid trust must have clearly identifiable beneficiaries. Where a class of beneficiaries is given, it is necessary to be able to say with certainty whether any individual is (or is not) a member of that class.[28]

[66] It seems a likely explanation for the nonsensical words, is that they were originally a placeholder in a precedent, which the drafters erroneously forgot to remove. The words have the hallmarks of an unfortunate drafting error that could readily be open to rectification. The settlor, Mr Ellison, however, did not give evidence at the hearing, so that remedy is not available. To the extent the words create an ambiguity, they fall to be interpreted objectively in accordance with standard interpretation principles.

[67] Mr Hikaka's suggested reading of "discrencerny beneficiaries" is not the only available interpretation, however. Another interpretation would read the words not as an additional item in the list of beneficiaries, but as a caption-like affirmation that the three persons listed above are the "discretionary beneficiaries" of the Webb Family Trust.

[68] I consider this latter interpretation to be the preferable one. The words are objectively nonsensical, and no reasonable person would assume that by them the settlor had intended to create a wholly uncertain class of beneficiaries which would immediately invalidate the trust by operation of basic equitable principles. Mr Hikaka's interpretation is also less consistent with the other terms of the trust deed. When these are considered, it is apparent that all

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[28] *McPhail v Doulton* [1971] AC 424 (HL).

beneficiaries are discretionary ones; the trust deed not specifying or creating different classes of beneficiaries. The terms of the trust are not consistent with an interpretation which reads Mr Webb, Sebastian and Bethany as being, for example, fixed beneficiaries alongside a separate of class of "discrencerny", or discretionary ones.

[69] It follows that words "discrencerny beneficiaries" in clause 2 do not void the Webb Family Trust for uncertainty of objects.

Conclusion as to the challenges to the Trusts' validity

[70] For the reasons given above, I have found that the Arorangi Trust and Webb Family Trust are not void or invalid on the grounds advanced by Mrs Webb. I also accept, that on the basis of the evidence, the Arorangi property, the half interest in the adjoining Terepai Arihii property, the bank accounts in the name of the Arorangi Trust, the shares in Solar 3000 Limited, the shares in Fleet Lease Limited, and the shares in Kuru Investments Limited are owned by one or other of these trusts.

[71] The consequence of these findings is that the abovementioned assets do not form part of the matrimonial property pool. Accordingly, they do not fall to be divided between the parties in accordance with the Act.

Other property

[72] Mr Webb made no claim to the matrimonial chattels in storage in Auckland. I accordingly made an order on 19 May 2017 that these chattels are the separate property of Mrs Webb. I understand that the situation in respect of most of the other household and family chattels has been resolved between the parties.

[73] The remaining chattels which Mrs Webb seeks to have classified are certain artworks, the boat and the Nissan Leaf G car.

[74] A Cook Islands motor vehicle registration form indicates that the Nissan Leaf G car was transferred to the Arorangi Trust in October 2014. The inference to be drawn from this is that the car is no longer a matrimonial chattel belonging to Mr Webb.

[75] There was not sufficient evidence adduced in respect of the artworks and the boat to enable findings or orders in respect of those chattels. I therefore make no findings or orders in respect of these chattels.

The effect of Mr Webb's personal debt on the matrimonial property pool

[76] Mr McAnally submitted that even if the trusts are invalid, and their assets can properly form part of the matrimonial property pool, their value would be completely diminished by Mr Webb's debts, which are factored into the matrimonial property valuation by s 20(5) and (7) of the Act. In case I am wrong as to the trusts' validity, I turn to address this submission.

Preliminary jurisdictional issues

[77] Mr Hikaka resisted Mr McAnally's position as to s 20 by submitting that the money Mr Webb owes to the New Zealand Inland Revenue Department is not relevant to these proceedings because it is not a "debt" in terms of the Act. He says that in order for the Inland Revenue Department's claim to be an enforceable debt in the Cook Islands, there would need to be a sealed judgment from a competent New Zealand court followed by enforcement proceedings in the Cook Islands. He also says a significant component of the money owed comprises of interest and penalties, and so a High Court judge would need to be satisfied that it is proper to allow such impositions to be enforced in the Cook Islands.

[78] It may be that the New Zealand Inland Revenue Department is unable to bring tax-enforcement proceedings against Mr Webb in the Cook Islands at all, it being a well-recognised conflict-of-laws principle that domestic courts will not recognise claims by foreign states to recover taxes or enforce revenue laws.[29] But the issue here is not about the direct enforcement of foreign judgments or revenue laws; the issue is whether Mr Webb's foreign tax "debt" could be taken into account when valuing the parties' matrimonial property under s 20. This will be discussed in some detail below.

[79] Mr Hikaka also raised another jurisdictional issue. He claimed the Inland Revenue Department has "secured" Mr Webb's "debt" to the parties' former matrimonial home in Auckland because it has obtained a freezing order over the property and has also lodged caveats

[29] *Government of India v Taylor* [1955] AC 491 (HL).

in respect of it. He submitted that these actions therefore make the Inland Revenue Department's debt an "immovable" situated outside of the Cook Islands, which accordingly falls outside the Act's jurisdiction.[30] He refers to Mr Webb and Ms Dixon's evidence, which made passing reference to the existence of a freezing order against the property, and to the property's certificate of title. This records two caveats: one lodged in February 2013 by the Registrar-General of Land, and another lodged by Ms Dixon in May 2016.

[80] Notwithstanding the debatable question of whether "securing" a debt against land transforms it into an "immovable", there is no evidence that the Inland Revenue Department has "secured" its claims against the Auckland home. Freezing orders do not create a security or lien in respect of claims or debts; they simply restrain a party from disposing of, or dealing with the assets covered by the order.[31] The position as to caveats is similar: they freeze the land register to protect existing, unregistered property rights, interests, or securities. They do not improve on, secure, or create new rights.[32]

[81] Here, there is no evidence as to the existing interests or securities underlying the caveats recorded on the certificate of title. Even more significantly, neither of the caveats appears to have been lodged by the Inland Revenue Department. Against that background, and without further information, there is simply insufficient evidence to indicate that the Inland Revenue Department's claim has been "secured" against the Auckland home.

Definitional issues surrounding s 20

[82] Turning then to assess the effect of the Inland Revenue Department's claim on the matrimonial property pool, it is necessary to begin by outlining the relevant provisions of the Act. Section 20(5) sets out the formula for calculating the value of matrimonial property. Significantly, paragraph (b) provides that a spouse's unsecured "personal debts" can be deducted from the matrimonial property pool to the extent those debts exceed the value of that spouse's separate property:

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[30] See s 7(1), which provides that the Act applies to "immovables which are situated in [the Cook Islands]; and movables which are situated in [the Cook Islands] or elsewhere …"

[31] See Sim's Court Practice at [32.1], *Cretanor Maritime Co Ltd v Irish Marine Management Ltd, The Cretan Harmony* [1976] 1 WLR 966 (CA); *Euro-National Corporation Ltd v NZI Bank Ltd* (1991) 4 PRNZ 365 (HC).

[32] *Butler v Fairclough* (1917) 23 CLR 78/84; *Lombard Finance & Investments Ltd v Albert Street Ltd* HC Auckland CIV-2004-404-2120, 14 October 2004 at [20]

> (5) The value of the matrimonial property that may be divided between husband and wife pursuant to this Act shall be ascertained by deducting from the value of the matrimonial property owned by each spouse:
>
> (a) Any secured or unsecured debts (other than personal debts or debts secured wholly on separate property) owed by that spouse; and
>
> (b) The unsecured personal debts owed by that spouse to the extent that they exceed the value of any separate property of that spouse.

[83] "Personal debt" is defined by s 20(7):

> (7) For the purposes of this section, 'personal debt' means a debt incurred by the husband or the wife, other than a debt incurred -
>
> (a) By the husband and his wife jointly; or
>
> (b) In the course of a common enterprise carried on by the husband and the wife, whether or not together with any other person; or
>
> (c) For the purpose of improving the matrimonial home or acquiring or improving or repairing family chattels; or
>
> (d) For the benefit of both the husband and the wife or of any child of the marriage in the course of managing the affairs of the household or bringing up any child of the marriage.

[84] I will return to the mechanics of these provisions in more detail shortly, after dealing with the preliminary definitional issues. At this stage, it is sufficient to record the New Zealand Court of Appeal's helpful overview of these provisions:[33]

> … [L]eaving aside for the moment any impact of s 20(2) [relating to the spouses' protected interest in the matrimonial home] and the question of separate property, the net value to be divided between the spouses is the sum of the value of the matrimonial property owned by the husband, less the amount of any qualifying debts by the husband, and the value of matrimonial property owned by the wife, less the amount of any qualifying debts by the wife.

[85] The first definitional issue is whether the New Zealand Inland Revenue Department's tax claim represents a "debt owed" or "incurred" by Mr Webb, given that it is owed overseas and cannot be enforced in the Cook Islands. A similar matter was considered by the New Zealand High Court in *Livingstone v Livingstone*.[34] There, the husband, who was domiciled in New Zealand, owed $28,164 to Canadian revenue authorities. However, he deliberately avoided travelling to Canada and was at pains to ensure that he kept no assets there. Somers J

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[33] *Wilson v Wilson* [1991] 1 NZLR 687 (CA) at 694.
[34] *Livingstone v Livingstone* (1980) 4 MPC 129 (HC).

considered it was unlikely Canadian revenue authorities would ever recover the sum, and so disregarded it when valuing the matrimonial property.

[86] Although Somers J ultimately refused to take the Canadian tax debt into account, *Livingstone* does indicate courts are willing to countenance the inclusion of a foreign-tax debt when valuing matrimonial property, at least when there is a likelihood that the debt will be paid. It is not yet inevitable that Mr Webb will pay or satisfy the sum claimed by the Inland Revenue Department, but his situation is quite different from the husband's in *Livingstone*. Indeed, Mr Webb now lives in New Zealand, and he has taken steps to engage with the Inland Revenue Department as to their claim.

[87] The learned author of Fisher on Matrimonial Property also suggests that the words "debt", "owed" and "incurred" warrant a broad interpretation:[35]

> To qualify under s 20(5) a proposed deduction must constitute a "debt", it must be "owed by that spouse" and, in the case of non-personal debts, it must have been "incurred". Each of these expressions is capable of more than one interpretation, but in the present context it seems probable that a debt is intended to qualify if a spouse has an existing legal liability to either pay immediately or at some time in the future a sum of money either certain or capable of estimation which liability is likely to be satisfied by the debtor-spouse or is actionable with a real prospect of recovery on the part of the creditor. …
>
> It is even possible that a debt might be deductible where, at the date of the hearing, the debt is merely contingent and not inevitable. Thus an unresolved claim for damages against one of the spouses might be dealt with by placing an estimate upon the prospects as to liability and quantum of damages. …
>
> It might be conceded the "debt", "owed" and "incurred" are all capable of interpretations contrary to the foregoing. However, they must be recognised in the context of social legislation whose principal object is to "recognise the equal contribution of husband and wife to the marriage partnership". … Further, it will generally be in the interests of both parties that their financial and property disputes be resolved as soon as possible. This may justify a broad approach to the recognition and valuation of debts in a manner akin to the treatment of assets.

[88] The Inland Revenue Department's claim against Mr Webb is for a significant, liquidated sum. Mr Webb is resident in New Zealand and the Inland Revenue Department is in the process of enforcing its claim. As noted, the situation is quite different from *Livingstone v Livingstone* because there is a real likelihood that Mr Webb will have to pay or satisfy the

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[35] R L Fisher *Fisher on Matrimonial Property* (2nd ed, Butterworths, Wellington, 1984) at [15.6].

Inland Revenue Department's claim. I therefore consider that it is proper to recognise the claim as a "debt owed" or "incurred" by Mr Webb.

[89] The next issue would normally be whether the Inland Revenue Department claim is "personal debt" of Mr Webb's in terms of s 20(7). The imprecise drafting of this subsection was the subject of significant criticism in New Zealand. I query Mr McAnally's submission that Mr Webb's core income tax liability arising from his business ventures, totalling $4,435,466.66 (being the core tax debt before penalties and interest), is not a personal debt because it was incurred "for the benefit of Mr and Mrs Webb, and also for Bethany, in the course of managing the affairs of the household or bringing up the child".[36] Nevertheless, Mr McAnally accepts that the bulk of the debt, being $19,426,840.30, is "personal" to Mr Webb. Given this concession and the effect of the application of s 20(5) to the unusual facts of this case, as discussed below, it is unnecessary to explore the effect of s 20(7) any further.

The effect of s 20(5) on the value of the matrimonial property pool

[90] For convenience, I set out s 20(5) again:

> (5) The value of the matrimonial property that may be divided between husband and wife pursuant to this Act shall be ascertained by deducting from the value of the matrimonial property owned by each spouse:
>
> (a) Any secured or unsecured debts (other than personal debts or debts secured wholly on separate property) owed by that spouse; and
>
> (b) The unsecured personal debts owed by that spouse to the extent that they exceed the value of any separate property of that spouse.

[91] If the Arorangi Trust and the Webb Family Trust are not trusts, and their assets do fall into the pool of matrimonial property, their assets are matrimonial property that is "owned by" Mr Webb. Those assets will make up almost the entire pool of matrimonial property.

[92] Section 20(5)(a) provides that the value of non-personal debt (i.e. relationship debt) owned by Mr Webb is to then be deducted from those (i.e. Mr Webb's) assets in the pool. If

[36] Per s 20(7)(d). Mr McAnally relied on the judgment of Prichard J in *Anderson v Anderson* (1980) 3 MPC 1 (HC) which held that "where income tax attaches to income used for the support of the family, it is a liability to be treated not as a personal debt but as a debt incurred for the benefit of both the parties in the course of managing the affairs of the household".

Mr McAnally is correct that Mr Webb's core tax liability is non-personal debt, then its value of $4,435,466.66 will need to be deducted from Mr Webb's matrimonial property.

[93] As far as Mr Webb's personal debts go, being the $19,426,840.30 tax debt, s 20(5)(b) provides that this debt is then to be deducted from the matrimonial property owned by him, but only to the extent that those debts exceed the value of Mr Webb's separate property.

[94] Mr Webb gave evidence that he has very little separate property to speak of, being only a TAG Heuer watch he received as an inheritance, worth around $25,000. This means the $19,426,840.30 personal debt falls to be almost completely deducted from the matrimonial property belonging to him. Given Mr Hikaka's highest estimated value of this matrimonial property is $8,092,111.41, the deduction of Mr Webb's personal debts from this amount would completely deplete the pool of matrimonial property available for division.

[95] As Mr McAnally acknowledged, the effect of s 20(5)(b) in this present case is, at least at first blush, "surprising". But as the New Zealand Court of Appeal has acknowledged, the provision exists as a "sensible and straightforward" means of protecting creditors:[37]

> [Section] 20(5)(b) provides in a sensible and straightforward way for the protection of creditors in arriving at the value of the matrimonial property owned by that spouse. Any separate property of a spouse is available to meet the unsecured personal debts of that spouse. If and to the extent that there is a shortfall those debts are deductible against matrimonial property owned by that spouse, so that it, too, is available for the creditors. But, if there is still a shortfall no further deduction is allowed under s 20(5), and the other spouse is to that extent protected from the creditors.

[96] It therefore follows that, even if the "trust" assets were to form part of the matrimonial property pool, Mr Webb's debts completely diminish the matrimonial property available for division.

Separate property

[97] Mrs Webb's uncontested evidence is that her separate property comprises:

a) The two ASB bank accounts in Mrs Webb's name;

b) The ASB term deposit accounts in Mrs Webb's name at separation;

[37] *Wilson v Wilson* [1991] 1 NZLR 687 (CA) at 694-695.

c) Mrs Webb's Fisher Funds retirement savings; and

d) Mrs Webb's jewellery.

[98] I conclude that the above described items are the separate property of Mrs Webb.

[99] Mr Webb claimed little or no separate property, beyond perhaps the TAG Heuer watch. I make no determination as to any separate property of Mr Webb.

Maintenance

[100] Section 548 of the Cook Islands Act 1915 empowers the court to make maintenance orders against a father in favour of his child where the court is satisfied that the father has failed or intends to fail to provide that child with adequate maintenance.

> **548 Maintenance order against father in favour of child**
>
> (1) The High Court may make a maintenance order against the father of any child in favour of that child if the Court is satisfied that the father has failed or intends to fail to provide that child with adequate maintenance.
>
> (2) When the father and child are living apart from each other, and the Court is satisfied that there is reasonable cause for the child continuing so to live apart from the father, the father shall not be deemed to have made provision for the adequate maintenance of the child merely by reason of the fact that he is ready and willing to support the child if and so long as the child lives with him.

[101] Section 550 of that Act provides for maintenance orders in respect of a wife, in similar terms:

> **550 Maintenance order against husband in favour of wife**
>
> (1) The High Court may make a maintenance order against a husband in favour of his wife if the Court is satisfied that the husband has failed or intends to fail to provide his wife with adequate maintenance.
>
> (2) Unless the Court is satisfied that the wife is a destitute person, no maintenance order shall be made against the husband if it is proved that he is not of sufficient ability to contribute to her maintenance.
>
> (3) When the husband and wife are living apart from one another and the wife has, in the opinion of the Court, reasonable cause for refusing or failing to live with her husband, the husband shall not be deemed to have provided her with adequate maintenance merely by reason of the fact that he is ready and willing to support her if and so long as she lives with him.

[102] Maintenance in respect of Bethany at the rate of $1,000 per calendar month seems to be agreed. However, I note that despite his offer to pay maintenance for Bethany, Mr Webb is seriously in arrears with this maintenance and also with maintenance previously ordered by the Court in respect of Mrs Webb.

[103] Mrs Webb has given unchallenged budgetary evidence that her current monthly expenses equate to $5,300.63. At her current rate of take-home pay, she falls far short of meeting this budget. She seeks monthly maintenance of $1,272.47 in respect of herself (this being the level of shortfall), in addition to the $1,000 in respect of Bethany.

[104] Mr Webb, however, says it is unrealistic to expect him to maintain the Arorangi Property via a maintenance order when this property is disproportionate to Mrs Webb's and Bethany's needs. There may be some merit in this point.

[105] Mr Webb also says he has limited income of $2,000 to $3,000 per month, and that this should be considered when assessing the level of maintenance.

[106] I propose to make orders for the maintenance of Mrs Webb and Bethany but I consider the parties should first have the opportunity to consider this judgment and its impact, and to confer in order to reach agreement regarding the amount of Mrs Webb's maintenance. Counsel should present to the Court either a joint memorandum, as they were able to do regarding custody and access for Bethany, or file short further written submissions.

[107] Any such memorandum or further submissions must be filed within 21 days of the date of this judgment.

[108] Counsel should also advise the current amount of indebtedness of Mr Webb in respect of:

a) Bethany's maintenance at the rate of $1,000 per calendar month; and

b) Mrs Webb's maintenance pursuant to previous Court orders.

[109] To facilitate the parties' endeavours to agree an appropriate arrangement regarding maintenance, the current interim orders of the Court which are in force until further order of the Court, for occupancy by Mrs Webb and Bethany of the Arorangi property, for restraint on dealings with the Arorangi property and for non-molestation in favour of Mrs Webb, shall

remain in force until maintenance orders are made in respect of Bethany and Mrs Webb. At that point I shall also give further attention to these interim orders.

Conclusion

[110] The conclusions I have reached, notwithstanding the admirably courageous and competent advocacy of Mr Hikaka, assisted by Mr Marshall, will no doubt be disappointing for Mrs Webb. Although the evidence presented gives rise to misgivings about the way Mr Webb has managed his financial affairs, suspicions or general perceptions of unfairness are not grounds to set aside properly and validly created trusts.[38] Despite the call for "worldly realism" impressed on me by Mr Hikaka,[39] it would take legislative intervention relating to trusts or the Cook Island's matrimonial property regime to achieve the results sought by Mrs Webb in this case.

Result

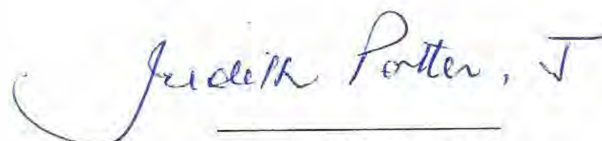
[111] Mrs Webb's application for matrimonial property orders is dismissed.

[112] I order that the property listed in [97] is the separate property of Mrs Webb.

[113] Issues of maintenance will be determined pursuant to the process outlined above in paragraphs [106] to [108].

Costs

[114] My preliminary view is that in all the circumstances of this case no costs award should be made and that costs should lie as they fall. I note the numerous interlocutory applications on which costs have been reserved and on which Mrs Webb would be entitled to costs. If the parties wish to pursue the matter of costs, memoranda must be filed within 21 days.



Judith Potter, J

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38 Echoing the comments of Asher J in *Official Assignee v Sanctuary Propvest Ltd* (2009) 2 NZTR 19-017 (HC) at [60].

39 Citing *Clayton v Clayton [Vaughan Road Property Trust]* [2016] NZSC 29, [2016] 1 NZLR 551 at [79].