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IN THE FAMILY COURT
AT TAURANGA

I TE KŌTI WHĀNAU
KI TAURANGA MOANA

FAM-2021-006-000056
[2024] NZFC 12409

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	JOYCE CECILIA MURPHY Applicant
AND	AIDAN JOHN MURPHY Respondent

Hearing:	17-19 September 2024
Appearances:	B A Millar for the Applicant J N Steele and A L Thomas for the Respondent
Judgment:	25 September 2024

RESERVED JUDGMENT OF JUDGE S J COYLE
[IN RELATION TO ORDERS CONCERNING THE DIVISION OF THE PARTIES' PROPERTY]

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[1] Mrs Murphy seeks the Court's assistance to resolve a dispute between her and Mr Murphy around the division of their property following the end of their relationship. Mr and Mrs Murphy began living together in a de facto relationship in 1989 and married in 1998. They have two adult daughters, Amy, aged 34 and Ciara, aged 24.

[2] For most of their lives they lived in Ireland, but due to difficulties obtaining employment in Ireland, they shifted to Australia; Mr Murphy moved over initially to look at potential opportunities, and Mrs Murphy and Ciara around a year later.

[3] Mr Murphy had been working in the mines in Australia but was made redundant in 2016. Following his being made redundant, Mr Murphy's brother, Ross Murphy, who lived and worked in New Zealand, offered Mr Murphy work in New Zealand through his contacts with HEB Construction.[1] Mr Murphy accepted that offer and relocated to New Zealand, but Mrs Murphy remained living in Australia. On 25 June 2020 the parties agreed to separate. Mrs Murphy maintains that it was when she had discovered that Mr Murphy had, unbeknown to her, set up a company in New Zealand, Murphy's Civil Limited; that for her that was a significant breach of trust, and she decided that their relationship was at an end. Mr Murphy has continued to live in New Zealand.

[4] Mr Murphy's work as a contractor has been through the vehicle of a number of different companies, it is the shares in these companies that form the basis of the parties' relationship property. Those companies are as follows:

(a) Lee Valley Civil (Pty) Ltd was established on 11 April 2016[2] in Australia prior to Mr Murphy moving to New Zealand to purchase a Caterpillar digger/excavator. That company was deregistered on 18 August 2021,[3] and has been removed from the Companies Register in Australia.

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1 A major construction company in New Zealand specialising in major infrastructure works.
2 Bundle of Documents at 517.
3 Ibid.

(b) Mr Murphy and his brother, Ross Murphy, set up Murphy Civil Limited in 2016. They both hold 50 shares in MCL, Mr Murphy's 50 per cent shareholding is relationship property.

(c) Once LVC (Pty) Ltd was deregistered in Australia, Mr Murphy then set up Lee Valley Civil Ltd (NZ), although after taking advice the company name was changed to MPile Limited. Mr Murphy is the sole shareholder in LVC (NZ).

[5] It would appear that LVC (Pty) retains legal ownership of the Caterpillar excavator/digger notwithstanding its deregistration in Australia. Even though the excavator was shipped out to New Zealand by Mr Murphy, its ownership was never transferred to LVC (NZ).

Agreed Issues

[6] There are a number of issues which are agreed between the parties. They are as follows.

Superannuation

[7] Both parties have superannuation policies in Australia. Mr Murphy's was worth $AUD103,000 at separation, and Mrs Murphy's was worth $AUD22,722.79 as at separation. These values are to be divided equally between the parties.

[8] Each party had their own bank accounts, the values as at separation are agreed. Mrs Murphy has a bank account balance at separation of $AUD105,000. It is her contention that $AUD10,000 of this belongs to Ciara, leaving a balance of $AUD95,000 to form part of the parties' relationship property pool. Mr Murphy does not accept that the $AUD10,000 belongs to Ciara. His rationale for not accepting it is that he simply has never been told about it and therefore cannot agree to something in relation to which he has no knowledge. Mrs Murphy's explanation is that Ciara wanted her mother to hold onto the money so that Ciara would not be tempted to spend it. I accept Mrs Murphy's evidence in this regard (it not being seriously challenged

by Mr Murphy), and thus the balance of that account available for the purpose of division pursuant to the Property (Relationships) Act 1976 (the PRA) is $AUD95,000.

[9] Mr Murphy had a Harley Davidson in Australia which was sold by Mrs Murphy for $12,000. She proposes that given she had to sell it, that she keeps the entire proceeds. That is not accepted by Mr Murphy. There is no evidence that the costs of sale were significant, and there is no proper basis to assert that Mrs Murphy should be compensated for facilitating the sale by her retaining the entire sale proceeds. I determine that the sale proceeds should be divided equally between the parties.

[10] Mrs Murphy had a Mitsubishi Triton in her possession worth $7,900 which forms part of the parties' relationship property pool; its value should be shared equally between the parties.

Issues in Dispute

[11] However, there are a number of issues in which the parties are unable to agree, and these are the issues that I need to determine. They are as follows:

(a) Whether the Chevrolet motor vehicle, owned by Murphy Civil Limited, should be classified as relationship property or not, and if so, whether the value should be divided equally between the parties. Mrs Murphy maintains it was purchased for Mr Murphy out of relationship funds and it should be classified as relationship property.

(b) The value of the excavator owned by LVC Pty Ltd.

(c) The value of Mr Murphy's 50 per cent shareholding in Murphy Civil Limited. There are two valuations before the Court. One by Ms Owen which values Mr Murphy's 50 per cent shareholding at $1.2 million and one by Mr Manning, who values Mr Murphy's shareholding at $1.08 million.

(d) The status and value of a property formerly known as the East Coast Inn in Ward, Marlborough. It is included as an asset of Murphy Civil Limited. Mrs Murphy's position is that the East Coast Inn property is relationship property on the basis that it was intended to be the family home. Alternatively, she argues that it is held by Murphy Civil Limited on a constructive trust for the parties.

[12] Furthermore, Mrs Murphy seeks adjustments as follows:

(a) Pursuant to s 9A of the PRA on the basis that her actions and/or relationship property have contributed to the increase in Mr Murphy's separate property.

(b) Compensation pursuant to s 11B of the PRA for the absence of a family home.

(c) Adjustments for post-separation contributions pursuant to s 18B of the PRA.

(d) An unequal division of the parties' relationship property pursuant to s 13 of the PRA on the basis that an equal sharing would be repugnant to the interests of justice.

(e) Mrs Murphy seeks an adjustment pursuant to s 18B for Mr Murphy's use of East Coast Inn.

(f) Mrs Murphy seeks interest on her share of the parties' relationship property from the date of separation until the date of settlement pursuant to the Interest on Money Claims Act 2016.

(g) Mrs Murphy seeks an award pursuant to s 15 of the PRA.

(h) Mrs Murphy seeks compensation for the loss of the use of her share of relationship property from the date of separation until the date of hearing, or such later date as fixed by the Court.

Is the Chevrolet motor vehicle relationship property or not?

[13] While I accept the Chevrolet may have been used by Mr Murphy for his personal use, its ownership is clearly vested in Murphy Civil Limited. It is an asset of the company. Sections 9A or s 17 of the PRA therefore cannot apply as submitted by Ms Millar as no relationship property funds have been applied to Mr Murphy's separate property. The Chevrolet is not his separate property; it is company property.

[14] Mrs Murphy's alternative argument is that relationship property funds were put into the company to purchase the Chevrolet. In support of that she relies upon a narration by Ms Owen in her report where she references a payment in the sum of $25,411 "for purchase of Chevrolet" as capital introduced to MCL from the parties.[4] However, that figure does not reconcile with the MCL company accounts for the year ending 2017 and in the depreciation schedule which shows that the Chevrolet was purchased for $24,348. The 2017 accounts record as an asset of the company motor vehicles worth $24,348; there are no vehicles recorded in the assets for the 2016 year.[5] That $24,348 figure as it relates to the Chevrolet is confirmed in the Depreciation Schedule attached to the MCL accounts for the year ending 31 March 2021, which records that the Chevrolet was purchased for $24,348.[6]

[15] It is unclear, therefore, why Ms Owen recorded the funds introduced as relating to the purchase of the Chevrolet as the two figures do not corelate. As she was not available for the purposes of cross-examination, that issue could not be clarified by her. Mr Murphy's evidence, which I accept, is that the Chevrolet was purchased by the company out of company funds, and not out of monies "leant" or otherwise advanced by Mr and Mrs Murphy to the company. He gave evidence of other vehicles that were purchased out of company funds, and there is no basis in the evidence to suggest that he departed from that "usual" practice. What the amount referred to by Ms Owen relates to is entirely unclear. But even if there were relationship funds introduced, it cannot be caught by s 9A or s 17 as submitted by Ms Millar as the Chevrolet is not Mr Murphy's separate property; it is MCL property. Neither is it

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4 Bundle of Documents at 499.
5 Bundle of Documents at 207.
6 Bundle of Documents at 273.

caught by s 44F of the PRA, given that I have accepted Mr Murphy's evidence that it was bought out of company funds, not relationship property monies. The Chevrolet forms part of the assets of MCL and therefore has formed part of the share valuation.

[16] It is my determination that the Chevrolet is owned by Murphy Civil Limited, and that it is not a separate asset falling for division as part of the parties' relationship property. Rather it simply forms part of the assets of the company which impact upon the share valuation, with Mr Murphy's shares being accepted as relationship property.

Issue 2 – The status and value of the Caterpillar excavator

[17] A Caterpillar excavator was purchased by Lee Valley Civil (Pty) Ltd on 19 April 2016 when Mr Murphy was in Australia for $195,385.[7] The purchase was funded in part by a deposit of $70,000, those monies coming from Mr Murphy's redundancy payment. Both Mr and Mrs Murphy accepted in evidence that there had been a discussion following Mr Murphy's redundancy as to alternative means of income, and that there was a joint decision made to purchase the excavator. Mrs Murphy was aware that it was being purchased through LVC (Pty) Ltd in Australia. The most accurate evidence of its current value is the depreciated value of $43,891 in the LVC (Pty) Ltd accounts for the year ending 30 June 2019.[8]

[18] Both Mr and Mrs Murphy agreed that the $70,000 was leant by them to the company. What is not agreed is whether the monies have been repaid or not. Mr Murphy's evidence is that the monies were repaid. His evidence is that there was an accounting error, as the loan repayment was not recorded in the LVC (Pty) Ltd accounts for the year ending 2019 as a repayment of the loan but was simply shown as income earnt by the company. However, all of the income from the company was paid into the parties' joint account.

[19] Mr Murphy's evidence was that there was a subsequent falling out between he and his then accountant as he could not understand why repayment of a debt had been classified by the accountant as income, rather than repayment of a loan. Because of

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7 The invoice is in the Bundle of Documents at 49.
8 Bundle of Documents at 512.

the classification of $70,000 as income, that then became taxable income for him. Whereas, if the $70,000 had been recorded as a repayment of a loan, then that would not be taxable income. Regardless of any accounting error that did or did not occur, it is clear to me on the evidence that the loan was repaid by LVC (Pty) Ltd to the parties. As Mr Murphy put it, it could only have been through repayment of those monies that the parties were then subsequently in a position to pay the deposit for the purchase of East Coast Inn by Murphy Civil Limited.

[20] Notwithstanding that LVC (Pty) Ltd has been deregistered, ownership of the excavator has never been formally transferred from that company to LVC (NZ) Ltd/ MPile Limited. That is notwithstanding that the excavator was subsequently shipped from Australia to New Zealand and has been operated by Mr Murphy in New Zealand since 2016.

[21] It is my determination that the excavator remains the property of LVC (Pty) Ltd. The only way to assess its value is on a notional liquidation basis. That company earns no income and its only asset is the excavator. There is no accurate evidence as to its current value. It is currently parked up at the East Coast Inn property and has not been used for a number of years. Its actual value may be less than the depreciated value as Mr Murphy's evidence is that there will need to be a reasonably significant sum of money expended to get it working again. I accordingly fix its value as at the last known depreciated value, namely $43,891.

Status and Value of the East Coast Inn Property

[22] Prior to the parties' separation the intention was that once Ciara had finished school, that Mrs Murphy would consider moving out to New Zealand to live with Mr Murphy. Together they looked at a property formerly known as the East Coast Inn just out of Ward on State Highway 1, Marlborough. It was a property severely damaged in the Kaikōura earthquake and was red stickered. Mr Murphy believed, however, that he could renovate the property or alternatively it could be demolished, and that they could build what would have been their family home on that property.

[23] Mr and Mrs Murphy therefore entered into an agreement for the sale and purchase of the property. However, it subsequently became apparent that neither Mr or Mrs Murphy held a New Zealand IRD number, and therefore they were not entitled to lawfully purchase the property. Notwithstanding that Mr Murphy had been working in New Zealand for MCL, he essentially worked as a contractor, contracting out his services to MCL initially through LVC (Pty) Ltd. Accordingly, there was no need for him to have a New Zealand IRD number. This changed following the falling out with Mr Murphy's accountant, as set out above. At that point he received advice that LVC (Pty) Ltd should be wound up, and in 2021 Mr Murphy established LVC Ltd in New Zealand. LVC Ltd then contracted to MCL Ltd. It was only then that he needed to obtain an IRD number.

[24] However, because of their failure to hold a New Zealand IRD number at the time of the proposed purchase of East Coast Inn and to therefore be able to legally purchase the property, the sale was voided. Mr Murphy was adamant that there were then discussions with Mrs Murphy over a number of weeks, which resulted in an agreement that Murphy Civil Limited would buy the property so as to store equipment and plant, particularly at that time as Murphy Civil Limited had secured work as part of the Kaikōura rebuild after the Kaikōura earthquake.

[25] Mrs Murphy maintains she was ignorant that the property was subsequently purchased in the name of Murphy Civil Limited. It is her position, as set out at the outset, that she had no knowledge of that company until just prior to separation, and that it was her gaining knowledge of the existence of this company which led to her decision to end the parties' relationship.

[26] Regardless of that issue, East Coast Inn was purchased by Murphy Civil Limited in June 2018 and is recorded in the accounts as an asset of the company. Its purchase was funded out of an advance by Mr and Mrs Murphy of AUD$132,000. I accept Mr Murphy's evidence that Mrs Murphy must have been aware of this transfer as she was, on her own evidence, all over the accounts, and I would have expected her to have noticed the transfer out of their joint account on 28 June 2018 to the Commonwealth Bank, with a narration on the bank statement of "app property in

Ward".[9] Mr Murphy accepts that the company accounts do not show a liability back to he and Mrs Murphy for that loan, and that the accounts should have reflected the fact that those monies remain outstanding and are owed by Murphy Civil Limited to he and Mrs Murphy personally. That debt owed by Murphy Civil Limited therefore forms part of the parties' relationship property assets.

[27] Mrs Murphy's position is that the entire value of the East Coast Inn should be treated as relationship property on the basis that it was acquired during their relationship, for the common use or benefit or from relationship property funds.[10] The property has been valued at $275,000, and thus Mrs Murphy seeks the sum of $137,500 being a half share of the value of the East Coast Inn property. Furthermore, she submits that she should receive interest on the $137,500 pursuant to the Interest on Money Claims Act 2016 (the Act), being $19,721.78.[11]

[28] There are a number of difficulties with the propositions advanced by Mrs Murphy. Firstly, East Coast Inn is owned by Murphy Civil Limited and not the parties. Section 8(1)(e) of the PRA relates to property owned by the parties. A company is a separate legal entity, and assets owned by the company are not relationship property. If all that was required was a reliance on s 8(1)(e) of the PRA, then there would be no issues in relation to homes owned by a trust, for example, on the basis that the trust property was purchased during the parties' relationship. The position advanced by Mrs Murphy does not reflect well-established law as the parties did not own the East Coast Inn property. While I accept that they intended to do so, because of matters beyond their control they could not purchase it in their own names. Therefore, the property was purchased in the name of the company, and not with the intention of benefiting them both, but as a resource available to the company to store equipment associated with Murphy Civil Limited.

[29] Secondly, implicit in Ms Millar's submission that the East Coast Inn should be treated as relationship property is that there is to be no adjustment to the share valuation to take into account the removal of the East Coast Inn property from the

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9 Bundle of Documents, p 44.
10 In terms of the Property (Relationships) Act 1976, s 8(1)(e).
11 Calculated from the date of separation until 19 September 2024 using the Civil Debt Interest Calculator.

MCL's assets. That is, if it is to be treated as relationship property, then its value should come off the value of the shares, which would require a further valuation from Ms Owen and/or Mr Manning. In short, Mrs Murphy cannot "double-dip".

[30] Consequently, her claim for interest under the Interest on Money Claims Act 2016 must fail. But in any event, as submitted by Mrs Steele, s 25 of the Interest on Money Claims Act 2016 states that:

> A court may not award interest under a section of this Act for a period unless the party who claims interest under the section for that period specifies the section and, as far as possible, the period in that party's statement or notice of claim or counterclaim.

[31] In this case it is only in Ms Millar's submissions that a claim under that Act has been raised on behalf of Mrs Murphy. That is, contrary to s 25 of the Act, it has never been previously pleaded. That omission is fatal to Ms Millar's submission that the Act should apply.

[32] However, as Ms Millar also sets out in her submissions s 33(4) of the PRA does allow the Court to award interest; often phrased as loss of use of money interest, from the date of separation until the date of payment.

Does MCL hold East Coast Inn on trust for the parties?

[33] In the alternative Ms Millar submits that if the East Coast Inn is not relationship property in and of itself (which for the reasons set out above it could never have been), then Mrs Murphy argues that a constructive trust has been established. That is, she submits that the company held the East Coast Inn property pursuant to a constructive trust on behalf of Mr and Mrs Murphy. This claim similarly cannot succeed.

[34] The leading case in the relationship property context is *Lankow v Rose*.[12]

[35] In that case the Court of Appeal held that a claimant must establish the following:[13]

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12 *Lankow v Rose* [1995] 1 NZLR 277, [1995] NZFLR 1 (CA).
13 At [25].

(a) More than a minor direct or indirect contribution to the acquisition, preservation or enhancement of the defendant's assets.

(b) That in all circumstances both parties must be taken to reasonably have expected the claimant would share in the asset as a result.

(c) A causal nexus between the contributions and the acquisition preservation on enhancement of the defendant's assets.

(d) That the contribution manifestly exceeds any benefits that the claimant derives from the arrangement.

[36] In this case there is no dispute that AUD$132,000 was advanced by Mr and Mrs Murphy towards the purchase of the East Coast Inn property.

[37] However, for a trust to be established there must be commonality of intention, or circumstances in which commonality of intention can be inferred. That is, Mrs Murphy needs to have established that she, Mr Murphy, and Mr Murphy and Ross Murphy as directors of Murphy Civil Limited, all had a common intention that the East Coast Inn was held on behalf of Mr and Mrs Murphy in their personal capacity, and that they would somehow share in the value or use of that property. There is simply not an evidential foundation to enable the Court to conclude that this was so. For example, no evidence has been provided by Ross as to his understanding of the circumstances of the purchase and of the intention. Secondly, Mr Murphy's evidence is that the property was purchased to benefit the company and to be utilised by the company to store plant and equipment. I accept that during lockdown Mr and Mrs Murphy resided in the property. I accept that there were discussions about renovating the property, but as Mr Murphy set out in his evidence, as he began some preliminary works, he realised the property was entirely structurally unsound and needed to be demolished. But that is not in and of itself evidence of an intention by all parties that Mr and Mrs Murphy should be compensated for their intentions to renovate to the property, or for an unplanned occupation during the 2020 COVID lockdown.

[38] Should Mr and Mrs Murphy have either renovated the property or subsequently built what would have been their family home on the property, then I accept there may well have been an argument supporting the establishment of a constructive trust. But in circumstances in which the parties lent money to the company on the basis that the company would use the property for the storage of plant and equipment, certainty of intention cannot be established on the balance of probabilities, and nor does the evidence support a claim that both parties (Mr and Mrs Murphy and the directors of Murphy Civil Limited) must have been taken to reasonably have expected that Mr and Mrs Murphy would share in the assets as a result. Mr Murphy was not cross-examined on this issue as was required,[14] nor was Ross Murphy summonsed to give evidence on this issue. There is simply insufficient evidence to enable the Court to make a finding of a constructive trust.

[39] But additionally, if a constructive trust were to be established, then that similarly would affect the share valuation, and as I do not apprehend Ms Millar's submissions to be suggesting that the share valuation should be departed from, in effect Mrs Murphy is again seeking to "double-dip". Significantly, there is an agreed debt owed back by the company to Mr and Mrs Murphy in relation to the AUD$132,000, and that debt forms part of the relationship property pool.

Valuation of Murphy Civil Limited

[40] Two valuations have been provided in relation to Mr Murphy's 50 per cent shareholding in Murphy Civil Limited. The first is dated 28 September 2023 which was a joint instruction to Ms Owen of Augmented Solutions Ltd.[15] Ms Owen was not available for cross-examination as she has apparently retired. Given that Mr Murphy does not accept her valuation, and has provided his own valuation from a Mr Manning, I would have thought that a summons could have been issued against Ms Owen.

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14 Evidence Act 2006, s 92(1).

15 Her valuation is set out in the Bundle of Documents at 497 to 521.

[41] Ms Owen has valued Mr Murphy's shares in Murphy Civil Limited using the net tangible assets plus good will approach, with good will having been calculated on super profits. She also notes, significantly in my view:[16]

> I would also like to highlight the sustained growth of the Company since Ross Murphy commenced active participation in early 2019. It may very well be that a significant portion of the Goodwill relates to the personal Goodwill of Ross Murphy and is not attributable to the company itself. I have made the assumption that the calculated Goodwill is the Goodwill of the company, and not specific to either shareholder.

[42] Ms Owen concluded that the 50 shares held by Mr Murphy in Murphy Civil Limited as of 31 July 2023 were worth $1.2 million. She notes funds introduced from relationship property being $25,411 for the purchase of the Chevrolet;[17] for the reasons set out above, that figure cannot relate to the purchase of the Chevrolet. She also notes for the year ending 31 March 2019 the sum of $151,440 for the purchase of the East Coast Inn property; as set out in this judgment Mr Murphy accepts that that is a debt owed by the company to he and Mrs Murphy.

[43] Ms Owen also references at page 501 of the bundle of documents monies paid to Lee Valley Civil by way of "hire of plant" for the years ending 31 March 2019, 31 March 2018 and 31 March 2017; those figures are $240,000, $300,000 and $150,000 respectively. As Ms Millar established in cross-examination, those figures appear to have come in part from the MCL accounts for the year ending 31 March 2019.[18] The reference to Lee Valley Civil must be LVC (Pty) Ltd and not LVC (NZ) Ltd. The accounts for LVC (Pty) Ltd for the year ending 31 June 2018,[19] are set out in the bundle of documents at page 311. They show income for the year ending 2018 of $194,666.40 and for the year ending 2017 of $148,432.60. While the figure of $150,000 at page 501 is similar to the $148,432.60 at page 311 of the bundle of documents, there is no correlation between the $300,000 in Ms Owen's report and the actual accounts which show for the year ending 31 June 2018 income of only $194,666.40. It would appear that Ms Owen is in part wrong in the figures she has

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16 Bundle of Documents at 499.
17 Bundle of Documents at 499.
18 Bundle of Documents at 234.
19 In Australia the balance year appears to be from 1 July to 30 June in the following calendar year.

been using. Mr Manning then relied upon Ms Owen's figures when completing his valuation.

[44] Mr Manning has provided his valuation attached to his affidavit sworn on 16 November 2023.[20] Mr Manning agrees that the methodology used by Ms Owen in her valuation is appropriate for this type of business. He has undertaken a valuation on a fair and reasonable basis. Where he differs from Ms Owen's valuation is in the required rate of return. Ms Owen used a 17 per cent required rate of return. Mr Manning's opinion is that due to the high risks and high level of investment required for this type of business to operate successfully, he believes a required rate of 20 per cent is more appropriate. He also disagrees with Ms Owen on the reasonable salary level for owners working in this type of business. He has increased the reasonable salary value for the owners of Murphy Civil Limited to be $400,000 compared to Ms Owen's assessment of $300,000.

[45] He also notes that the information provided by Ms Owen indicates the company has been able to pay shareholders salaries of $455,000 in the year ending 31 March 2023. However, there is no evidence that Mr Murphy has in fact been paid that amount. For example, his last taxable return filed for the year ended 31 March 2021 shows a gross salary of $95,000.[21] Consequently, Mr Manning has calculated the total value of Murphy Civil Limited's company shares to be $2.15 million as of 31 July 2023, slightly lower than Ms Owen's valuation of $2.42 million. He accordingly values Mr Murphy's shares at $1.08 million. The difference between the two is therefore $120,000.

[46] Mr Murphy's position is that he does not have the income or the assets to pay to Mrs Murphy a half share based upon those valuations. When asked by Ms Millar, Mr Murphy advised that he had just over $5,000 currently in his bank account. Mr Murphy owns no other property apart from the shares, and Mrs Steele advised me that a bank will not lend money to Mr Murphy solely on the basis of his 50 per cent shareholding in MCL. He is accordingly unable to finance by way of a loan monies to buy out Mrs Murphy's shares in the company. His proposal, therefore, is that half

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20 Bundle of Documents, pp 656 to 664.
21 Bundle of Documents at 277.

of his shares (a 25 per cent minority shareholding of the company) be placed on the open market for sale.

[47] Mr Manning in his evidence was quite clear that such a proposal would be fraught. He states that effectively someone would be buying into the company as a minority shareholder, with the majority shares held by two brothers who have run the company to date. Effectively, Mr Manning was saying the minority shareholder would be powerless in a situation where there is a disagreement between Mr Murphy and his brother Ross. His evidence is that any component financial advisor would caution around such risks to any prospective purchaser. In these circumstances, Mr Manning advised that a minority shareholder discount of 35 per cent should be applied to his figure. I accept his evidence in this regard. I cannot ignore the fact that it is unlikely that a third party would want to pay market value for a 25 per cent shareholding in MCL when they would be a minority shareholder in a company controlled by two brothers. A 35 per cent discount would reduce the value of Mr Murphy's 50 shares by $378,000 to $702,000; a half share accordingly equates to $351,000 payable to Mrs Murphy (as opposed to the $540,000 on the original valuation).

[48] Consideration of a minority shareholder discount is therefore appropriate. But Mr Murphy's inability to pay anything at all is not a factor I take into account in assessing the overall value of the shares. For example, Mr Murphy indicated that if I fixed the value of the shares at the separation date value, he could potentially buy out Mrs Murphy's shares in MCL. While that would be a pragmatic solution, the PRA does not require me to resolve disputes pragmatically; it requires me to resolve disputes fairly and justly and consistent with the PRA and the law; a pragmatic approach would be neither fair not just to Mrs Murphy.

[49] Similarly, an approach whereby I let the market "fix" the value by simply placing a 25 per cent shareholding on the "open market" would be unfair as it may result in no offers ever being made, and the decision having to be revisited at a later date. That would be contrary to the principles of the PRA and s 1N(d) in particular.

[50] I need to therefore fix a value of the shares only taking into account the relevant law. If Mr Murphy does not pay Mrs Murphy the monies that she is owed, then she can enforce this judgment in the civil jurisdiction of the Court.

Alternative approaches to the valuation issues

[51] An alternative option is to assess the value of the shares on a notional liquidation basis. However, I discount that option on the basis that this company is, currently at least, not insolvent, and it cannot be liquidated because Mr Murphy is not the sole shareholder of the company.

[52] Assistance as to another option is gained from the decision of *[M] v [C]*[22] which contains similar factual issues to this case. In that case the High Court upheld a Family Court decision to value the shares in a company as at the hearing date, but also consider the value of the wife's interest in the company, both at hearing date and at separation date, and then calculating the husband's award for post-separation contributions[23] as a percentage of the difference between the separation date and the hearing date valuation. Justice Dunningham recorded at [16]:

> What the appellant appears to have overlooked is that in order to calculate an adjustment for post-separation contributions it is essential to know what the increase in value of the property is between separation date and hearing date. If, for example, there had been little or no increase in value between those two dates, then there could be no case for making an adjustment for post-separation contributions. Conversely, where, as here, there has been a significant increase in value (no matter which party's expert accounting evidence is referred to), there is a much stronger argument for considering whether someone like Mr [M], with full control of the company in the period post-separation, should be compensated for his efforts in achieving that significant increase in value.

[53] The High Court found that the wife was entitled to 20 per cent of the post-separation increase and that the husband received 80 per cent of the increase between the separation date and the hearing date. The rationale was that post-separation increase in the value of the shares had occurred in the main because of the particular skills and efforts of the husband. That is, the increase was not due to inflationary or market factors (such as the rise in the value of realty), which would

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22 *[M] v [C]* [2019] NZHC 813.

23 Pursuant to the Property (Relationships) Act, s 18B.

require both parties to share in the gains, but solely because of the post-separation skills and endeavours of one party and minimal efforts of the other.

[54] In this case, Ms Owen had earlier completed a valuation of the shares in Murphy Civil Limited as of 8 July 2022. In that valuation she determined that the value of the shares was $228,750 as of 25 June 2020 (the date of separation) and $949,250 as of 31 January 2022. In her recent valuation, the figures set out at page 501 of the bundle of documents show that as at the year ending 31 March 2020 income was $1,151,934, and as of 31 July 2023 it had increased to $2,012,800. As she noted at page 499 of the bundle of documents, since Ross Murphy commenced active participation in early 2019 there has been sustained growth in the company. Contrary to the factual situation in *[M] v [C]*, Mrs Murphy has done nothing post-separation to contribute towards the increase in the value of Mr Murphy's shares in MCL. The shares have increased because of the efforts of him and his brother, but particularly that of Ross Murphy.

[55] Mr Murphy was quite clear during his cross-examination, that by virtue of his personality, he lacks the "finesse" to negotiate contracts. His style, he concedes, is one that would tend to alienate people. An example of this can be seen when Ross Murphy returned to Ireland, and Mr Murphy was simply unable to secure any further significant contracts for MCL. Mr Murphy's evidence was that he phoned his brother Ross, who suggested he make contact with an acquaintance in HEB.[24] Mr Murphy's evidence was that he then made contact with that person, but again no new contracts eventuated. It was only when he convinced Ross to return to New Zealand for a brief period, and to then remain living in New Zealand, that Ross was able to negotiate further contracts and security of work for MCL. There has been, as Ms Millar submitted, work that Mr Murphy has been able to secure. But in the main, the increase in contract work for MCL has predominantly occurred because of the efforts of Ross Murphy, and to a lesser degree, Mr Murphy.

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[24] HEB has provided the majority of the work for Murphy Civil Limited because of Ross Murphy's former employment there and the relationships he has built up with senior and significant HEB staff.

[56] An alternative, therefore, in accordance with the *[M] v [C]* decision, is to fix a hearing date valuation, but to then adjust the increase in the value of the shares from the date of separation to the date of hearing, to recognise Mr Murphy's post-separation contributions[25] to the increase in the value of the shares in MCL, and the fact that Mrs Murphy has made no contributions at all to the increase in value.

[57] Mr Manning also conceded that there are issues with both his and Ms Owen's valuations in that they contain a goodwill component. Part of a consideration of goodwill is a recognition of super profits and that is in effect projected profits with reference to the past performance of the company. In this case, MCL has lost the IREX contract[26] because of decisions made by Central Government upon its election to Government last year. MCL only has work up until the end of the year. Beyond that it is unclear whether they will obtain any future work or not. Mr Manning's evidence is that an ongoing issue with the procurement of future contracts would affect and reduce the goodwill component of the valuation.

[58] My decision is to prefer and accept the valuation of Mr Manning. He has been available for cross-examination, and he has been of great assistance to me, discussing the various issues which have arisen in the context of this case, including the inability of Mr Murphy to be able to buy out Mrs Murphy's interests. But given the inability of Mr Murphy to be able to buy out Mrs Murphy's 25 per cent interest in his shares, I have decided to deduct, as recommended by Mr Manning, a 35 per cent minority shareholder interest. That arrives at an adjusted valuation figure for Mr Murphy's 50 per cent shareholding in MCL of $702,000.

[59] Additionally, when I consider the fact that the increase in the share value post-separation has been predominantly due to the post-separation contributions of Mr Murphy and his brother, and not of Mrs Murphy, a fair and just outcome is to adopt the approach set out in the *[M] v [C]* decision.

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25 PRA, s 18B.

26 IREX was the project by KiwiRail to develop the new Inter-Islander Ferry Terminals in Picton and Wellington, cancelled by the National Government last year.

[60] The earlier valuation of Mr Murphy's shares in MCL by Ms Owen was $228,750 as of 25 June 2020. The increase between the adjusted figure of $702,000 and the $228,750 is $473,250. There should be an adjustment in Mr Murphy's favour in recognition of the fact that the increase in the value has been because of his contributions. However, the increase has not been solely due to his endeavours, but also that of his brother Ross. I determine that the increase in value should be fixed at 60 per cent to Mr Murphy and 40 per cent to Mrs Murphy.[27] Therefore, the adjustment due to Mrs Murphy should be a half share of the value of the shares at separation, and 40 per cent of the adjusted increase in value; that is $114,375 plus $189,300 being a total figure of $303,675.

Should the parties' relationship property be divided unequally?

[61] Mrs Murphy seeks an unequal division of the parties' relationship property pursuant to s 13 of the PRA. That section provides that there can be an unequal sharing of relationship property if there are extraordinary circumstances which make the equal sharing of relationship property repugnant to justice. As Ms Millar sets out in her submissions a higher threshold is required before s 13 can be invoked. In *Castle v Castle* Quillam J held:[28]

> The extraordinary circumstances will, I think, require to be those which force the Court to say that, notwithstanding the primary direction to make an equal division, the particular case is so out of the ordinary that an equal division is something the Court feels it simply cannot countenance.

[62] In Ms Millar's submissions the extraordinary circumstances here are:

(a) The use of relationship funds to purchase the excavator and the East Coast Inn.

(b) That the excavator was used to help establish Mr Murphy in New Zealand and subsequently set up Murphy Civil Limited.

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[27] The difference between this case and the *[M] v [C]* decision is that the increase is not solely due to Mr Murphy but also to Ross' efforts, hence my fixing the percentage at less than 80 per cent.

[28] *Castle v Castle* [1977] 2 NZLR 97 (SC) at 102.

(c) The lack of accounting to Mrs Murphy for the use of the East Coast Inn.

(d) Mrs Murphy taking on the majority of outgoings since 2014 which enabled Mr Murphy to concentrate on the building up of his business and subsequently Murphy Civil Limited.

(e) A submission by Ms Millar that there was a clear intention by Mr Murphy to mislead Mrs Murphy.

[63] In Ms Millar's submission a 60/40 division in favour of Mrs Murphy would be appropriate. The s 13 argument must fail. There is nothing extraordinary in the circumstances pleaded which make equal sharing repugnant to justice. It is not out of the ordinary for parties to structure their business affairs through the vehicle of a company. As set out above, while relationship funds were used to purchase the excavator, that debt of $70,000 has been subsequently repaid to the parties. While relationship property was used towards the purchase East Coast Inn on behalf of Murphy Civil Limited, there is an acceptance by the company that there is a debt owed back to Mrs Murphy.

[64] Furthermore, up until the date of separation, the monies earnt by Mr Murphy were channelled through LVC (Pty) Ltd in Australia, and then into the parties' joint bank account. It has only been following separation that the monies were no longer channelled into the parties' joint account. There was no requirement to account to Mrs Murphy for the use of East Coast Inn as it was owned by the company, and not she and Mr Murphy personally. There is simply a lack of evidential foundation to conclude that there were extraordinary circumstances which would render an equal sharing repugnant to justice.

Economic Disparity – s 15

[65] Section 15 of the PRA provides that if, at the end of a relationship, the Court is satisfied the income and living standards of Mr Murphy are likely to be significantly higher than those of Mrs Murphy because of the effects of the division of functions

within the relationship, the Court may adjust the division of relationship property to compensate that partner. The purpose of the provision was clearly stated by Robertson J in *M v B* at [123]:[29]

> The purpose of an order made under s 15 is to compensate a spouse/partner whose economic position, that is income and living standards, is significantly lower than their spouse's/partner's because of the effect of the division of functions within the relationship: *Property (Relationships) Act 1976, s 15(3)*. An order results in a readjustment of the division of relationship property and is guided by the principle in 1N(c). The aim of this section is to provide a means by which residual inequality, in terms of earning capacity and standard of living that is not addressed in the division of relationship property, can be dealt with where it is required in all the circumstances of the case. A s 15 award does not permit a Court to exercise a broad and unfettered discretion to redress economic disparity simpliciter.

[66] Mrs Steele submits there is no evidence that there is disparity in living standards at separation and while their respective incomes were different, in her submission Mrs Murphy's claim lacks any causative nexus. That is, in Mrs Steele's submission there is no evidence that the divisions of functions between the parties resulted in Mr Murphy having the opportunity to develop his earning capacity. I agree with that submission.

[67] During the parties' relationship both parties worked. The evidence of the company accounts is that up until separation Mr Murphy's income was not significantly higher than that of Mrs Murphy, and in any event it was all channelled into the parties' joint account. Post-separation, the income earnt by Murphy Civil Limited has significantly increased. But on the evidence, as set out above, that has occurred because of the actions of Ross Murphy. The significant disparity that is potentially there in terms of the income has nothing to do with the divisions of functions of the parties during their relationship, but everything to do with Ross Murphy, the contacts he has within HEB, and the consequent ability to secure ongoing work for Murphy Civil Limited.

[68] Furthermore, there is no actual evidence of Mr Murphy's current income. On the face of it, Murphy Civil Limited makes a significant profit, but when questioned by me (having not been questioned on the issue by Ms Millar) his evidence was that

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[29] *M v B* [2006] 3 NZLR 660, [2006] NZFLR 641, (2006) 25 FRNZ 171 (CA).

from that profit there are a number of expenses which need to be deducted. His evidence when asked by Ms Millar is that currently he has only $5,000 in his bank account, although I accept he has been able to pay his not insignificant legal costs to date. For the year ending 31 March 2021 Mr Murphy's taxable income was $95,000. After tax, his net income was $49,347. That is almost identical to Mrs Murphy's income.

[69] There is no evidence before the Court, as the Court would expect, to show that Mrs Murphy has foregone a career opportunity because of the divisions of functions within the marriage. Rather, the evidence is both parties worked. When they came from Ireland, they had nothing. They built up enough to enable them to buy the excavator, but not to buy a family home. When Mr Murphy moved to New Zealand there was enough to sustain the family household income, but not a significant income. I agree with Mrs Steele's conclusion that there is simply no evidence of a disparity in Mr Murphy's living standards post-separation. Mrs Murphy must establish that they were "significantly higher" or "noteworthy, important or consequential"[30] for her claim to be successful. For living standards to be deemed significantly higher, it requires a factual assessment based on the circumstances of the case. Her claim pursuant to s 15 of the PRA must fail as there is no evidence before the Court to justify its consideration.

Should there be a s 18B adjustment for contributions made by Mrs Murphy?

[70] Section 18B(2) of the PRA provides that if a spouse has done anything that would have been a contribution to the marriage had the marriage not ended, and if the Court considers it to be just, the Court may award compensation from the other spouse.

[71] I have considered the s 18B issues in relation to the increase in the value of Mr Murphy's shares. The other contribution that Mrs Murphy seeks relates to her claim that there should be an adjustment for Mr Murphy's use of East Coast Inn. I cannot see how this is a s 18B contribution that requires the Court's determination. It was MCL that has used the East Coast Inn property to store plant and equipment belonging to MCL. Mr Murphy has not used it at all for any purposes related to

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30 *P v P [Relationship Property]* [2003] NZFLR 925, (2003) 22 FRNZ 895.

relationship property. The Caterpillar Excavator is stored there, but that is a contractual issue between MCL and LVC (Pty) Ltd.

[72] There are therefore no further s 18B adjustments that need to be made.

Compensation for the absence of a Family Home

[73] Mrs Murphy seeks compensation pursuant to s 11B of the PRA for the absence of a family home. It is unclear from Ms Millar's submissions why Mrs Murphy suggests that she should be compensated, and Mr Murphy should not. For there is no family home. Mr and Mrs Murphy have rented throughout their lives, and they never lived in the East Coast Inn property; in any event it could not have been their family home as they did not own it. The remedy in the PRA is to award each spouse (not one as sought by Mrs Murphy) an equal share in "such part of the relationship property as [the Court] thinks just in order to compensate for the absence of an interest in the family home."[31] There can be compensation ordered where what would have been the family home is not owned by either or both of the parties.[32] For example, in *Schubert v Schubert*[33] what could have been their family home was owned by a company. But on the facts of this case, there is not a factual basis to apply this subsection.

[74] In circumstances where there has never been a family home, there cannot be any justifiable basis to compensate Mrs Murphy. She is in effect seeking that she, and not Mr Murphy, receive a "top up" from her half share because of joint decisions made during their relationship to not own a family home, and where they have never owned or lived in a property that could be classified as their family home under the PRA. Mrs Murphy's claim in relation to s 11B must similarly fail as there is no jurisdiction or factual basis to make the order sought.

[75] Mrs Murphy clearly has had expectations as to what she should receive to reflect her belief as to what is a fair and just outcome. Section 1M of the PRA states that one of the purposes of the Act is to "provide for a just division of the relationship

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31 Property (Relationships) Act, s 11B(2).
32 Section 11B(1)(b)(ii).
33 *Schubert v Schubert* [2001] 1 NZLR 76, [2000] NZFLR 1077, (2000) 19 FRNZ 652 (HC).

property."[34] But pursuant to s 4 of the PRA, the Act is a code, and therefore determination as to what is fair and just can only be determined through the provisions of the PRA. Therefore, where Mrs Murphy has been unsuccessful, it is because the provisions of the PRA must be applied, and as set out, there has not been the jurisdiction to make the orders/adjustments that she seeks. There has been a conflict between what she perceives as fair and just and fairness and justice in terms of the PRA.

Loss of use of money interest

[76] Mrs Murphy is entitled to loss of use of money interests from the date of separation until the date of payment in relation to the monies owed by MCL to Mr and Mrs Murphy (at [80](d) below). For most of that time, interest rates had increased, so I fix the rate at four per cent per annum.

[77] She is also entitled to interest at the same rate in relation to the difference in the value of Mr Murphy's superannuation and bank accounts, and the value of her superannuation and bank accounts. Her share in the difference should attract interest from the date of separation until the date of payment.

[78] I order loss of use of money interest from the date of separation until the date of payment at the same rate in relation to Mrs Murphy's half share in the value of Mr Murphy's shares in MCL as at the date of separation (i.e. interest on the sum of $114,375). Interest should then attach from the date of this judgment until the date of payment in relation to her 40 per cent share in the increase in the value of Mr Murphy's shares in MCL post-separation (i.e. on $189,300).

[79] Mr Murphy is entitled to loss of use of money interest at the same rate in relation to his half share of the sale proceeds of the Harley Davidson motorcycle from the date of sale until the date of payment.

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[34] Property (Relationships) Act, s 1M(c).

Result

[80] I have therefore made the following determinations:

(a) The Chevrolet motor vehicle is not relationship property as it is owned by MCL. No relationship property funds were applied towards its purchase.

(b) The excavator is owned by LVC (Pty) Ltd (Australia), and on a notional liquidation basis I fix its value at $43,891; consequently, the shares in LVC (Pty) Ltd are worth $43,891.

(c) The East Coast Inn property is owned by MCL, and forms part of the assets of MCL. The constructive trust claim against MCL is dismissed.

(d) The monies advanced by Mr and Mrs Murphy to MCL to help fund the purchase of the East Coast Inn property remain a debt owed to them by MCL, and Mrs Murphy is entitled to a half share of that debt.

(e) I fix the value of Mr Murphy's shares in MCL at $702,000.

(f) Taking into account the s 18B post-separation contributions to the increase in the value of the shares, the adjustment to Mrs Murphy's ½ share in Mr Murphy's shares in MCL should be a half share of the total value of the shares at separation, and 40 per cent of the adjusted increase in value; that is $114,375 plus $189,300 being a total figure of $303,675.

(g) Mrs Murphy's claims under ss 11B, 13 and 15 and further claims under s 18B of the PRA are dismissed.

(h) Mrs Murphy is to account to Mr Murphy for a half share of the sale proceeds of the Harley Davidson motorcycle sold by her.

(i) Mrs Murphy is entitled to loss of use of money interest from the date of separation in relation to her half share of the debt owed by MCL to her and Mr Murphy.

[81] I would ask that Mrs Steele forward a draft order for sealing to reflect the determinations made pursuant to this judgment, and to reflect the agreements reached as to the division of the parties' superannuation and bank accounts.

[82] Mrs Murphy has lodged a notice of claim against the East Coast Inn property; it should be immediately lifted by her, at her cost, given my findings that there is no relationship property interest in that property.

[83] Mrs Steele has foreshadowed the issue of *inter partes* costs, which given that Mr Murphy has been substantially successful in this case, now fall for consideration. I therefore make the following directions:

(a) Mrs Steele to file memorandum and submissions as to costs with reference to the relevant rules and case law, no later than 18 October 2024.

(b) Ms Millar to file any submissions in reply no later than 8 November 2024.

(c) The file to then be referred to me for the making of a chambers determination as to whether *inter* partes costs are payable or not.

[84] Finally, neither party is a vulnerable party in terms of s 11D of the Family Court Act 1980. Accordingly, there is no basis for anonymisation in terms of s 11B of the FCA 1980, and this judgment can be published using the parties' actual names.

S J Coyle
Family Court Judge

Signed this 25th day of September 2024 at am / pm