

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN  
[SQUARE BRACKETS].

**NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE**

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**IN THE FAMILY COURT  
AT AUCKLAND**

**I TE KŌTI WHĀNAU  
KI TĀMAKI MAKĀURAU**

**FAM 2019-004-000903  
[2020] NZFC 1253**

IN THE MATTER OF	PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	CODRI LUYK Applicant
AND	NEIL HENRY LUYK First Respondent
AND	NEIL HENRY LUYK, JANE ELIZABETH DAWSON AND SLL TRUSTEES NO.8 LIMITED as trustees of the NEIL LUYK FAMILY TRUST Second Respondents

**FAM 2019-004-000813**

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
AND BETWEEN	CODRI LUYK Applicant
AND	NEIL HENRY LUYK Respondent

Hearing: 6 December 2019

Appearances: J McCartney QC for Applicant  
V Crawshaw QC for Respondent  
K Muir for Second Respondent

Judgment: 24 February 2020

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**RESERVED DECISION OF JUDGE A M MANUEL**

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**A. The applications**

[1] The applicant Codri Luyk is seeking an occupation order under s 27 of the Property (Relationships) Act 1976 (PRA) or a tenancy order under s 28 PRA in relation to [address A deleted]. The second respondent trustees, who are the trustees of the Neil Luyk Family Trust (NLFT), own [address A] and they are opposed. They say there is no jurisdiction for an occupation order and no justification for a tenancy order to be made. On the applicant's evidence [address A] could be rented for \$1,315 a week.<sup>1</sup>

[2] The applicant is also seeking an interim spousal maintenance order under s 82 of the Family Proceedings Act 1980 (FPA) from her estranged husband, the respondent Neil Luyk. She is asking for \$10,000 a month to meet her reasonable needs plus \$10,000 a month for her legal and accounting costs.<sup>2</sup> The respondent is opposed. He is paying spousal maintenance of \$3,000 a month plus about \$1,000 a month for outgoings on [address A], where the applicant is living.<sup>3</sup> He is willing to increase this to \$7,000 a month if she moves out of [address A] to a rental property. He says this is sufficient to meet his wife's reasonable needs. He claims her budget is inflated and

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<sup>1</sup> Applicant's affidavit in reply dated 22 October 2019, at Exhibit E.

<sup>2</sup> Although she does not say so directly she is also seeking to have certain outgoings on [address A] (home and contents insurance, rates, gas, water, Sky TV and gardening) paid by the respondents. Electricity, internet, phone and her medical insurance are included in her budget and she is proposing to pay these from any award of spousal maintenance.

<sup>3</sup> The outgoings currently being paid include home and contents insurance, rates, electricity, gas, water, internet, phone, Sky TV, gardening and the applicant's medical insurance.

he is effectively being asked to support or subsidise her adult son Connie Pienaar and his family. They are also living at [address A].<sup>4</sup> The respondent is not willing to fund the applicant's legal and accounting costs because he says she has sufficient funds to pay them herself.

## **B. Background**

[3] The parties separated in late October 2018 after a relationship of about 14 years. They began living together in 2004 and married in August 2007. They have no children together but both have two children from previous marriages.

[4] They are now in their early 60s. The respondent is an oral surgeon with an income of over \$1 million a year before tax<sup>5</sup>. His income for the 52 weeks prior to 2 October 2019 was \$1.385 million before tax, on which he paid tax of about \$448,000.<sup>6</sup>

[5] The applicant has not been in paid employment since about 2011 when she left her role as a part-time practice manager at the respondent's surgical practice.

[6] In about 2002 she was diagnosed with fibromyalgia, a condition which is characterised by "muscular skeletal pain, tension headaches, fatigue, and a difficulty concentrating on mental tasks".<sup>7</sup> It is exacerbated by stress.

[7] In May 2019 the applicant underwent major bowel surgery. She spent a week in hospital followed by a month of recuperation.

[8] Before they married the parties signed a pre-nuptial agreement contracting out of the PRA (the s 21 agreement). The applicant has applied to this Court to set the s 21 agreement aside. She has also filed constructive trust proceedings in the High Court. Relying on a report prepared by her expert accountant, the applicant claims that the value of the property pool as at April 2019 was about \$20 million.<sup>8</sup> This includes two homes - [address A], which is worth over \$2 million, and a beach property at [address

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<sup>4</sup> Mr Pienaar has been living at [address A] since February 2017, prior to the separation. He and his wife reconciled and she moved to [address A] with their child in May 2019. A second child was born in November 2019.

<sup>5</sup> In the years ending 2016, 2017 and 2018 the respondent's gross fees were \$1.145m, \$1.306m and \$1.369m respectively as set out in the applicant's expert account's report dated April 2019.

<sup>6</sup> Respondent's affidavit of financial means and sources, 2 October 2019.

<sup>7</sup> Applicant's affidavit, 10 October 2019 at [28].

<sup>8</sup> This does not include the parties' motor vehicles, art collection, or shares in a boat.

B deleted]. [Address B] is owned by the second respondent trustees and the trustees of the applicant's trust, the Nikcon Family Trust (NFT), as tenants in common in equal shares. The respondent says [address B] is worth about \$4.3 million, with substantial borrowings.

[9] The NLFT is a discretionary family trust settled by the respondent by deed dated 3 November 2006. In November 2006 the respondent trustees passed a resolution giving the parties a right to reside at [address A] subject to paying all outgoings associated with the property. From November 2006 to October 2018 the parties lived together at [address A]. In terms of the s 21 agreement, all the respondent's legal and beneficial interest under the NLFT was to be his separate property.

[10] During the marriage the parties' expenditure was commensurate with the respondent's high earnings as a surgeon. They travelled abroad, drove late model luxury cars and had household help including cleaners, gardeners, window cleaners, and a dry cleaning and ironing service. They acquired artworks. They provided generously for their children and their families. They were well groomed and attired.

[11] At separation the respondent moved out of [address A] at the applicant's request. He had the sole use of [address B]. In Auckland he stayed with the applicant's daughter and her family and paid them rent. This arrangement came to an end in October 2019 and he has been without an Auckland base since then. The commute between his practice in Auckland and [address B] can take up to two and a half hours.

[12] Initially the respondent paid maintenance of \$5,000 a month to the applicant as well as the outgoings on [address A] of about \$1,000 a month. In May 2019 he paid her \$70,000 in a lump sum which was due in terms of the s 21 agreement. In August 2019 he reduced her maintenance to \$3,000 a month plus the outgoings. By the date of the hearing he had paid about \$136,000 to the applicant.

[13] In November 2018 the applicant was removed as a beneficiary of NLFT. In September 2019, after attempts at mediation broke down, the respondent trustees gave notice to the applicant to vacate [address A] by 13 December 2019. The applicant responded to the reduction in her maintenance and notice to vacate by making these applications.

[14] The respondent's suspicion that he was supporting or subsidising expenses for the Peinaars was a vexed issue. While he accepted that he had an obligation to support his wife, he maintained that he had no obligation, legal or moral, to support the Peinaar family. Funding legal proceedings designed to overturn the s 21 agreement on which he sought to rely did not sit well with him. The applicant had access through the NFT to capital of more than \$400,000. The respondent also queried what had happened to the capital over the past year or so. In January 2019 there had been a balance of about \$600,000 available in the NFT. This had since reduced to about \$400,000. When the lump sum was added in, a total of about \$270,000 had apparently been spent over a period of some nine months. The applicant had incurred costs in her proceedings (legal fees of about \$90,000 and accounting fees of about \$40,000) and she had spent more on her living expenses than she had received in maintenance payments but this only partly explained the reduction.

### **C. The evidence and the hearing**

[15] The applications were heard on a submissions only basis on 6 December 2019. The applicant made five affidavits in the PRA proceedings<sup>9</sup> and the respondents made five.<sup>10</sup> The applicant made six affidavits in the FPA proceedings<sup>11</sup> and the respondent four<sup>12</sup>.

[16] Limited weight was placed on some of the evidence, either because the other party had not had a proper opportunity to respond, or it was of limited assistance, or both.<sup>13</sup> By way of example:

- (a) the applicant's affidavit of 19 November 2019 purported to compare her budget to pre-separation expenditure. However the comparison was only for a brief two month period of pre-separation spending. The respondent had little or no chance to respond;

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<sup>9</sup> Dated 26 September 2019 x 2 (narrative and affidavits of assets and liabilities), 10 October 2019 (occupation/tenancy) and 19 November 2019 (occupation/tenancy). Her expert accountant made an affidavit dated 25 September 2019.

<sup>10</sup> Dated 2 October 2019, 22 October 2019 x 2, and 12 November 2019 x 2.

<sup>11</sup> Dated 9 September 2019 x 2 (narrative and affidavit of financial means and their sources), 10 October 2019, 22 October 2019, 19 November 2019, and 4 December 2019.

<sup>12</sup> Dated 2 October 2019 x 2 (narrative and affidavit of financial means and their sources), 17 October 2019, and 12 November 2019.

<sup>13</sup> Counsel for each party opposed the other's affidavits made after mid October 2019 being filed but leave was granted to admit them as evidence.

- (b) the applicant's affidavit of 22 October 2019 set out her spending over the previous 52 weeks, but most of this was post-separation. Only about two months of pre-separation spending was included.
- (c) the applicant's affidavit of 4 December 2019 purported to analyse the respondent's post-separation expenses from bank statements provided by way of discovery, but the period over which the analysis had been made was not specified. The analysis included expenditure by NLFT and an investment company as well as expenditure by the respondent himself. It did not include transactions made from a bank account which the applicant claimed had yet to be disclosed. The respondent had no chance to respond;
- (d) the respondent's affidavit of financial means did not include any entry for spousal maintenance or legal and accounting fees, although obviously these had been paid;
- (e) although the applicant deposed that her claimed expenses did not include any expenses for the Peinaar family, she did not explain how these had been extracted from the total household expenses and doubts remained about whether some of the expenses claimed in her budget in fact included expenses for the Peinaars.

[17] However, the Court seldom has a perfect financial picture in an interim spousal maintenance application and oftentimes must work with anecdotal evidence and broad brush figures, not precise ones. Despite the voluminous paperwork produced, that was so in this case.

#### **D. Interim maintenance**

##### **(a) The law**

[18] Section 82(1) FPA provides that the Court "may make an order directing the respondent to pay such periodical sum as [the Court] thinks reasonable towards the future maintenance of the respondent's spouse ... until the final determination of the

proceedings or until the order sooner ceases to be in force.” Section 82(4) FPA limits the duration of an interim maintenance order to a maximum of six months.

[19] Section 82 does not stipulate any relevant or mandatory principles for the Court to take into account. It simply provides that the discretion must be exercised “reasonably”.<sup>14</sup> Whilst the Court is not required to apply the principles which govern the making of a final maintenance order, they may be taken into account if appropriate in a given case. Section 63 FPA sets out the principles that apply where a marriage is still in subsistence. Section 64 FPA sets out the principles that apply after a marriage has been dissolved. Both s 63 and 64 are subject to s 64A which provides that spouses must assume responsibility for their own needs within a reasonable time.

[20] Broadly, s 64 FPA provides that the respondent is liable to maintain the applicant to the extent necessary to meet their reasonable needs if they cannot practicably meet all or part of their means as a result of :

- (a) an inability to become self-supporting having regard to:<sup>15</sup>
  - (i) the effects of the division of functions within the relationship while the spouses lived together;
  - (ii) the likely earning capacity of each spouse;
  - (iii) any other relevant circumstances or
- (b) the standard of living of the spouses while they lived together.<sup>16</sup>

[21] Section 63 FPA provides additional factors relevant to the obligation to maintain, two being:

- (a) any physical or mental disability; and <sup>17</sup>

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<sup>14</sup> *Owen v Thomas* [2014] NZHC 2200 at [44].

<sup>15</sup> (Section 64(2)(a) FPA). There are other FPA grounds set out in s 64 FPA, such as child care responsibilities, which are not relevant here.

<sup>16</sup> (Section 64(2)(c) FPA).

<sup>17</sup> (Section 63(2)(d) FPA).

(b) any inability to obtain reasonable or adequate work.<sup>18</sup>

[22] However no liability on the two s 63 FPA grounds above (in terms of a final maintenance order) continues after the dissolution of a marriage.

[23] The leading authority on s 82 FPA is the Court of Appeal decision *Ropiha v Ropiha* which confirmed the Court has unfettered discretion as to whether an order ought to be made and if so, how much should be paid.<sup>19</sup> In exercising the discretion about liability and the amount, the Court is not required to have regard to ss 63, 64 and 64A principles. What the Court must do is ensure that it has proper regard to all the factors and circumstances relevant to the case in question. However, while there is no obligation to take these factors into account, there is no prohibition against it and the reality is that they often are.<sup>20</sup>

[24] In *Hodson v Hodson* the High Court confirmed s 82 FPA involved an assessment of:<sup>21</sup>

(a) the reasonable needs of the applicant over the period for which the order would subsist;

(b) the means likely to be available to the applicant to meet those needs and

(c) the respondent's reasonable means to meet any shortfall.

[25] In the present case there is no dispute about whether the applicant requires maintenance. The parties agree that she does. The dispute is over the amount that should be paid. The amount the applicant is seeking from the Court (including legal and accounting fees) is about \$247,200 a year (excluding rent)<sup>22</sup>. The amount the respondent has put forward is about \$48,000 (excluding rent)<sup>23</sup>. Her ability to contribute to her reasonable needs is also disputed. The respondent does not accept

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<sup>18</sup> (Section 63(2)(e) FPA).

<sup>19</sup> *Ropiha v Ropiha* [1979] 2 NZLR 245 (CA).

<sup>20</sup> See *Cornell v Cornell* FC Auckland FAM-2015-004-810, 24 March 2016 at [7]; and *Hohaia v Caldwell* [2019] NZHC 102 at [9].

<sup>21</sup> *Hodson v Hodson* [2012] NZFLR 252 (HC).

<sup>22</sup> \$20,000 a month plus say \$600 a month for the outgoings which she assumes the respondents will continue to pay = \$240,000 + \$7,200 = \$247,200 a year.

<sup>23</sup> \$3,000 a month plus \$1,000 a month for the outgoings - \$36,000 + \$12,000 = \$48,000.



that the applicant's health prevents her from re-entering the work force and says that she worked for many years during their marriage notwithstanding her fibromyalgia. There is no argument about whether the respondent can pay any shortfall between the reasonable needs and her means. Given that his own after tax income is over \$70,000 a month<sup>24</sup> there could hardly be any issue about this.

**(b) What are the applicant's reasonable expenses?**

[26] The applicant produced a budget which set out her claimed expenses on an annual basis.<sup>25</sup> The respondent contended that a number of items could be reduced or eliminated.<sup>26</sup> He identified these and replaced them with his own budget for the applicant. The applicant then provided a schedule with her expenses again, some of them updated, aligned against the respondent's budget.<sup>27</sup> The schedule set out at the end of this judgment is largely based on the applicant's final schedule.

[27] The items in contention include, by way of example:

- (a) insurance and superannuation - \$5,256 with no breakdown or documents in support;
- (b) psychologist - \$4,500 with fortnightly visits at \$170. However a letter from the applicant's psychologist dated 19 November 2019 stated that the applicant was attending sessions only every two months or so;<sup>28</sup>
- (c) medical and dental costs - \$7,464 a year and said to be excessive;
- (d) food and household supplies – around \$32,000 a year and said to be excessive for the applicant, who drank sparingly, had dietary restrictions, and did not eat out very often;

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<sup>24</sup> \$1.385m a year, less income tax of \$448,000 = \$937,000 ÷ 12 = \$78,083.33 a month.

<sup>25</sup> Affidavit of 9 September 2019.

<sup>26</sup> Affidavit of 2 October 2019.

<sup>27</sup> Affidavit of 22 October 2019.

<sup>28</sup> Exhibit "G" applicant's affidavit of 19 November 2019.

- (e) electricity - \$4,800 a year and said to be excessive for a single householder;
- (f) telephone including mobile and internet - \$2,160 compared to a basic plan which cost only \$1,440 per year;
- (g) clothing - \$10,000 a year, excessive;
- (h) vehicle expenses - \$8,000 a year, excessive for a late model luxury vehicle;
- (i) personal care - \$8,800 a year, excessive;
- (j) miscellaneous - \$9,000, insufficiently itemised or explained;
- (k) gifts to her family - \$5,960, not a proper inclusion.

[28] The respondent submitted that it was “not sufficient for the applicant to point to [his] high income; she must also show that it [was] commensurate with the standard of living in the marriage and also that it [was] proportionate to [his] expenditure.”<sup>29</sup> He contrasted her budget with the more modest spending set out in his own documents. However, as explained at [16] (d) the expenditure set out in the respondent’s affidavit of financial means was incomplete and it was not possible to make a direct comparison between his spending and hers.

**(c) What are the applicant’s means?**

[29] The respondent argued that costs for the Peinaar family were concealed in the applicant’s budget. He also claimed that the Peinaars’ contribution of \$800 in October 2019 was inadequate. The Peinaars had been staying in [address A] without permission from the trustee respondents; Mr Peinaar was in his mid 30s, and there was no obligation for the respondent to support the family either legally or morally.

[30] The respondent also argued the fact that the applicant did not assert that her health rendered her unable to work in paid employment was a “serious lacuna” in her

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<sup>29</sup> Submissions for Respondent dated 23 October 2019 at [35].

application.<sup>30</sup> She had managed her condition sufficiently to work as his practice manager for a number of years and there was no reason why she could not now obtain paid employment to at least begin to become self-supporting and contribute to her living and legal costs.

[31] In her final schedule the applicant assessed her expenses per year at about \$144,903 or \$12,075 a month (excluding legal and accounting costs) which was more than the \$10,000 a month she was claiming. In his budget, the respondent assessed her reasonable expenses at about \$47,245 a year or \$3,937 a month, which was more than the \$3,000 a month he maintained was sufficient.

#### **(d) Findings**

[32] I have assessed the applicant's reasonable expenses and the result is set out in the fourth column of the schedule with an explanation in the far column. They are \$112,822 a year or about \$9,400 a month.

[33] The applicant should not be required to supplement her living expenses from capital when the respondent does not need to do so.<sup>31</sup>

[34] I do not accept the respondent's submission that the applicant should be required to return to work. In his own evidence the respondent states:

Codri's fibromyalgia largely prevented her from participating in household chores.<sup>32</sup>

...

Also Codri resigned due to ill health and was not coping with the stress of the job [as practice manager]<sup>33</sup>.

...

It is apparent that her fibromyalgia impacted upon her ability to contribute to the marriage in all aspects leaving me to fully finance our marriage, deal with our financial affairs, deal with day-to-day matters and attend to the needs of wider family (on both sides) as well as being fully supportive of Codri.<sup>34</sup>

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<sup>30</sup> As above at [25].

<sup>31</sup> *Dalrymple v Dalrymple* [2019] NZHC 637 at [59].

<sup>32</sup> Affidavit 2 October 2019 at [5].

<sup>33</sup> Affidavit 2 October 2019 at [36].

<sup>34</sup> Affidavit 2 October 2019 a [42].

[35] Given these concessions, it is surprising the respondent ever suggested the applicant could and should return to the paid workforce. In addition to a chronic illness the applicant has given evidence that she is suffering from depression and anxiety. Apart from some brief stints in the medical practice due to short staffing, she has not been in paid employment for about eight years.

[36] A contribution of \$800 a month by the Peinaar family towards their accommodation is insufficient in the circumstances. The applicant's expenses have been scrutinised to try to avoid any extra for the Peinaar family, but there should still be a reasonable contribution to the costs of their accommodation. If the applicant had boarders at [address A] there would be no question about this. Notwithstanding the emotional support the applicant claims the Peinaars provide, the FPA does not require the respondent to fund other family members. A reasonable contribution to their accommodation would be \$2,500 a month.<sup>35</sup> This sum is to be offset against the applicant's reasonable needs.

[37] The result is that the respondent is to pay the applicant interim maintenance of \$6,900 a month from the date of this judgment for six months. The applicant is also to continue to be responsible for the payment of the outgoings on [address A] other than those identified in the applicant's budget.

#### **(e) Legal costs and accounting fees**

[38] The applicant had incurred legal and accounting fees of about \$140,000 over nine months from January to September 2019. These had been paid from capital. The corresponding amount spent by the respondent was unclear, but it seemed he had spent as much or more than the applicant and had paid his fees from income.

[39] The prospect of paying all his wife's legal and accounting fees stuck in the respondent's craw. While his counsel acknowledged that the cases showed the Courts had been willing in some instances to include legal and accounting fees in an award for spousal maintenance where they were an ongoing expense,<sup>36</sup> it was argued that the

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<sup>35</sup> Rent of \$1,315 a week ÷ 2 = \$657.50 x 26 weeks ÷ 6 = \$2,849, say \$2,500.

<sup>36</sup> Following *C v G* [2010] NZCA 128, [2010] NZFLR 497 (in which legal fees were excluded on the grounds they were an ongoing expense).

outcomes were fact-specific. Where awards had been made, the amount was usually for significantly less than the \$10,000 a month being claimed by the applicant.

[40] In *Clayton v Clayton* a final maintenance order of \$15,000 a month, which included legal costs of \$10,000 a month, was upheld by the High Court on appeal.<sup>37</sup> The parties had been involved in litigation for about eight years and the wife had exhausted her ostensible entitlement under the PRA. She required about \$100,000 to litigate appeal proceedings. If no award had been made she would have been unable to continue to fund litigation. On appeal the husband argued that an allowance for legal and accounting fees in a maintenance order was not permitted as a matter of law but the High Court rejected this proposition.

[41] There were four main arguments put forward by the husband:

- (a) First, that the FPA was not intended to include costs incurred in post-separation litigation which had nothing to do with the financial arrangements and circumstances during the marriage. The High Court held, however, that the reference at s 64(2)(a)(iii) FPA to “any other relevant circumstances” could extend in appropriate cases to include the need to resolve a relationship property dispute;
- (b) Second, that there was injustice in requiring one party to fund litigation against themselves. The High Court found that “that is to mischaracterise the nature of an allowance for legal costs in a maintenance award. The payment does no more than place the party seeking maintenance in a position that will assist him or her to become self-supporting”;<sup>38</sup>
- (c) Third, that the inclusion of legal fees cut across the statutory costs regime under which costs were fixed at the conclusion of a case. The High Court rejected this argument too, citing the UK case of *A v A*<sup>39</sup>, where the legal fees were “enormous” and the husband could afford

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<sup>37</sup> *Clayton v Clayton* [2015] NZHC 550.

<sup>38</sup> At [16]. *Clayton* involved a s 64 FPA final maintenance application, unlike this case, which is a s 63 FPA interim maintenance application. However, both s 64(2)(a)(iii) and s 63(2)(a)(iii) refer to “the ability of the parties to be or to become self supporting, having regard to “.... any other, relevant circumstances” so the difference is immaterial.

<sup>39</sup> At [17]. See *A v A (Maintenance Pending suit: payment of legal fees)* [2001] 1 WLR 605 (Fam D).

them but the wife could not. The Court in *A v A* had commented that typically in matrimonial proceedings there was a history of economic dependence by one party on the other, and any analogy with ordinary civil proceedings was “unsound”.<sup>40</sup>

- (d) Finally, that the Court of Appeal decision of *C v G* supported the exclusion of legal and accounting fees.<sup>41</sup> But the High Court chose to treat *C v G*, which excluded fees as part of a maintenance order in that particular case, as confined to cases where there was no on-going litigation between the parties and thus no on-going legal expenses.

[42] Nevertheless, in conclusion, the High Court in *Clayton* acknowledged that problems could arise as a result of a “lack of any adjustment mechanism by which the paying party could recoup funds paid as maintenance at the conclusion of the proceedings”<sup>42</sup>. Section 32 PRA was not a means by which sums already paid under a maintenance order could be recouped. Nor did the compensatory provisions in the PRA provide any mechanism. These problems had<sup>43</sup>:

... prompted the suggestion that putting a party in funds to meet legal expenses through interim distribution of relationship property [was] preferable to making an allowance in a ...maintenance order ... [which was] uncontroversial in the sense that it [was] only once the division of relationship property [had] been resolved that parties will know with any certainty whether there [was] a need for ongoing maintenance and, if so, the extent of that need. Interim distributions of relationship property are therefore an appropriate means of generally hastening the path towards independence.

[43] In *Clayton*, however, there was no scope for any interim distribution of relationship property to be made. The share of property which the husband maintained constituted the wife’s entitlement had already been paid out and spent.

[44] The various cases cited by both counsel in argument tended to support the respondent’s submission that the outcomes were highly dependent on the facts in each case.

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<sup>40</sup> At [612].

<sup>41</sup> *C v G* [2010] NZCA 128, [2010] NZFLR 497.

<sup>42</sup> At [25].

<sup>43</sup> At [27].

[45] In the High Court decision *Dalrymple v Dalrymple* a monthly award of \$7,000, which included legal fees of \$2,000 and accounting fees of \$1,000, was reduced to \$6,000 but there was no criticism of the inclusion of the fees.<sup>44</sup> The wife otherwise had little or no access to funds to pay her legal and accounting fees.

[46] In *Hodson v Hodson* a 2011 High Court appeal decision, legal fees were excluded from the wife's expenses on the grounds that she was legally aided and there was no evidence she would be required to pay any legal fees over the six month duration of the interim maintenance order.<sup>45</sup>

[47] The Family Court in *Biggs v Biggs* awarded interim maintenance of \$14,000 a month including legal and accounting fees of \$5,000 a month but the decision was recorded in a minute, not on a fully argued or reasoned basis.<sup>46</sup>

[48] In *DCK v RK* the applicant was awarded interim maintenance of \$10,000 a month<sup>47</sup> with legal and accounting fees excluded. In 2009 the award was upheld on appeal with the High Court commenting to the effect that the applicant would need to find room in her award to include payment of her legal and accounting fees.

[49] In *GCH v SMH*<sup>48</sup> a 2014 High Court appeal decision overturned a decision at first instance to include legal fees of \$1,500 a week (or \$6,500 a month) in an award of interim maintenance. The High Court affirmed that the Judge at first instance "was correct in principle, namely that interim maintenance may include provision for legal expenses where those expenses are ongoing and [do] not pre-empt an award of costs."<sup>49</sup> But the husband was incurring debt to trusts to cover legal expenses for both himself and the wife. The Court found a solution in making a "like for like" distribution to the parties from the trusts to cover legal expenses and avoid pre-empting any final award of costs.<sup>50</sup> Parity of distribution was also said to "avoid allegations of unfairness" with the outcome designed to "preserve the appellant's position in any subsequent costs award while achieving [the FPA's] protective purpose"<sup>51</sup>.

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<sup>44</sup> *Dalrymple v Dalrymple* [2019] NZHC 637.

<sup>45</sup> *Hodson v Hodson* [2012] NZFLR 252 (HC).

<sup>46</sup> *Biggs v Biggs* FC Queenstown FAM -2017-059-000011, 23 August 2017.

<sup>47</sup> *DCK v RK* HC Auckland, CIV-2009-404-4421, 20 November 2009.

<sup>48</sup> *GCH v SMH* [2014] NZHC 211, (2014) 29 FRNZ 727.

<sup>49</sup> At [47].

<sup>50</sup> At [44].

<sup>51</sup> At [44].

**(f) Findings – legal and accounting fees**

[50] This is not a case where the applicant is unable to fund her legal and accounting fees over the coming six months. She can clearly do so from her available resources. Her concern is that while the respondent is able to pay his own legal and accounting fees from income, she is not. She is faced with the prospect of legal and accounting fees eroding her capital, against the uncertain result of her litigation. Her counsel submits that if she succeeds with her claims she may share more or less equally in a property pool of \$20 million. If she is unsuccessful, she will be left with only the remnants of the capital and other items currently in her possession and control.

[51] Quantum is another issue altogether. The applicant maintains that her fees will continue much at the same level as before. Her expert accountant's report was complete but he still needs to respond to the respondent's expert's report when it arrives and to update or revise his report, if necessary. Interlocutory proceedings in the High Court are due to be heard in June 2020. The hearing itself is not due to take place until the first part of 2021. Mediation had been unsuccessful and there are no plans to return. But when the respondent is spending at much the same level there can be no real criticism of the amount the applicant is spending to bring her proceedings.

[52] Some of the cases discussed above such as *Clayton* and *Dalrymple* have resulted in maintenance awards which included legal and accounting fees where the costs were ongoing, funds were not available (or at least not readily accessible) to pay them, and interim distribution was not an option. No further interim distribution is proposed in this case. The respondent may claim none is available because the applicant has already received what he maintains is her entitlement under the s 21 agreement. But the applicant has available funds and she is most unlikely to come close to exhausting them in the next six months.

[53] In *C v G* the Court of Appeal held<sup>52</sup>:

The proper course was to deal with the litigation costs as a separate issue in accordance with the rules of court. The inclusion of costs in a maintenance order assumes an outcome in favour of the beneficiary of the order which may not be justified for a range of reasons when the maintenance order is made.

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<sup>52</sup> *C v G* [2010] NZCA 128, [2010] NZFLR 497 at [52] and [54].



Such issues could include the existence of pre-trial offers or the impact of legal aid where applicable ...

The costs rules now applicable evince a clear statutory policy that awards of costs in proceedings of the kind at issue here are to be dealt with on a principled basis generally following the detailed rules relevant to the case at hand. The costs rules allow (amongst other things) for costs to be increased or decreased on specified criteria. In general terms, however, the rules are designed to promote consistency by providing for specified rates of costs applied to allocations of time for particular steps in the litigation. To include awards of costs in periodical maintenance orders would cut across the policies behind the costs rules.

[54] In other words, the Court should be reluctant or refuse to include legal and accounting fees in an award of spousal maintenance if there is some other means to pay them because this would potentially cut across the policies behind the costs rules. Extrapolating these findings into the present case, while the applicant is currently able to find her own legal and accounting fees, I decline to include them in her interim maintenance order.

#### **E. Occupation/tenancy order**

[55] It will be apparent that the interim maintenance award made at [37] in the applicant's favour is premised on her continuing to live in [address A].

[56] In submissions counsel for the applicant and for the second respondents agreed there was jurisdiction for a tenancy order but did not agree whether there was jurisdiction for an occupation order to be made.

[57] Under s 27 PRA the Court may make a tenancy order granting either spouse the right to personally occupy the family home for such period or periods and on such terms and subject to such conditions as the Court thinks fit.

[58] Section 28A PRA provides that in determining whether to make a tenancy order, the Court "shall have particular regard to the need to provide a home for any minor [or dependent] child of the marriage" and "may also have regard to all other relevant circumstances."

[59] While "tenancy order" and "tenant" are undefined in the PRA, oral tenancies and licences fall within the term "the tenancy of any dwelling house" under s 28(1) PRA.

[60] The factors to be taken into account for a tenancy order were discussed in *Rangi v Rangi* and include:<sup>53</sup>

- (a) the health and age of the parties;
- (b) the desirability of finality;
- (c) the desirability of releasing capital for the parties;
- (d) whether or not one party has rent-free accommodation;
- (e) whether the non-occupying party has paid the outgoings on the home;
- (f) whether the parties need to improve their present accommodation;
- (g) any relationship between the home and the occupant's business and;
- (h) any gross or palpable misconduct which has affected the value or extent of relationship property.

**(a) Health and age of the parties**

[61] The respondent trustees rejected the applicant's health issues as a reason for a tenancy order. They submitted that a comfortable rented house would be suitable for her to manage her health. In fact "it may well be in her interests to occupy a less substantial dwelling or property requiring less maintenance, housework and general upkeep."<sup>54</sup> They queried how much support the Peinaar family could provide given their work and child care commitments and the fact that many household tasks such as cleaning, gardening, window cleaning and so forth were carried out by paid helpers.

**(b) & (c) Desirability of finality and releasing capital**

[62] [Address A] was owned by the second respondents and protected by the contracting out agreement. While the applicant was bringing constructive trust proceedings the respondent trustees claimed that it was unlikely that the result would be that the title in [address A] was vested in her. An award of compensation was more likely, so "allowing her to continue in occupation of the home now when she [was]

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<sup>53</sup> *Rangi v Rangi*, FC Oamaru, FAM-2010-045-11, 17 February 2010.

<sup>54</sup> Submissions of Second respondent dated 29 November 2019 at [26].

not a beneficiary and unlikely to obtain ownership [did] not sit well with the desirability of finality”.<sup>55</sup>

[63] There was no suggestion that [address A] should be sold.

**(d) Rent-free accommodation**

[64] While the defendant previously lived with the applicant’s daughter and he had occupation of [address B], [address B] was prohibitively distant from the respondent’s work place. The respondent trustees pointed out that if a tenancy (or occupation) order was granted, in addition to paying for his own accommodation the trustee respondents would have to pay for the applicant’s accommodation at [address A]. Meanwhile, the respondent had offered to increase his maintenance payments to cover the costs of rental accommodation for the applicant.

**(e) Payment of the outgoings**

[65] The applicant had never contributed to the outgoings at [address A]. Even after she began receiving \$800 a month from her son as a contribution to his accommodation she had not shared those contributions with the respondents.

**(f) Improvement of accommodation**

[66] There was no suggestion that either party needed to improve their accommodation.

**(g) Connection between home and business**

[67] There was no relationship between the applicant and the home and any business, but for the respondent the use of [address A] would be of significant assistance with his work.

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<sup>55</sup> At [32].

#### **(h) Any misconduct**

[68] While it was not suggested there had been any misconduct, the trustee respondents submitted that the applicant had a collateral purpose which was to provide a home for her son and his family. While that was commendable, “there [was] no reason why her obligations to [them] should be imposed on the second respondent trustees and at the expense of the beneficial owners of [address A]”.<sup>56</sup>

#### **(i) Findings**

[69] Weighing these factors, I make a tenancy order in favour of the applicant for a nine month term commencing from the date of this judgment. This is because the applicant has health issues which are likely to be impacted by the stress of a move to a rental property. Although she appears to have instigated the separation, the evidence is that she has found the separation, coupled with her age and parlous health, to be quite traumatic. It is understandable that she would want the comfort of familiar surroundings with her family close by to help her adjust to her new circumstances.

[70] However, she is not in a position to contribute to the outgoings and her constructive trust claim is unlikely to result in the title to [address A] being vested in her. The nine month term of the tenancy order will result in the applicant having occupation of [address A] for about two years post-separation. By then, both parties should have had sufficient opportunity to recover from the end of their marriage and move on with their new lives.

[71] For the respondent the commute from [address B] to Auckland may be untenable but whether he pays to rent a property for the applicant, or pays to rent a property for himself, is ultimately neither here nor there. The reality is that the respondent’s income from his practice and investments is the only source of funds available to the parties.

[72] Given that a tenancy order is justified, it is unnecessary to consider whether there is jurisdiction or justification for an occupation order to be made.

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<sup>56</sup> At [42].

## F. Outcome

[73] The outcome of this decision is that the applicant has been granted a tenancy order for [address A] worth \$5,698 a month and an interim maintenance order of \$6,900 a month on the basis that the respondents will also continue to pay some of the outgoings on [address A], at a cost of an extra \$600 or more a month. The total is about \$13,200 a month.

[74] By the standards of interim maintenance orders this is relatively high, but it must be seen in the context of the parties' lifestyle during the marriage and the respondent's monthly income after tax of more than \$70,000. The parties were together for many years and the application was made less than 12 months after separation. The applicant is an older woman with health problems who has not been in the paid workforce for many years. Legal and accounting fees have not been included in the award because the applicant has access to substantial funds of more than \$400,000.

[75] If the parties are unable to agree about costs, a memorandum is to be filed within 14 days, with any reply within a further seven days.

Dated at Auckland this                      day of

A M Manuel  
Family Court Judge

SCHEDULE				
Living expenses as per declaration of financial means and sources	Applicant per year	Respondent per year	Reasonable expense per year as assessed by this Court	Explanation
(a) income tax	Nil	Nil	Nil	Nil
(b) insurance and superannuation	\$5,256	\$2,244	\$5,256	Applicant's figure is accepted on basis her life insurance is \$3,797 and medical insurance is \$1,756. Budget does not include house or contents insurance which the applicant assumes will be paid by respondents
(c) medical & hospital benefits				
- psychologist	\$4,500	\$2,040	\$1,530	Applicant's figure is reduced. Psychologist has confirmed applicant attends counselling only every one or two months at \$170 a session.
- physio/osteo	\$735	\$240	\$735	Applicant's figure is accepted. Physiotherapy/osteopathy is necessary for fibromyalgia. It is partly subsidised by ACC and the applicant pays \$75 a month
- doctor	Not	\$876		Applicant's figure is accepted. Evidence suggests applicant's health is parlous.
- dental	Itemised	\$250		
- chemist		\$520		
- natural health		\$600		
- colon care		\$600		
	\$7,464	\$2,846	\$7,464	
(d) rent	Nil	Nil	Nil	Applicant assesses rent at [address A] at \$1,315 a week or \$68,380 a year but assumes she will not be required to pay this.

(e) rates	Nil	Nil	Nil	Applicant assumes these will continue to be paid by respondents.
(f) mortgage payments	Nil	Nil	Nil	No mortgage on [address A]
(g) repairs on home	Nil	Nil	Nil	Applicant assumes these will be paid by respondents
(h) food & household supplies - supermarket - lunch and dinners - coffee - wine	\$16,926 \$7,800 \$3,000 <u>\$4,160</u> <u>\$31,886</u>	\$7,800 Nil \$1,040 <u>\$1,040</u> <u>\$9,880</u>	\$20,000	Applicant's figure is reduced. She drinks sparingly, has dietary restrictions and does not eat out often.
(i) electricity, gas & fuel	\$4,800	\$2,160	\$2,160	Applicant's figure is reduced. Claim is excessive for a single householder  The applicant assumes that the respondents will continue to pay any gas.
(j) telephone including mobile phone/internet	\$2,160	\$720	\$1,500	Applicant's figure is reduced. Insufficient evidence of details provided.
(k) laundry and cleaning	\$650	\$700	\$650	Applicant's figure is accepted.
(l) clothing	\$10,000	\$5,200	\$10,000	Applicant's figure is accepted. Parties were clothed to a high standard during marriage.
(m) child maintenance care	N/A	N/A	N/A	
(n) maintenance for former spouse	N/A	N/A/	N/A	
(o) entertainment	\$3,134	\$5,200	\$5,200	Applicant's figure is accepted.
(p) fares	N/A	N/A	N/A	
(q) vehicle expenses				

<ul style="list-style-type: none"> <li>- car wash</li> <li>- insurance &amp; repairs</li> <li>- petrol</li> <li>- registration</li> <li>- warrant of fitness</li> </ul>	<p>_____</p> <p>\$8,000</p>	<p>_____</p> <p>\$6,035</p>	<p>_____</p> <p>\$6,035</p>	<p>Applicant's figure is reduced. Insufficient evidence and expenses should be less for late model vehicle.</p>
(r) fares	N/A	N/A	N/A	
(s) other expenses <ul style="list-style-type: none"> <li>(i) personal care <ul style="list-style-type: none"> <li>- beauty therapy</li> <li>- hair/colour</li> <li>- product</li> </ul> </li> <li>(ii) pet</li> <li>(iii) flowers</li> <li>(iv) holidays</li> </ul>	<p>_____</p> <p>\$8,800</p> <p>\$1,360</p> <p>\$800</p> <p>\$35,000</p>	<p>_____</p> <p>\$7,800</p> <p>Nil</p> <p>\$780</p> <p>Nil</p>	<p>_____</p> <p>\$8,800</p> <p>\$1,360</p> <p>\$800</p> <p>\$35,000</p>	<p>Applicant's figure is accepted. Haircut and colour every four weeks. Attends beauty therapy every fortnight and purchases products at a cost of about \$3,600 a year. Said to be commensurate with expenses during relationship.</p> <p>Applicant's figure accepted. She has the family pet. Costs include vet, dog food, groomer, walker and sitter.</p> <p>Applicant's figure is accepted.</p> <p>Applicant's figure is accepted. Evidence suggests respondent has spent at least this much post separation on holidays abroad.</p>



(v) cleaning  - housecleaning - window Cleaning	\$5,398	\$3,120	\$5,398	Applicant's figure is accepted.  House is cleaned once a week at cost of \$90. Windows are cleaned three times a year at cost of \$275. Applicant does not include cost of gardener which she assumes will be paid by the respondents.
(vi) miscellaneous Items	\$9,000	Nil	\$3,000	Insufficient evidence of expenses provided although they may include some household maintenance items.
(vii) gifts	\$5,960	Nil	Nil	Applicant's figure not accepted. Gift of \$5,000 to daughter-in-law inappropriate post-separation
TOTALS	\$144,903	\$48,965	\$112,822	