NOTE: PURSUANT TO S 124 OF THE CHILD SUPPORT ACT 1991, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.

IN THE FAMILY COURT
AT NORTH SHORE

FAM-2014-044-000347
FAM-2010-044-002274

[2015] NZFC 3178

IN THE MATTER OF	THE CHILD SUPPORT ACT 1991
BETWEEN	RIAN MORRISON Applicant
AND	MELODY MORRISON Respondent

Hearing:	16 December 2015
Appearances:	Mr McDonald for the Applicant No appearance by or for the Respondent
Judgment:	19 April 2016

RESERVED JUDGMENT OF JUDGE D M PARTRIDGE
[WITH RESPECT TO APPEAL UNDER PART 6A OF THE CHILD SUPPORT ACT 1991 FROM A DECISION OF A REVIEW OFFICER FOLLOWING AN ADMINISTRATIVE REVIEW]

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[1] Mr Morrison is the appellant in these proceedings. He has brought an application pursuant to s 103B of the Child Support Act 1991 ("the Act"). He appeals against a decision by the Commissioner of Inland Revenue ("the CIR"), which departed from the formula assessment in assessing his child support liability.

Background

[2] The parties were married in [date deleted] 1995 and separated in [date deleted] 2010. They are the parents of Phillipa, now 16 years old, and Drake, now aged 14 years.

[3] The children are in the primary care of their mother. At the time of the CIR decision, Mr Morrison calculated that they were in his care for 36 per cent of the time.

[4] In December 2013 Ms Morrison filed an application for administrative review for the 2011, 2012, 2013 and 2014 child support years.

[5] A notice of decision was issued by the CIR on 10 February 2014, who made a retrospective order and assessed Mr Morrison's child support income figure as $60,000 per annum for the period 18 June 2010 to 31 March 2015.

[6] On 27 March 2014 Mr Morrison filed an appeal against the determination. He has sworn two affidavits. Affidavits have also been filed by his accountant and the trustees of three Trusts that own the properties referred to in the CIR decision.

[7] Service was effected on Ms Morrison and the CIR. Ms Morrison filed a notice of defence and two affidavits.

[8] The CIR advised the Court on 16 July 2014 that it would not be intervening in these proceedings but cautioned that this should not be construed as a concession that the application should be granted.

Hearing Process

[9] This matter was set down for a half-day hearing on 16 December 2015. Mr Morrison appeared on that date with his counsel, Mr McDonald, and his accountant, Mr Brown. There was no appearance by or on behalf of Ms Morrison or her counsel, Mr Smith. The matter proceeded by way of a submissions-only formal proof hearing on that date.

[10] The matter took the half day that had been allocated. At the conclusion of the hearing I made an order under s 117 of the Act suspending Mr Morrison's child support liabilities, and reserved my decision on the substantive issue.

[11] I proceeded in this way because I was aware that this was the third occasion where a hearing had been allocated for this matter, and that neither Ms Morrison nor her counsel had appeared at the previous two hearings.

[12] As a result of the previous non-appearance, on 31 August 2015 Judge Druce made an order for costs on a 2B basis against Ms Morrison of $310 for non-appearance on that date, and indemnity costs of $1,600 in respect of the hearing scheduled on 17 June 2015.

[13] On 17 December 2015 counsel for Ms Morrison advised the Court that he had wrongly diarised the hearing date, and sought a re-hearing of the matter. I issued a minute on 18 December 2015. I directed a half-day re-hearing on 17 March 2016, provided that the earlier costs awards were paid in full by 29 January 2016, together with costs for the 16 December 2015 non-appearance. If costs were not paid by that date, I directed that the re-hearing was to be vacated and I would issue my decision on the basis of the evidence at the formal proof hearing on 16 December 2015.

[14] The costs awards were not paid. Both counsel filed submissions in relation to this. I issued a minute on 5 February 2016 vacating the re-hearing and confirming that I would issue my decision on the basis of the formal proof hearing.

The CIR Decision

[15] Ms Morrison's application to the CIR was brought on the grounds that the formula assessment resulted in an unjust or unfair level of child support having regard to Mr Morrison's earning capacity and access to financial resources.

[16] Under the formula assessment Mr Morrison was assessed to pay child support of $67.90 per month for the year ending 31 March 2011; $70.65 per month for the year ending 31 March 2012; $71.90 per month for the year ending 31 March 2013; and $72.60 per month for the year ending 31 March 2014. This reflects the minimum child support assessments.

[17] The review officer was satisfied that there should be a departure from the usual formula assessment of child support on s 105(2)(c)(i) grounds, for the period 18 June 2010 to 31 March 2015.

[18] In the decision the review officer set out the background and analysis of each of the party's accounts of their financial resources and asset position. It recorded that both parties were working[1] and they both lived in properties owned in Trust. It also recorded that there were relationship property proceedings before the Court, and other proceedings involving Trusts.[2] The review officer noted information obtained from a search of records from the Companies Office and Inland Revenue records. Relevant case law was considered and referenced.

[19] The review officer was satisfied that a departure order could be made retrospectively, and concluded that a departure would be just and equitable. She further concluded that it was 'otherwise proper' for there to be a departure from the formula assessments for those years, having regard to the objects of the Act.

[20] The review officer assessed Mr Morrison's income for child support purposes as $60,000 per annum for the period 18 June 2010 to 31 March 2015 on the basis that:[3]

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[1] Ms Morrison as a [occupation details deleted] and Mr Morrison as a [occupation details deleted].
[2] CIR Decision 10 February 2014, page 2, paragraph 1.
[3] Ibid, page 10, paragraph 6.

> …this reflects Mr Morrison's maximum earnings of $100,000 (referenced by Mrs Morrison's evidence of his income during the marriage, and the acquisition of property and the parties' lifestyle during the marriage; and a reasonable level of income for a person managing a small to medium sized business (reflecting Mr Morrison's role in [name of company 1 deleted]).

[21] This figure appears to be based on what Ms Morrison estimated Mr Morrison's income to be during the marriage, and the review officer's belief that Mr Morrison's income during the marriage had been sufficient to fund the purchase of three properties and sustain a very comfortable lifestyle for the family, which included overseas holidays.

[22] The review officer also considered the ownership and structure of the Trusts and companies which Mr Morrison had involvement in, and concluded: [4]

> It is apparent the company structures and ownership are unfair and inappropriate devices with the effect of diminishing Mr Morrison's liability under the Child Support Act. The child support income figure of just over $14,600 for the 2011, 2012, 2013 and 2014 year formula assessments did not reflect Mr Morrison's access to income, earning capacity or financial resources.
>
> The situation was unusual and out of the ordinary and rendered the formula assessments unjust and unfair.

[23] Further, when considering whether retrospective orders should be made, she noted: [5]

> Consideration of the elaborate company arrangements, the involvement of Mr Morrison's mother (where there is no apparent or obvious reason for why Mr Morrison could not manage his own affairs) and the information now available on Mr Morrison's actual income and earning capacity establish that this is a case where the paying parent hid his financial position such that the child support assessments were made on an inaccurate and inequitable basis. This is an appropriate situation where the discretion to retrospectively back date the formula assessment should be exercised.

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[4] CIR Decision 10 February 2014, page 8, paragraphs 5 and 6.
[5] Ibid, page 9, paragraph 6.

[24] As a result of the CIR decision, Mr Morrison was assessed to pay $900.85 of child support per month for each of the relevant child support years. He was also required to pay arrears of the difference between the formula assessment and the new retrospective assessment.

Grounds of Appeal

[25] Mr Morrison's appeal in these proceedings is brought on the basis that the review officer made a number of factual errors in determining his personal income, earning capacity, and access to financial resources. He submits that this resulted in an assessment which was "incorrect, inequitable and unenforceable."[6] He denies there is any basis for the conclusion that he has hidden his true financial position. Mr Morrison seeks that the decision of the CIR is set aside and the previous formula assessments be reinstated.

[26] It is appropriate to mention at the outset of this decision that Ms Morrison in her affidavit evidence refers to transactions and companies which she states should be taken into account by the Court. The status of each of the Trusts and companies is being considered by the High Court in relationship property proceedings. A draft amended statement of claim (undated and unsigned) is annexed to Ms Morrison's affidavit.[7] The various Trusts and companies are named as defendants in those proceedings. This Court does not have access to the evidence that Ms Morrison relies on in those proceedings. Nor was Mr Morrison cross-examined about those issues in these proceedings as a result of the formal proof hearing process adopted for the reasons stated above. On the information available to this Court, the issues around the status of those Trusts and companies remain unresolved. It is clear that the outcome of those proceedings will clarify Mr Morrison's income position. However, this Court is not in a position to make a determination on those matters. This Court can only make decisions on the information available to it.

[6] Affidavit of Rian Morrison dated 27 March 2014, paragraph 3.
[7] Affidavit of Melody Morrison dated 20 August 2015, annexure 'JHB2'.

The Law

[27] The appeal is brought pursuant to s 103B of the Act. The appeal was lodged within two months of the CIR decision dated 10 February 2014, as required under s 103B(3).

[28] An appeal is to be considered by way of a re-hearing.[8] The decisions of *SLB v LDB*[9] and *Wildbore v Accident Compensation Corporation*[10] confirm the process to be adopted. The Court is entitled to accept and consider further evidence that was not available to the first instance adjudicator, and is required to reach its own conclusion on its assessment and evaluation of the evidence and the merits of the case.

[29] The powers of the Court on appeal under s 103B permit the Court to make any determination in terms of s 103D, having regard to the circumstances and supporting evidence raised by the parties, and in accordance with the Act. Section 103D provides:

> **103D Powers of Family Court on appeal**
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> (1) In determining an appeal under any of sections 103A to 103C, a Family Court may—
>
> (a) confirm, modify, or reverse any determination or decision appealed against (in whole or in part):
>
> (b) make any decision that the Commissioner could have made in respect of the determination or decision appealed against:
>
> (c) exercise any of the powers that could have been exercised by the Commissioner.
>
> (2) Without limiting subsection (1),—
>
> (a) in reversing a decision or part of a decision, a Family Court may make an order that the provisions of this Act relating to the formula assessment of child support should not be departed from:
>
> (b) in reversing a decision made under subpart 3 of Part 5A to refuse to make a determination, a Family Court may exercise any of the powers that could have been exercised by the Commissioner to make a determination under that subpart.

[8] Section 103B(5).
[9] (2011) 25 NZTC 20-011 (HC).
[10] [2009] NZCA 34.

(3) An order under this section may make different provision in relation to different child support years and in relation to different parts of a child support year.

(4) Subject to section 98(2), an order made under this section does not operate so as to increase or reduce the amount of child support payable in relation to any child to whom the order does not apply, and the child support payable in relation to any child to whom the order does not apply must be calculated as if the order had not been made.

(5) Every order made under this section must specify the period of time in which the order is to apply or specify the event the occurrence of which will cause the order to terminate.

[30] Section 106 permits the Court to make a wide range of orders, including prescribing an amount that varies a liable parent's child support income level.

[31] Section 105 sets out the grounds that must be satisfied for departure from the formula assessment. The Court must be satisfied of three matters:

(a) That one or more of the grounds for departure under s 105(2) are made out;

(b) A departure is just and equitable as between the child, qualifying custodian and liable parent; and

(c) A departure would otherwise be proper.

[32] In this case, Ms Morrison relied on what is commonly referred to as 'ground 8', which is reflected in s 105(2)(c)(i) and provides:

(2) For the purposes of subsection (1)(a) of this section, the grounds for departure are as follows:

(c) That, by virtue of special circumstances, application in relation to the child of the provisions of this Act relating to formula assessment of child support would result in an unjust and inequitable determination of the level of financial support to be provided by the liable parent for the children because of –

(i) The income, earning capacity, property, and financial resources of either parent or the child;

[33] In assessing whether ground 8 is satisfied, s 105(5)(a) requires the Court to have regard to:

> …the capacity of the child or parent to earn or derive income, including having regard to any assets of, under the control of, or held for the benefit of, the child or parent that do not produce, but are capable of producing, income …

[34] In making my decision I am also guided by the objects of the Act, especially s 4(b) which affirms the obligation of parents to maintain their children,[11] and s 4(d) which states that the level of financial support to be provided by parents for their children is to be determined according to their relative capacity to provide financial support and their relative levels of provision of care.

[35] It is evident both within s 105, and the case law, that the Court is empowered to look through companies, trusts and other structures in order to ascertain the true financial ability and resources of a parent, when determining whether ground 8 is established in the circumstances.[12]

[36] The term 'special circumstances' has been considered by various courts. In *Re M (child support) (No 2),*[13] the High Court held it to mean "facts peculiar to the case which set it apart from other cases", but "something less than extraordinary". This interpretation was affirmed by the Court of Appeal in *EJV v AJCB*.[14]

[37] In *EJV v AJCB,* the Court referred to other relevant principles, as derived from *Andrews v Andrews*[15] and *Lyon v Wilcox,*[16] including:[17]

> (b) The thrust of the legislation is plain from its objects and provisions…departure from it will be allowed only if stringent tests are satisfied. As has been said in a number of cases, those seeking departure must pass through a narrow gate.

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[11] And not the general taxpayer or third parties.
[12] *Andrews v Andrews* [1994] NZFLR 39, (1993) 11 FRNZ 250 (HC), at 256-257; Endorsed on appeal in *Andrews v Andrews* [1995] NZFLR 769 (CA).
[13] [1993] NZFLR 74, (1992) 9 FRNZ 693 (HC) at 701.
[14] [2013] NZCA 100 at [54].
[15] [1995] NZFLR 769 (CA).
[16] [1994] 3 NZLR 422 (CA).
[17] Above n 12, at [54].

> (d) "Special circumstances" include, but are not confined to, those where "it is apparent that unfair, or inappropriate devices have been adopted to diminish liability – often to evade liability under the Act…" Such circumstances entitle the Court "to have regard to the "real income of the assessed person".

Are there grounds for departure under s 105(2)(c)(i) of the Act?

A Mr Morrison's income and earning capacity

[38] Ms Morrison submits that Mr Morrison has income, property and/or financial resources available to him that improve his financial position and, consequently, his ability to pay child support above what his taxable income prescribes on formula assessment. She seeks that the CIR decision is upheld.

[39] Mr Morrison's position is that the review officer failed to understand his true income position or earning capacity. He submits that the review officer failed to make enquiries directly of him about this, and did not consider his income tax account information for the periods in question (and earlier periods) which the review officer had access to. Instead, the review officer simply accepted Ms Morrison's statement that he earned $100,000 per annum during the marriage.

[40] Mr Morrison submits that his personal income pre- and post-separation is reflected in his income tax accounts. That is, that he had a taxable income of approximately $24,000 from his employment as a [occupation deleted] in the year ending March 2014, and earned commission of between $250 and $350 per [details deleted] sold.

[41] During the relevant financial years Mr Morrison also received money in repayment of debts from two companies, [name of company 2 deleted] and [name of company 1 deleted]. Mr Morrison submits that as repayment of debt is not considered taxable income under tax law and accounting principles, this should not be considered as taxable income for child support purposes.

[42] Mr Morrison further submits that the parties' qualified for, and received, Working for Families tax credits for a period during their marriage, which supports

his assertion of the family's modest level of income. He submits that the Inland Revenue Department accepted this level of income as accurate, as it made these payments to the family.

[43] It is unclear whether the review officer was aware that the parties had received the Working for Families support as it is not referred to in the decision. Receipt of those payments is relevant if it is accepted that the parties' level of income throughout their marriage has remained at a similar level post-separation. During the course of the hearing I received evidence that Mr Morrison received Working for Families tax credits from 13 July 2009 to 1 April 2010. There was no evidence available to me that that payment was being received during the child support year ending March 2011 (the financial year in which the parties separated).

[44] It is clear from the CIR decision that the review officer accepted Ms Morrison's estimate of Mr Morrison's income during the marriage. However, it is unclear whether Ms Morrison provided any evidence to support the accuracy of this figure, or if such evidence was sought from her. There is no mention of this in the decision.

[45] There is also no reference in the decision about whether this sum was discussed with Mr Morrison or he was asked to comment on it. It appears that the review officer relied on information about family overseas holidays, the purchase of three properties, and Mr Morrison's interests in property, Trusts and company entities (which are considered further below), to support the contention that Mr Morrison's income was higher than returned.

[46] In affidavit evidence Mr Morrison acknowledged the holidays and submitted that two of the holidays were funded by an inheritance Ms Morrison received from her mother, and other holidays were paid for by the sale of capital assets or family savings. Ms Morrison has not refuted this in her affidavit evidence.

[47] It also appears that the review officer did not consider the information provided by Mr Morrison that the family's lifestyle during the marriage was

subsidised by the sale of a [details deleted] lease for $350,000 in 2002,[18] or that he had been meeting expenses by selling assets.[19] There is no comment in respect of either of these in the decision.

B Property

[48] Both parties live in properties owned by Trusts.

[49] Mr Morrison lives in a property at [address 1 deleted], which is owned by [name of trust 1 deleted]. [Name of company 3 deleted] is a corporate trustee of [name of trust 1 deleted]. Mr Morrison is not a trustee or a beneficiary of that Trust.

[50] The review officer commented that the reduced rent of $150 per week that Mr Morrison pays suggests "that this was not a commercial arrangement"[20] given that research showed that an average rental for a comparable property is $653 per week. It was further noted that a self-contained flat on the property was rented for $375 per week.

[51] Ms Morrison lives in a property at [address 2 deleted], which is owned by [name of trust 2 deleted]. The property is registered in the name of [name of company 4 deleted] which is the sole trustee of [name of trust 2 deleted]. Mr Morrison is not a beneficiary of that Trust.

[52] The review officer records that Ms Morrison lived in her property "subject to an agreement with the mortgagee", however no comment is made about what the 'agreement' was, what rent was paid, or whether the agreement raised similar suspicion to that of Mr Morrison's situation. Mr Morrison's evidence is that Ms Morrison is not paying any rent for the property. Ms Morrison has not refuted this in her evidence. I note however that she records in her monthly outgoings payments of $2,000 "to Westpac to prevent mortgagee sale of [address 2 deleted]."[21]

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[18] Ibid, page 5, bullet point 5.
[19] Ibid, page 4, bullet point 9.
[20] Ibid, page 8, paragraph 2.
[21] Affidavit of Melody Morrison dated 20 August 2015, paragraph 3.3.

[53] Whilst a third property is referred to in the decision, there are no details about it. That property is situated at [address 3 deleted], and is owned by [name of trust 3 deleted]. [Name of company 5 deleted] is the trustee of [name of trust 3 deleted]. Mr Morrison is not a beneficiary of that Trust. The property is occupied by Mr Morrison's mother, Bethany Morrison.

[54] The structure of the companies and the Trusts are detailed in affidavit evidence filed by and in support of Mr Morrison. Corroborating evidence has been filed by the trustees of the [name of trust 2 deleted], [name of trust 1 deleted] and [name of trust 3 deleted], and by Mr Morrison's accountant, Alan Brown. Mr Brown is also the accountant for [name of trust 4 deleted] and [name of company 2 deleted].

[55] On 1 September 2011, the [name of trust 2 deleted] purchased the property at [address 2 deleted] from [name of trust 4 deleted] for $560,000. The trustees secured a mortgage for $350,000 which was paid to [name of trust 4 deleted] in part-payment of the purchase price. A Deed of Acknowledgement of Debt dated 29 July 2011 was signed in respect of the balance of the purchase price ($210,000).

[56] On 2 September 2011, the trustees of the [name of trust 1 deleted] purchased the property at [address 1 deleted] from [name of trust 4 deleted] for $1,500,000. $405,000 was borrowed from the bank in part-payment of the purchase price. The trustees of [name of trust 1 deleted] resolved in July 2011 to sign a Deed of Acknowledgement of Debt if so requested for the balance of the purchase price of $1,095,000.

[57] On 30 August 2011 [name of trust 3 deleted] purchased the property at [address 3 deleted] from [name of trust 4 deleted] for $320,000, subject to a caveat protecting the interests of Bethany Morrison. A Deed of Acknowledgement of Debt dated 4 August 2011 was signed in respect of $320,000.

[58] In the CIR decision, the review officer made reference to the three properties purchased during the marriage, and the existence of Trusts and companies which owned the properties as further support that Mr Morrison's true income position was

higher than returned. However, there is no evidence available to the Court that Mr Morrison personally funded the purchase, in full or in part, of any of the properties.

C Mr Morrison's Financial Resources

[59] The review officer searched the Companies Office records and revealed a complex labyrinth of company and Trust entities which had been established by the parties. After some analysis, the review officer concluded that the company structures and ownership were unfair and inappropriate devices providing possible sources of income or other advantage to Mr Morrison, including a way to hide his income and diminish his child support liability under the Act.

[60] In support of this conclusion, the review officer referred to the close relationship between Mr Morrison, Bethany Morrison and Mr Goode, and Bethany Morrison's involvement in the companies despite the fact that the registered office for many of the companies was [address 1 deleted] (where Mr Morrison resides). The review officer suggested this meant that "Mr Morrison had greater input and control over the companies and financial situation than he suggested."[22]

[61] While there is no evidence available to the Court that Mr Morrison funded the purchase, in full or in part, of any of the properties outlined above, there is evidence that he is involved with other companies and Trusts linked to those transactions.

[62] ***[Name of trust 4 deleted]*** **–** This Trust was settled on 10 February 1995, prior to the parties' marriage. Mr Morrison is the primary discretionary beneficiary. The trustees are two corporate trustee companies - [name of company 6 deleted] and [name of company 7 deleted]. There have been no distributions or advances made to Mr Morrison from the Trust.[23]

[63] ***[Name of company 6 deleted]*** - Bethany Morrison is the sole director. Mr Morrison owns 100 per cent of the shares, however [name of company 6 deleted]

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[22] Ibid, page 8, paragraph 3.

[23] Affidavit of Alan Brown dated 9 September 2014, paragraph 37, and annexure 'A'. [Name of company 7 deleted] has been a trustee of [name of trust 4 deleted] since 19 December 2008.

holds the shares on behalf of (and as the property of) the trustees of [name of trust 4 deleted].

[64] ***[Name of company 7 deleted]*** – This is an independent trustee. Mr Morrison's [name deleted], is the sole director and shareholder of this company.

[65] ***[Name of company 1 deleted]*** - Mr Morrison owns one per cent of the shares and [name of company 6 deleted] owns 99 per cent of the shares, which it holds in its capacity as trustee of the [name of trust 4 deleted].[24] Mr Morrison has a shareholders current account with the company. The review officer states that Mr Morrison is effectively the sole shareholder of this company because he has a one per cent shareholding of [name of company 1 deleted], and a 100 per cent shareholding in [name of company 6 deleted].[25] This is not correct. The trustees of [name of trust 4 deleted] have the sole power to make decisions for [name of company 1 deleted] in terms of their obligations under the Trust Deed, not Mr Morrison.

[66] ***[Name of company 2 deleted]*** - Bethany Morrison is the sole director. [Name of company 6 deleted] and [name of company 7 deleted] own 99 per cent of the company's shares. Mr Morrison owns one per cent of the shares. Mr Brown's evidence is that no dividend has been paid since he has been the company accountant and the retained earnings have been used as working capital.[26] The [name of trust 4 deleted] provides security for this company, including by way of a flexible loan facility of $350,000 obtained in September 2008 to help fund the company's operations.

[67] Analysis of the evidence, and in particular the affidavit evidence filed by Mr Brown, provides clarification about the money stream between Mr Morrison and the companies [name of company 2 deleted] and [name of company 1 deleted]. I accept this evidence was not available to the review officer at the time the CIR decision was made.

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[24] Affidavit of Alan Brown dated 17 December 2014, paragraph 33.
[25] CIR Decision 10 February 2014, page 7, paragraph 4.
[26] Affidavit of Alan Brown dated 9 September 2014, paragraph 35.

[68] That evidence makes it clear that Mr Morrison made advances to the companies during the 2010, 2012 and 2013 financial years, and he received money from the companies in repayment of debts.

[69] Mr Brown's second affidavit, and the table summary of loan advances, repayments and drawings by Mr Morrison[27] provides the following analysis:

(a) **2010 financial year** - Mr Morrison made advances to [name of company 2 deleted] of $5,399, and received payments of $993. The difference is -$4,406.[28] Mr Morrison made advances to [name of company 1 deleted] of $35,000 and received payments of $52,090.[29] The difference is $17,090. The total difference between what Mr Morrison advanced to both companies and the payments he received from them for that year is $12,684.[30]

(b) **2011 financial year** - Mr Morrison made no advances to [name of company 2 deleted] or [name of company 1 deleted]. He received payments of $37,241 from [name of company 2 deleted],[31] and $3,095 from [name of company 1 deleted] .[32] The total received was $40,336.[33]

(c) **2012 financial year** - Mr Morrison made advances to [name of company 2 deleted] of $33,712 and received payments of $56,788, resulting in a difference of $23,076.[34] Mr Morrison made no advances to [name of company 1 deleted] and received payments of $67,[35] resulting in a difference of $67. The total difference between what Mr Morrison advanced and the payments he received from both companies for that year is $23,143.[36]

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[27] Affidavit of Alan Brown dated 17 December 2014, annexure 'A'.
[28] Ibid, paragraph 43.
[29] Ibid, paragraph 34.
[30] Ibid, paragraph 44 and annexure 'A'.
[31] Ibid, paragraph 45.
[32] Ibid, paragraph 35.
[33] Ibid, paragraph 45 and annexure 'A'.
[34] Ibid, annexure 'A'.
[35] Ibid, paragraph 36.
[36] Ibid, annexure 'A'.

(d) **2013 financial year** - Mr Morrison made advances to [name of company 2 deleted] totalling $38,174 and received payments of $57,568, leaving a difference of $19,394.[37] In the same year Mr Morrison made advances to [name of company 1 deleted] totalling $31,237 and received payments of $17,441.[38] The difference is - $13,796. The total received was $5,598.[39]

[70] Both companies continue to run at a loss.[40] Mr Morrison is owed significant sums by them. The debts pre-date the parties' marriage, however the amount of indebtedness has varied over time. As at 31 March 2011, Mr Morrison was owed $1,696,018 by [name of company 2 deleted]. Mr Morrison submits that both companies have only been able to continue trading because of the funds that he introduced to the companies, as reflected in the shareholder's current account.

[71] In submissions, counsel for Mr Morrison referred to *De Vere v Beavis*.[41] In that case the liable parent set up a trust structure following separation in order to avoid income tax. The High Court determined that the reduction in the father's loan account, vehicle expenses and advances made by the company to him should be added on to his declared income for child support purposes.

[72] The facts of that case can be distinguished from the current case because Mr Morrison had already established the company and Trust structures prior to the parties' separation. Some of them were in fact in place prior to their marriage.

[73] I accept the submissions of counsel for Mr Morrison that the Trust and company structures were established for genuine commercial purposes given Mr Morrison's involvement in the businesses. I further accept that, at the time these were established, he could not have envisaged that the parties would have children and their marriage would break down, with Ms Morrison retaining the greater care-giving responsibility for the children. The reduction in child support liability as a

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[37] Ibid, paragraph 47 and annexure 'A'.
[38] Ibid, paragraphs 38 and 40.
[39] Ibid, annexure 'A'.
[40] Ibid, annexures 'B' and 'C'.
[41] [2007] NZFLR 683 (HC); Appeal decision is reported as *EJV v AJCB* [2013] NZCA 100, [2013] NZFLR 325.

consequence of the Trust and company structures was an incidental factor, not a device deliberately set up by Mr Morrison with the intention to diminish his child support liability.

[74] Mr Morrison's counsel also submitted that the current situation can be distinguished because the payments made by the companies to Mr Morrison were in repayment of loan accounts. Counsel stated that because they are not considered as taxable income for taxation and child support purposes, they should also not be considered income when considering departure from the formula assessment.

[75] However it is clear from the case law that the Court must ascertain the true income of the parties when considering an application for departure. In the appeal decision of *De Vere v Beavis*, the Court of Appeal held: [42]

> Accepting the Judge was correct to hold that those benefits were not incorporated into the formula, we do not agree that it is logical to exclude them when considering an application for a departure from the formula. This proceeding is, by definition, about departure from the formula assessment, and it is illogical to conclude that what cannot be included in the formula assessment can by extension not be included in considering a departure from the formula assessment. The reason for allowing a departure is that the formula assessment is unable to take into account certain things, such as the use of a car and of interest-free loans, which affect the financial position and resources of the liable parent and which it is just and equitable and otherwise proper to take into account.

[76] Trusts and companies are structures which can alter a person's true income as they comprise assets and resources from which people can derive economic benefits that in reality alter their financial position. As a result, although they are not available to be taken into account in a formula assessment of child support, they can be taken into account when considering an application for departure. The very nature of the 'departure' assessment means that additional matters outside of the formula may be considered.

[77] In *Clasper v Clasper*[43] Morris J considered an appeal from a Family Court decision which granted an upward variation from the formula assessment. The

[42] As above n 50, *EJV v AJCB*, at [75].

appellant earned $33,000 from salary, interest and dividends but that amount was reduced by deducting various losses from the business. It was not suggested that the deductions were improperly made or not in accordance with accepted accounting and taxation standards. However, the Court held that the return of income (post-deductions) did not give a true picture of the income position, thus requiring the Court to establish the "real" income of the appellant. Morris J stated that no judgment had held that because deductions are permissible under tax laws they should automatically be deducted when assessing taxable income for the purposes of child support. His Honour stated: [44]

> A number of liable parents will, however, derive income from various sources, eg wages, rent, dividends and income from Trusts. Such parents, by following acceptable accounting practices and advice, are able to reduce their taxable income significantly. Their child support liability is consequently reduced as the "base" figure is reduced.
>
> Can it be that the Legislature intended a person could avoid the obligation to provide proper maintenance based on real income simply because that person is able to regulate his or her affairs in such a way as to reduce his or her liability for income tax under the revenue statutes? I think not.
>
> It is vital to the integrity of a fair system of child support that a person's "real income" be ascertained and liability assessed as far as possible on a person's true ability to pay based on his or her real income. In common parlance, every liable parent should be assessed under the Act on the money the parent gets in his or her pocket. Sections 104 and 105 were enacted to enable this to be done in appropriate cases. An appropriate case will be where special circumstances or conditions are found to exist and where it would be equitable to allow an assessment based on return of income to stand.

[78] It is clear that Mr Morrison has derived a benefit from the way that the Trust and company structures have been established. One of the benefits is that his taxable income is minimised although he continues to derive income. Whilst this structuring is legal and legitimate, and has been in place for a significant period of time throughout and subsequent to the parties' marriage, it is inequitable that following the breakdown of the marriage, only he is able to continue to benefit from these structures by paying child support at a reduced level.

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[43] (1995) 13 FRNZ 604 (HC).
[44] At p 607.

D Ms Morrison's income, earning capacity, property and financial resources

[79] Section 105(2)(c)(i) provides that Ms Morrison's financial position must also be considered when making a determination under s 103B. In this situation, it is relevant that Ms Morrison is employed.[45] The evidence is unclear about whether Ms Morrison pays any rent for the Trust property that she occupies. If she now pays rental, there is no evidence of how long she has done so.

[80] It is also relevant that she has the children in her primary care, but that the children's care is also shared by Mr Morrison. Mr Morrison estimates that the children are in Ms Morrison's care for approximately 64 per cent of the time. Ms Morrison states in her last affidavit that Phillipa no longer spends time with her father, and is in her mother's full-time care.[46] That was not clarified by Mr Morrison in evidence.

[81] In his evidence, Mr Morrison estimates that Ms Morrison's total taxable income is approximately the same as the total income of his household. Ms Morrison has provided affidavit evidence of her financial position which records that she has a shortfall in her income each month, has few assets, and has taken out loans.[47]

[82] There is also evidence that Ms Morrison received a financial benefit under her mother's will, and has a third interest in a property at [location deleted], but she states that this "does not generate any positive income."[48]

[83] It appears from the CIR decision that many of these matters were not considered, or were given little consideration. Mr Morrison submits that these matters support the position that a departure order should not be granted.

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[45] Now as an [occupation deleted].
[46] Affidavit of Melody Morrison dated 20 August 2015, paragraph 5.1.
[47] Ibid, paragraph 3.3-3.4
[48] Ibid, paragraph 3.5.

E Children

[84] Counsel for Mr Morrison submits that the position of the children is a neutral factor in this determination. I accept this submission. There is no evidence available to me which satisfies me otherwise pursuant to s 105(5)(a).

F Conclusion

[85] Having regard to the evidence, I am satisfied that the review officer erred as follows:

(a) Assessing Mr Morrison's income throughout the parties' marriage and subsequently as $100,000 per annum without a sound evidentiary basis.

(b) Finding that Mr Morrison purchased three properties during the marriage.

(c) Finding that Mr Morrison manipulated his income and earning capacity and hid his financial resources and assets through the use of Trusts and company entities, to diminish his child support liabilities, and thereby failing to appreciate that most of these entities were in place during the parties' marriage, with some pre-dating the marriage.

(d) Failing to fully consider Ms Morrison's financial situation.

[86] However, on close analysis of the evidence, I am satisfied that special circumstances do exist in the circumstances of this case to satisfy s 105(2)(c)(i) of the Act. Whilst I am satisfied that Mr Morrison has not acted in a way to hide his income or deliberately structured his financial affairs to diminish his child support liability, on my assessment it is clear that his true income is higher than that which is disclosed in his income tax accounts (and which the formula assessment was based on). That is as a result of Mr Morrison receiving payments from [name of company 2 deleted] and [name of company 1 deleted] which added to his income but were not subject to tax or to be taken into account as taxable income. I am satisfied that these

are special circumstances relating to Mr Morrison's income, earning capacity and financial resources.

Is a departure just and equitable as between the child, qualifying custodian and liable parent?

[87] When considering whether it is just and equitable to grant a departure order, the Court must be guided by the provisions of s 105(4) which provide:

> (4) In determining whether it would be just and equitable as regards the child, a receiving carer, and the liable parent to make a particular order of the type specified in section 106, the court shall have regard to—
>
> (a) the objects of this Act, and, in particular, the nature of the duty of a parent to maintain a child and the fact that it is the parents of a child themselves who have the primary duty to maintain the child; and
>
> (b) the proper needs of the child, having regard to—
>
> (i) the manner in which the child is being, and in which the parents expect the child to be, cared for, educated, or trained; and
>
> (ii) any special needs of the child; and
>
> (c) the income, earning capacity, property, and financial resources of the child; and
>
> (d) the income, earning capacity, property, and financial resources of each parent who is a party to the proceeding; and
>
> (e) the commitments of each parent who is a party to the proceeding that are necessary to enable the parent to support—
>
> (i) himself or herself; or
>
> (ii) any other child or another person that the parent has a duty to maintain; and
>
> (f) the direct and indirect costs incurred by the receiving carer in providing care for the child, including the income and earning capacity foregone by the receiving carer in providing that care; and
>
> (g) any hardship that would be caused to—
>
> (i) the child or the receiving carer by the making of, or the refusal to make, the order; or

(ii) the liable parent, or any other child or another person that the liable parent has a duty to support, by the making of, or the refusal to make, the order.

[88] I also have regard to the objects of the legislation, which are set out in s 4:

"The objects of this Act are—

(a) to affirm the right of children to be maintained by their parents:

(b) to affirm the obligation of parents to maintain their children:

(c) [Repealed]

(d) to provide that the level of financial support to be provided by parents for their children is to be determined according to their relative capacity to provide financial support and their relative levels of provision of care:

(e) to ensure that parents with a like capacity to provide financial support for their children should provide like amounts of financial support:

(f) to provide legislatively fixed standards in accordance with which the level of financial support to be provided by parents for their children should be determined:

(fa) to affirm the right of carers who provide significant care to children to receive financial support in respect of those children from a parent or parents of the children:

(g) to enable carers of children to receive support in respect of those children from parents without the need to resort to court proceedings:

(h) to ensure that equity exists between parents and, where applicable, carers, in respect of the costs of supporting children:

(i) to ensure that obligations to birth and adopted children are not extinguished by obligations to stepchildren:

(j) to ensure that the costs to the State of providing an adequate level of financial support for children and their carers is offset by the collection of a fair contribution from liable parents:

> (k) to provide a system whereby child support and domestic maintenance payments can be collected by the Crown, and paid by the Crown to those entitled to the money."

[89] This is a situation where both parents are employed. They each have the children in their care for extended periods of time. They should both bear the responsibility of financially supporting the children. From the evidence available to me, both parents have financial resources available to them to assist them both to support the children, including assets under their control or held for the benefit of the parties or the children. There is evidence that Mr Morrison provides additional financial support for the children over and above his child support payments, such as payment of school fees and uniforms, sports and medical care.[49]

[90] Both parties are in new relationships. I must disregard the income, earning capacity, property and financial resources of any person who does not have a duty to maintain the child, unless there are special reasons where it would be appropriate to have regard to them. I do not find special reasons to do so in this circumstance.

[91] Mr Morrison has provided a statement of financial means which shows his limited income and accounts for half of his annual expenses, as his partner shoulders responsibility for the other half of the couple's expenses.

[92] In considering whether the review officer was wrong to find it was just and equitable to make a departure order, I take into account all of the objects of the Act, but rely in particular on s 4(d). On the information available to the Court I am satisfied that a departure from the formula assessment is both just and equitable by providing a fairer contribution to the children's financial support based on the parties' relative income, earning capacity and financial resources. The initial formula assessments did not achieve this as they did not take into account the monies Mr Morrison received which were non-taxable, with the result that Mr Morrison was not being assessed on his true income. The CIR assessment also failed to assess Mr Morrison's true income because those assessments were based on an estimation of Mr Morrison's income and financial position which was not supported by the

[49] Affidavit of Rian Morrison dated 27 March 2014, paragraph 22.

evidence and therefore created a situation where he bore the majority of the burden of financially supporting the children.

[93] I am satisfied that it is just and equitable for any benefit that Mr Morrison is able to derive to be reflected in the child support payable to Ms Morrison. The reality appears to be that the total payments made by [name of company 2 deleted] and [name of company 1 deleted] to Mr Morrison in some of the years claimed are less than the advances that he made to them. However, it is just and equitable for these payments to be taken into account when considering the quantum of Mr Morrison's income, and his resulting child support liability as it is clearly income which he has derived, even if it is not considered for tax purposes to be taxable income and subject to tax deductions.

Is the making of a Departure Order otherwise proper?

[94] Once the Court is satisfied that special circumstances exist, there are grounds to grant a departure order, and it would be just and equitable to do so, the Court must then determine whether it is "otherwise proper" to grant a departure order.

[95] The test of what is "otherwise proper" was considered by Blanchard J in *Commissioner of Inland Revenue v Cutbush.*[50] His Honour stated that the Court is required to stand back and look at the overall picture.

[96] It is clear on the facts of this case that Mr Morrison's financial affairs are arranged in such a way whereby much of the money he receives from the companies is protected from tax obligations. However, the fact remains that this is income that he receives. The money is available to him to do as he wishes. That he does not pay tax on the money is an additional benefit to him.

[97] On my assessment, when standing back and looking at the overall picture, I find that it is otherwise proper for a departure order to be made. My reasons for this are essentially the same reasons that satisfy me that it is just and equitable for a

[50] [1994] NZFLR 598, (1994) 12 FRNZ 168.

departure order to be made. The overall justice and equity of the situation must be considered having regard to the objects of the Act.

Retrospectivity

[98] The CIR decision makes orders retrospectively, from 18 June 2010 to 31 March 2015.

[99] The affidavit filed by Mr Morrison's accountant raises a question that Ms Morrison may have previously made an application for departure which was declined by the CIR. He deposes that Mr Morrison was "previously audited by IRD for child support", but a higher assessment of child support was not made.[51]

[100] The evidence filed does not provide any clarity on this issue. There is no reference to this in Mr Morrison's evidence, the CIR decision or any other documents. Ms Morrison did not respond to this in her affidavit evidence.

[101] I concur with the review officer's view that an order should be made retrospectively. I note in any event that Mr Morrison's income for those periods is unlikely to result in a child support liability much more than what the initial formula assessment required him to pay.

Decision

[102] In determining an appeal a Court may confirm, modify or reverse any determination or decision appealed against in whole or in part.[52]

[103] I am satisfied that the review officer erred by relying on incomplete and unsubstantiated evidence to find that special circumstances exist to justify a departure order being made for the period 18 June 2010 to 31 March 2015.

[104] However, I am persuaded, after analysing all of the evidence, that special circumstances do exist to justify a departure under s 105(2)(c)(i), and that it is just

[51] Affidavit of Alan Brown dated 17 December 2014, paragraph 51.
[52] Section 103D(1)(a).

and equitable and otherwise proper that a departure order should be made. Accordingly, I uphold the review officer's decision to grant a departure order on the grounds contained in s 105(2)(c)(i) of the Act.

[105] However, for the foregoing reasons, and having considered the various factors, I depart from the review officer's decision with regards to the quantum of child support payable by Mr Morrison. I am not satisfied that it is appropriate to set the child support income at the level that the review officer did. As noted, there was no evidence available to this Court to support a finding that Mr Morrison's income or earning capacity was $100,000. Therefore, that finding cannot stand and I grant that part of the appeal.

[106] I am satisfied that Mr Morrison's true income includes the payments he receives from [name of company 2 deleted] and [name of company 1 deleted] in addition to his declared taxable income each year. Accordingly, I make a retrospective order for departure from the formula assessment from 18 June 2010 to 31 March 2015. Mr Morrison's income that is to be assessed for child support is to be calculated as his declared taxable income for each year together with the sums he has received from the companies as follows:

(a) 18 June 2010 to 31 March 2011 – $12,684.

(b) 1 April 2011 to 31 March 2012 – $40,336.

(c) 1 April 2012 to 31 March 2013 – $23,143.

(d) 1 April 2013 to 31 March 2014 – $5,598.

Costs

[107] The order for costs recorded in the minute dated 18 December 2015 stands.

D M Partridge
Family Court Judge

Signed 19 April 2016 at 1.30pm