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**IN THE FAMILY COURT
AT WELLINGTON**

**FAM 2013-085-000520
[2016] NZFC 851**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	TRACEY CLARE WILLS Applicant
AND	ROBERT HENRY CATSBURG Respondent

Hearing: 27, 28, 29 January and 19 February 2016

Appearances: W Davis for the Applicant
Respondent Self Represented

Judgment: 7 March 2016

RESERVED JUDGMENT OF JUDGE J A BINNS

[1] Ms Wills and Mr Catsburg had a long relationship; the first two years as a de facto couple and then for over 17 years as a married couple.

[2] There is a dispute about the date of separation. The marriage ended either on 29 November 2010 or 31 January 2011. It is clear that their relationship was very strained in the latter years.

[3] This case is unusual due to the number of disputed facts regarding what would normally be straightforward matters.

[4] For example, Mr Catsburg says that the couple woke up in bed together on Christmas Day 2010. Ms Wills denies this. Mr Catsburg says that he was integrally involved in the purchase of a property at [address 1 deleted] which Ms Wills moved in to on 31 January 2011. Ms Wills says that although Mr Catsburg assisted in viewing [address 1 deleted] and giving her some advice, the purchase was her separate venture. Ms Wills says that on 29 November 2011 the parties had a detailed conversation when they agreed to separate. Mr Catsburg says the conversation never happened.

[5] The agreed relationship property pool is consistent with many couples and comprises the family home at [address 2 deleted], motor vehicles, chattels, bank accounts, shares, a small home loan and credit card debt.

[6] When first reading the pleadings, it was difficult to understand why matters had not been settled soon after separation, particularly when both parties have now re-partnered. Ms Wills has remarried. Mr Catsburg has been living with a partner, Judy, at [address 2 deleted] for approximately the last three years. Prior to that, he lived there by himself after the parties separated.

[7] Although Mr Catsburg has had legal representation in the past, he has not had a lawyer for some time and represented himself at the hearing. He had a McKenzie Friend present, largely for support and to assist in communications with Ms Wills' counsel.

[8] This dispute appears to have grown over time. There were five volumes of pleadings including evidence, reports, valuations, other memoranda and directions.

[9] [Address 2 deleted] requires completion of remedial work before a Code of Compliance can be sought from the local Council. Even then, there is no guarantee that a Code of Compliance will be issued. Although Ms Wills obtained a building report in November 2013, by and large none of the work which was recommended has been completed.

[10] The minimum work required includes:

- (i) Replacing loose roof nails with roofing screws and having the flexible skirt to the ridge capping better sealed to the corrugation.
- (ii) Failures noted with the exterior cladding to be mended. In particular repairing cracks in exterior cladding and then repainting the exterior in a quality elastomeric paint.
- (iii) Lowering the paving and landscaping away from the cladding to achieve recommended ground clearance. Alternatively, installing a recessed channel drain around the perimeter of the exterior.
- (iv) Fitting replacement friction stays on some of the window joinery.
- (v) Addressing a rodent problem.
- (vi) There were also issues raised about installing a kickout flashing, fascia spouting after the cladding is texture coated or sealed as well as identifying a number of cosmetic tasks relating to redecorating the interior, as well as remedial work on a number of items identified in the kitchen and bathrooms.

[11] Mr Catsburg claims compensation in relation to remedial work he has undertaken on [address 2 deleted] since the parties separated.

[12] As the hearing progressed, it became clear that Ms Wills had not been to [address 2 deleted] for some years and was therefore unable to comment, in a practical sense, on Mr Catsburg's claims. With Mr Catsburg's agreement, Ms Wills visited [address 2 deleted] on the second day of the hearing and was then recalled to give evidence about her visit.

[13] As a result of a meeting held after Ms Wills' visit, but before the hearing recommenced, the parties agreed to use the services of Mr Catsburg's McKenzie friend, Mr Rae as a go between to assist them to communicate about the necessary remedial work on [address 2 deleted]. Agreement was reached that quotes will be obtained for painting using an elastomeric paint finish and repair of the flue on the wood burning fire. A process was agreed for the parties to negotiate and agree on quotes. Ms Wills agreed that Mr Catsburg and Mr Rae will undertake some remedial work on [address 2 deleted] (refer paragraph [10](i) and (iii)), which she agreed was well within their capabilities. Ms Wills intended to liaise with Mr Rae about this work. She felt confident that she could agree on her half share of any remuneration for Mr Rae's services.

[14] Subject to the timing for any tradesmen to attend [address 2 deleted], both parties hope that [address 2 deleted] can be placed on the market for sale by the end of March 2016. It was agreed that both parties will meet the remedial costs equally.

[15] The agreed items of relationship property (including assets and liabilities) along with the respective values ascribed to each, are as follows:

Ms Wills' Property

Assets

Motor vehicle	\$9,500.00
Bank accounts (including \$99,385.02 – used towards purchase of [address 1 deleted])	\$234,488.33
ANZ superannuation	\$3,634.99
ANZ shares	\$10,169.28

ANZ bonus	\$21,185.90
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Liability

Credit card debt	\$2,233.18
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Nett value of relationship property in Ms Wills' possession	\$276,745.32
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Mr Catsburg's Property

Assets

Plant and machinery	\$22,966.00
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Contact Energy shares	\$8,951.25
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Wireless Warehouse Ltd shares	\$20.00
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[Address 2 deleted] section	\$120,000.00
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Nett value of relationship property in Mr Catsburg's possession	\$151,937.25
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Issues

[16] The specific issues for me to determine are:

- (i) The date of separation.
- (ii) [Address 1 deleted] - whether the property at [address 1 deleted], Wellington is relationship property.
- (iii) Chattels –
 - (a) Whether Mr Catsburg should receive any monetary compensation on account of any imbalance in the division of chattels.

(b) Reimbursement of \$440 costs incurred by Mr Catsburg to transport chattels to [address 1 deleted].

(c) Reimbursement of \$7,674 incurred by Mr Catsburg to replace chattels which Ms Wills removed from [address 2 deleted].

(iv) Economic disparity – s 15

Mr Catsburg makes a claim under s 15 to address disparity in the parties' respective incomes and living standards due to the parties' roles during the relationship.

(v) Value of Mr Catsburg's shares in Network Resources Ltd.

(vi) Section 13 -

Mr Catsburg seeks a greater than 50% share in relationship property on the grounds that equal sharing is repugnant to justice.

(vii) Mr Catsburg seeks to retain the nett proceeds of his bank accounts totalling \$407,190. He claims the funds are his separate property. This includes determining whether a property at [address 3 deleted], Wellington was relationship property or Mr Catsburg's separate property as he claims.

(viii) Occupation rent – s 18B

Ms Wills claims compensation of \$100,000 for occupation rent in relation to [address 2 deleted].

(ix) Mr Catsburg claims compensation for one half of his costs for work completed by him, or other people on [address 2 deleted]

(a) one half of \$5,164 = \$2,582).

(b) one half of the subdivisional costs of \$64,800 (= \$32,400).

(c) one half time and labour calculated at 300 hours at \$55 per hour totalling \$16,500 (= \$8,250).

(x) Other ancillary claims by Ms Wills include:

(a) That the notice of claim registered by Mr Catsburg over [address 1 deleted] is removed.

(b) That Mr Catsburg indemnify Ms Wills in respect of any claims by future purchasers of [address 2 deleted] relating to any necessary Code of Compliance work including issues relating to water tightness and any remedial work done on [address 2 deleted] since separation.

(c) Reimbursement of \$3,375.25 being half the setting down fee, filing and service fees and costs of bundles, (total \$6,750.50)

[17] The parties agree that there is no longer a debt owed to them by Mr Catsburg's brother.

[18] It is agreed that the interest of \$1,611.13 on Ms Wills' PIE savings account from 20 September 2010 will be apportioned depending on whatever date of separation I determine. In addition, if I find that the date of separation was 31 January 2011, it is agreed (subject to Ms Wills checking her bank statements) that sums of \$8,310 and \$10,000 be added to the relationship property pool, for division between the parties.

Issues (i) and (ii) – Date of Separation and whether [address 1 deleted] is relationship property

[19] In *CLM v KBI FC* Hamilton FAM-2010-019-1877, 8 March 2011, it was determined "*living apart*" does not necessarily mean living under two separate roofs:

[10] It is a basic proposition of law that parties can be living with each other though in separate addresses and they can be in the same address but not living with each other. It is a question of assessing the facts of the situation and the underlying mental attitudes.

[20] Rather, Courts have interpreted “*living apart*” as one of the parties having formed an attitude adverse to cohabitation (*Williams v Williams* (1988) 4 NZFLR 769).

[21] Ms Wills’ evidence is that the parties lived together as partners from August/September 1991, married on 13 March 1993, and separated on 29 November 2010.

[22] Ms Wills says that the date of separation was 29 November 2010 which is when the parties agreed to separate.

[23] Mr Catsburg agreed to that date when he was legally represented. He subsequently claimed that the date of separation was 31 January 2011, which is when Ms Wills left [address 2 deleted] to move to [address 1 deleted].

[24] For the purposes of the Property (Relationships) Act 1976, a marriage ends if the parties cease to live together as husband and wife (s2A (2) (a)). Counsel for Ms Wills submitted that I should take into account the factors set out in s 2D(2) of the Act in determining the date of separation. These factors are:

- (a) The duration of the relationship;
- (b) Nature and extent of common residence;
- (c) Whether or not a sexual relationship exists;
- (d) The degree of financial dependence or interdependence and arrangements for financial support;
- (e) Ownership, use and acquisition of property;
- (f) Degree of mutual commitment to a shared life;
- (g) Care and support of children;
- (h) Performance of household duties;
- (i) Reputation and public aspects of the relationship.

[25] Mr Catsburg strongly believes that Ms Wills nominated 29 November 2010 as the date for separation as a deliberate move to deprive him of a bonus of \$21,185.90 and other income that she received between 1 December 2010 and 31 January 2011.

[26] Even though Ms Wills has now conceded that the bonus is relationship property, Mr Catsburg was emphatic that the parties did not have a verbal discussion the day after his birthday, when they agreed to separate (as alleged by Ms Wills). He says that no such discussion occurred and that he and Ms Wills slept together and woke up in the same bed on Christmas Day 2010. Mr Catsburg emphasised that, but for an argument on Christmas Day, it was intended that Ms Wills accompany him to have Christmas with his family.

[27] After evaluating the evidence, the issue comes down to credibility.

[28] Mr Catsburg's position is that he had no warning of the separation and that Ms Wills was simply moving into [address 1 deleted] because the parties had agreed to buy a property in the city.

[29] With the greatest of respect to Mr Catsburg, this does not make sense in the context of the evidence. I am satisfied that there was a discussion between the parties about their separation on 29 November 2010, as well as subsequent discussions about Ms Wills taking steps to buy a property to move to. While Mr Catsburg was involved in looking at [address 1 deleted] with Ms Wills, I do not accept that this was ever intended by the parties to be a joint purchase.

[30] At the time [address 2 deleted] was purchased, Mr Catsburg arranged to have [address 2 deleted] registered in his sole name to gain the benefit of claiming back GST. Given the state of the parties' marriage in late 2010, which was clearly in difficulty, I cannot accept that if this was a joint purchase, Mr Catsburg would not have been involved in instructing the lawyer, arranging the mortgage advance and insisting that the property was registered in both parties' names. Mr Catsburg did not sign the agreement for sale and purchase, have any involvement with the lawyer acting on the purchase or with the bank regarding the borrowing required for the purchase of [address 1 deleted].

[31] In addition, I found Ms Wills' evidence far more convincing and plausible. My impression of Mr Catsburg is that he has somehow become "*immobilised*" by the separation and disputes about property and remedial work on [address 2 deleted].

He appears to be locked into a mindset which supports his reframing of past events. While Mr Catsburg was emphatic about the parties waking up in bed together on Christmas Day 2010, Ms Wills was equally emphatic that they did not.

[32] Ms Wills' recollection about the detailed discussion the day after Mr Catsburg's birthday and the discussions after that, were overall, more plausible. She said that after the conversation on 29 November 2010 she moved into a separate bedroom. Rather than give a different account, Mr Catsburg completely denied the conversation on 29 November 2010 and all related subsequent discussions. I find there was a mutual agreement to separate on 29 November 2010. I accept that Ms Wills moved out of the couples' bedroom as she states. From that point, there was no mutual commitment to a shared life and plans were made for Ms Wills to find a separate residence.

[33] I find that the date of separation was 29 November 2010.

[34] Mr Catsburg is not entitled to Ms Wills' post-separation earnings after that date, other than the bonus which related to Ms Wills employment during the marriage relationship.

[35] Mr Catsburg claimed that he negotiated the purchase price of [address 1 deleted]. I consider that he has exaggerated his degree of involvement and has denied or misrepresented conversations he had with Ms Wills and others about the purchase. This was clearly a separate enterprise undertaken by Ms Wills to ensure that she had separate accommodation following her physical separation from Mr Catsburg. Ms Wills accepts that the funds of \$99,385.02 used towards the [address 1 deleted] purchase are relationship property.

[36] Ms Wills' evidence was that Mr Catsburg had said she was putting [address 1 deleted] in trust, to cheat him out of his interest in those funds. Ms Wills told him that she would include him as a discretionary beneficiary so that it was clear he had an interest in the relationship funds she used towards the purchase of [address 1 deleted].

[37] That fact that Mr Catsburg is a discretionary beneficiary does not support Mr Catsburg's claim as he believes, rather, it corroborates Ms Wills' evidence about what was discussed.

[38] I find that [address 1 deleted] is not relationship property. It is owned by the [name of trust deleted], a separate legal entity, a legitimate trust and not a sham trust as claimed by Mr Catsburg.

Issue (iii) - Chattels

[39] It is my assessment that the family chattels were divided equally between the parties when Ms Wills moved out of [address 2 deleted]. As a matter of law, Mr Catsburg is not entitled to claim compensation for the cost of chattels purchased to replace the family chattels taken by Ms Wills. This was a consequence of the parties separating. Ms Wills also had to purchase new chattels to replace the family chattels which Mr Catsburg retained.

[40] I find that the family chattels have been divided equally and are not to be brought into account. Each party is to retain the family chattels which were in their possession or control at the date of separation.

[41] It is clear that Mr Catsburg paid the costs of \$440 for removal of chattels taken by Ms Wills from [address 2 deleted] to [address 1 deleted]. He is entitled to reimbursement from Ms Wills as this was her personal, post-separation expense.

Issue (iv) - Economic Disparity

[42] Section 15 of the Property (Relationships) Act allows the Court to adjust the amount of relationship property that each party receives to address any disparity that would likely occur in the respective incomes and living standards due to the parties' roles in the relationship. Section 15 provides:

15 Court may award lump sum payments or order transfer of property

(1) This section applies if, on the division of relationship property, the court is satisfied that, after the marriage, civil union, or de facto relationship

ends, the income and living standards of one spouse or partner (party B) are likely to be significantly higher than the other spouse or partner (party A) because of the effects of the division of functions within the marriage, civil union, or de facto relationship while the parties were living together.

(2) In determining whether or not to make an order under this section, the court may have regard to—

- (a) the likely earning capacity of each spouse or partner:
- (b) the responsibilities of each spouse or partner for the ongoing daily care of any minor or dependent children of the marriage, civil union, or de facto relationship:
- (c) any other relevant circumstances.

(3) If this section applies, the court, if it considers it just, may, for the purpose of compensating party A,—

- (a) order party B to pay party A a sum of money out of party B's relationship property:
- (b) order party B to transfer to party A any other property out of party B's relationship property.

(4) This section overrides sections 11 to 14A.

[43] The operation of the section is summarised in *X v X* [2009] NZCA 399. The elements of s 15 are:

- (a) The jurisdictional foundation that there is a disparity in both living standards and income.

Although there is no evidence about Ms Wills' living standards and income, the factual reality must be that there is a disparity between the parties' incomes which is likely to be significant.

- (b) The purpose of the award is compensatory.
- (c) Income should be considered in the round from all periodic streams of money. The assessment is of potential income, so that actual income may not be the relevant starting point.
- (d) The disparity must be significant as between the parties and caused by the division of functions, but it is presumed that there is mutuality to

the election of roles such that the Court need not inquire into the merits of the decision making. Evidence of reluctance to work or preference of leisure, may be relevant to the discretion rather than causation.

- (e) The exercise is discretionary and not a formulaic one.
- (f) There is no onus of proof in the strict sense, it being for the Court to be satisfied.

[44] It is clear that Mr Catsburg has been living off capital (his bank accounts) since separation. From the nett sum in his bank accounts at separation (agreed at \$407,990) approximately \$143,000 remains. He has therefore spent about \$264,00 since separation. He has earned no income. On his own evidence, he has spent a significant amount of time and money in relation to subdividing his section off [address 2 deleted] and on its development (landscaping, fencing).

[45] The parties made a decision during the marriage for Mr Catsburg to build, develop and landscape [address 2 deleted]. After Ms Wills obtained her law degree, Ms Wills was employed as a lawyer. It is clear that Mr Catsburg worked in paid employment as a registered electrician and financially supported Ms Wills when she was at University, although I note she also worked part time as a registered nurse during her studies. Ultimately, the parties will benefit from Mr Catsburg's work in building and landscaping [address 2 deleted], once the remedial work is attended to and [address 2 deleted] is sold.

[46] The parties have no children. Mr Catsburg is clearly, physically able to work. It is clear from his evidence that he has made a lifestyle decision not to work as a registered electrician. It is also clear that he has been quite capable of working and able to earn, at either a similar level to Ms Wills or at a level which is not significantly below Ms Wills' income.

[47] For s 15 to be available both the income and living standards for one party need to be significantly higher than that of the other spouse. There are also the

words in the section “... *because of the effect of the division of functions within the marriage*”.

[48] In assessing the parties’ respective positions post separation. the following factors have been identified as relevant:

- responsibility for ongoing care of children
- the length of relationship
- the age of the parties
- the potential for the lower earning party to improve their position
- how far away each party is from retirement
- what each party is likely to be able to earn in the future and any steps each party might take to enhance their position. For example if a party has been out of the work force and needs to retrain.

[49] In assessing living standards the following factors have been considered:

- ownership of property
- ability to work
- amount of leisure time
- ability to make lifestyle choices; and
- the amount of separate property owned by each party.

[50] At the heart of this dispute is the fact that Mr Catsburg considers it incredibly unfair to him, that during the parties’ relationship he supported Ms Wills when she was at university gaining a double degree, one in law. It is clear that he considers Ms Wills to be “*sitting pretty*” and benefitting from his past support particularly when he believes she brought nothing but debt into their relationship, whereas he had his own home. He is now 58. On his own evidence he blames Ms Wills for taking away his “*motivation and drive*”. He has not had employment or worked in his trade as an electrician for over 11 years, choosing to build and develop [address 2 deleted] and more recently, the [address 2 deleted] section (referred to under his assets in paragraph [15])) which he is in the process of subdividing from [address 2 deleted].

[51] There is a lack of evidence to support Mr Catsburg’s claim about the parties’ differences in incomes and living standards. However, even if the criteria in s 15(1) could be established, I am doubtful whether any differences in future income and living standards would be significantly higher, or because of any division of functions within the marriage.

[52] Even if grounds were established under s 15(1), I would not exercise my discretion in favour of compensating Mr Catsburg, whatever his views about his entitlement are. This is primarily because, while Mr Catsburg focuses on the five years during the parties' marriage when he financially supported Ms Wills while she studied, it is clear that Ms Wills has financially supported him exclusively for the last 11 years of their marriage. While it is clear that Mr Catsburg has not coped well with the separation, it is clear that he has had the ability to work. That is evident from the significant physical labours he has undertaken on the [address 2 deleted] section and in building and developing [address 2 deleted] during the marriage. He has clearly made a lifestyle choice not to work in paid employment. While he is relatively close to retirement, it is not so close that he is unable to work.

[53] In summary, I am not satisfied that there is a basis for a claim by Mr Catsburg under s 15. Even if there was, I would not exercise my discretion in favour of an award in Mr Catsburg's favour.

Issue (v) - Value of Shares in Network Resources Ltd

[54] The evidence provided by Mr Catsburg from Temperton and Associates Ltd, is that at the date of separation the indicative share value was \$17,000. It is important in this case that the value at separation be adopted. The evidence is clear that the value of the shares at the time of separation was \$17,000. The shares must therefore come into the relationship property pool at that value.

Issue (vi) – Section 13 - Exception to Equal Sharing

[55] Under s 11 of the Act, each party is entitled to an equal share of the family home, family chattels and other relationship property. However I have a discretion under s 13 to divert from equal sharing if there are exceptional circumstances that would make an equal division repugnant to justice. Section 13 provides:

13 Exception to equal sharing

(1) If the court considers that there are extraordinary circumstances that make equal sharing of property or money under section 11 or section 11A or section 11B or section 12 repugnant to justice, the share of each spouse or partner in that property or money is to be determined in accordance with the

contribution of each spouse to the marriage or of each civil union partner to the civil union or of each de facto partner to the de facto relationship.

[56] In this case, the parties' relationship was longstanding. While it is clear that both parties now have a fairly negative view of their relationship history, it is clear that they each contributed to their relationship. Both were in employment at different times. Ms Wills worked and provided the day to day financial support after she qualified as a lawyer and prior to that as a nurse. Mr Catsburg contributed to building and developing their home at [address 2 deleted]. Notwithstanding how Mr Catsburg feels, there are no extraordinary circumstances in this case. As a result there must be equal sharing of all relationship property.

Issue (vii) – Whether the Proceeds of Mr Catsburg's Bank Accounts are his Separate Property – [address 3 deleted] Property

[57] At hearing Mr Catsburg claimed that the sums in his bank accounts separation are his separate property. This is despite the fact that he had earlier said in an affidavit:

So far as the purchase of the [address 3 deleted] building is concerned I accept because our relationship commenced in mid to late 1991 that this property and the proceeds of sale thereof are relationship property. Accordingly I do not wish to reply to paragraphs 10 to 13 inclusive of Tracey's affidavit.

[58] The funds in Mr Catsburg's bank accounts came from the proceeds of sale of a property at [address 3 deleted]. Ms Wills' evidence was that while she and Mr Catsburg were living together at [address 4 deleted], Mr Catsburg met a Mr Colin Hodge. They became aware of a large commercial warehouse at [address 3 deleted] and made plans to purchase and develop it. Ms Wills said that she and Mr Catsburg discussed this proposal and the risks and potential benefits with the venture. She said they discussed the proposition and the implications, especially the financial implications for their relationship as partners. She said that she had concerns about taking on significant borrowing to purchase [address 3 deleted]. However, she said Mr Catsburg had done his homework and explained that the rental on the [address 3 deleted] building would meet the loan repayments. She said that [address 3 deleted] was purchased on 10 September 1992 for \$265,000. Mr Catsburg's evidence in Court was that there was no borrowing by him to enable the purchase. However, his

evidence was variable, at times confused and it contradicted his earlier affidavit evidence. Funds were borrowed by Mr Catsburg in 1992 to enable the [address 3 deleted] purchase which were secured by a registered mortgage over [address 4 deleted].

[59] I accept Ms Wills' evidence that the purchase was a joint decision and a joint venture by herself and Mr Catsburg. Further, that they considered it would be their "superannuation". At the time of the [address 3 deleted] purchase, the parties were living in a de facto relationship. I accept that Mr Catsburg and Ms Wills resumed their relationship in July 1991 and lived together in Mr Catsburg's home at [address 4 deleted], from August / September 1991. Mr Catsburg accepted that certainly by October 1991, he and Ms Wills were living together at [address 4 deleted].

[60] [Address 4 deleted] was sold in January 1996 and [address 3 deleted], which was registered in Mr Catsburg's sole name because he was registered for GST, was purchased on 10 July 1996.

[61] [address 3 deleted] was sold for \$1.7 million on 27 June 2003. The half share was \$850,000. From the proceeds, the parties paid off their mortgage and went on an overseas trip. The balance was saved and is reflected in the funds in Mr Catsburg's bank accounts at separation.

[62] These funds were the proceeds of the joint venture which the parties entered into during their de-facto relationship.

[63] At the time and after the [address 3 deleted] purchase, both parties were making contributions to the de facto relationship. Ms Wills was working as a nurse and Mr Catsburg was clearly involved in work relating to [address 3 deleted].

[64] Mr Catsburg does not recognise Ms Wills' contributions and minimises her involvement. In terms of s 18, both parties managed the household and performed household duties. Mr Catsburg acquired relationship property, including the borrowing secured over (at the time) the family home. Both directly or indirectly paid money to maintain [address 3 deleted] by paying the mortgage. Mr Catsburg

worked in respect of [address 3 deleted]. Both earned income for the purposes of the relationship. The [address 3 deleted] property was acquired by Mr Catsburg during the parties' de facto relationship, (s 8(1)(e)).

[65] While s 8(1)(e) is subject to s 9(2) – (6), 9A and 10, those provisions of the Act are not relevant in this case. Mr Catsburg clearly has a sense of injustice that Ms Wills will share equally in the proceeds of sale of [address 3 deleted], however he did not dispute that the parties were in a de facto relationship when [address 3 deleted] was purchased. While this time period pre-dates amendments to the Property (Relationships) Act in relation to de facto relationships, the Act is a code. Section 4C makes it clear that the Act applies in this case. The parties were in a de facto relationship before 1 February 2002, later married and did not separate until 29 November 2010.

[66] The bank accounts in Mr Catsburg's name with an agreed nett value of \$407,190 which were the balance of proceeds of sale of [address 3 deleted], are relationship property and are subject to equal sharing.

Issue (viii) – Occupation Rent

[67] Ms Wills claims post separation compensation, commonly referred to as "occupation rent" due to the fact that she had to house herself after the parties separated while Mr Catsburg continued to reside at [address 2 deleted] for five years (now 5 years 3 months). Thus, Mr Catsburg has had the benefit of Ms Wills' interest in [address 2 deleted].

[68] Occupation rental is available in situations where one spouse has remained living in a house that is relationship property, post-separation. Such rental is compensation for contributions made after separation under s 18B of the Property (Relationships) Act 1976, which states:

Compensation for contributions made after separation

(1) In this section, *relevant period*, in relation to a marriage, civil union, or de facto relationship, means the period after the marriage, civil union, or de facto relationship has ended (other than by the death of one of the spouses

or partners) but before the date of the hearing of an application under this Act by the court of first instance.

(2) If, during the relevant period, a spouse or partner (*party A*) has done anything that would have been a contribution to the marriage, civil union, or de facto relationship if the marriage, civil union, or de facto relationship had not ended, the court, if it considers it just, may for the purposes of compensating party A—

- (a) order the other spouse or partner (*party B*) to pay party A a sum of money:
- (b) order party B to transfer to party A any property, whether the property is relationship property or separate property.

(3) In proceedings commenced after the death of one of the spouses or partners, this section is modified by section 86.

[69] The reasons for granting occupation rental are set out in *E v G* HC Wellington CIV-2005-485-1895, 18 May 2006:

[21] It could be said however that the fundamental reason for an order for occupational rental was not identified explicitly by the Judge. The wife used the husband's capital, being his half share of the value of the house, for 17 years. This was to her a significant benefit given she avoided a mortgage or house rental. This was of significant disadvantage to the husband. He had capital which he could not use to benefit his own circumstances.

...

[24] The appellant, by providing his half share in the capital in the house to the respondent to use is making a "contribution" in terms of s 18B.

[70] Any compensation awarded under s18B is at the Judge's discretion, and only if the Court considers it "*just*". As stated in *C v C* HC Auckland CIV-2007-419-1313, 26 June 2008:

[28] The mere fact that one party has made such a contribution is not, however, sufficient to allow an award to be made under s18B. As is clear from the passage cited above from *E v G*, the Court must also be satisfied that it is just in all the circumstances that such an order be made. That question will require the Court to take into account a variety of factors, many of which will be case specific.

[71] The Court also has discretion in how compensation is calculated, such as assessing a market rental rate, or awarding interest on the non-occupant's capital in the property (*Griffiths v Griffiths* [2012] NZFLR 327). A corollary of this is where the house is unable to be rented (for example, if it was damaged), then the Court may

be justified in not awarding compensation to a non-occupant (as seen in *Caie v Caie*, FC Auckland FAM-2005-042-527).

[72] The decision to award occupation rent under s 18B of the Property (Relationships) Act is a discretionary one.

[73] “*Contribution*” is defined in s 18 as follows:

18 Contributions of spouses or partners

(1) For the purposes of this Act, a contribution to the marriage, civil union, or de facto relationship means all or any of the following:

- (a) the care of—
 - (i) any child of the marriage, civil union, or de facto relationship:
 - (ii) any aged or infirm relative or dependant of either spouse or partner:
- (b) the management of the household and the performance of household duties:
- (c) the provision of money, including the earning of income, for the purposes of the marriage, civil union, or de facto relationship:
- (d) the acquisition or creation of relationship property, including the payment of money for those purposes:
- (e) the payment of money to maintain or increase the value of—
 - (i) the relationship property or any part of that property; or
 - (ii) the separate property of the other spouse or partner or any part of that property:
- (f) the performance of work or services in respect of—
 - (i) the relationship property or any part of that property; or
 - (ii) the separate property of the other spouse or partner or any part of that property:
- (g) the forgoing of a higher standard of living than would otherwise have been available:

- (h) the giving of assistance or support to the other spouse or partner (whether or not of a material kind), including the giving of assistance or support that—
 - (i) enables the other spouse or partner to acquire qualifications; or
 - (ii) aids the other spouse or partner in the carrying on of his or her occupation or business.

(2) There is no presumption that a contribution of a monetary nature (whether under subsection (1)(c) or otherwise) is of greater value than a contribution of a non-monetary nature.

[74] As noted by Justice Young in the decision *E v G* CIV 2005-485-1895 High Court Wellington 4 May 2006, the appellant, by providing his half share in the capital in the house to the respondent to use is making a contribution in terms of s 18B. Section 18B requires the Judge to then consider whether it is just for compensation to be made for this contribution. There, the Judge concluded the answer was yes. Finally the Judge is to decide how much (here money pursuant to s 18B(2)(a)) needs to be paid for the purpose of proper compensation. Payment of occupation rental has been a way in which a just payment of compensation is assessed for exclusive use of the spouse's capital tied up in the occupied family home. A Judge could, if seen as just and appropriate, instead order interest payable on the capital being used.

[75] I am satisfied that there is an overwhelming case for occupation rent or compensation to be paid by Mr Catsburg to Ms Wills. [Address 2 deleted] is mortgage free. On Mr Catsburg's evidence, in its unsubdivided state, [address 2 deleted] is worth between \$875,000 and \$900,000 plus the agreed cost of the section (\$120,000). Therefore, a value within a range of between \$995,000 and \$1,020,000. On Ms Wills' evidence, the value is between \$955,000 and \$1,200,000. In principle, a value of \$1,000,000 would be reasonable.

[76] However [address 2 deleted] has no Code of Compliance and has been described by Mr Rediken who prepared the builder's report as, sometimes being leaky, the flue lets smoke in and it had a problem with rodents. There is remedial work required before a Code of Compliance can be issued. There is also no guarantee that a Code of Compliance will issue. A failure to have a Code of

Compliance will undoubtedly affect the ultimate sale price. Furthermore, it is clear from the recent photographs that the property is not well presented currently.

[77] Ms Wills seeks compensation in the sum of \$100,000 calculated as follows:

Quinovic Property Management Report 27.6.14

• House rental range \$900 - \$950 per week	
For 51 weeks (say \$925)	\$47,175.00
• Less repairs and maintenance	
(5% of gross rental) (\$2,358.75)	\$ <u>2,358.75</u>
	\$44,816.25
• Less property management fee	
(8.5% \$3,809.38 + GST = \$4,380.78)	\$ <u>4,380.78</u>
	\$40,435.47
x 5 years =	\$202,177.35
• Half share, say	\$100,000.00

[78] From this figure should also be deducted one half of the rates and insurance payments made by Mr Catsburg for five years. In submission Ms Wills accepted a figure of \$20,539.86.

[79] It is clear that emotionally, Mr Catsburg has been unable to face the sale of [address 2 deleted] and has let matters drift. Although there was no formal evidence, my impression is that he has been depressed since the separation and indecisive. There is no doubt that Ms Wills would have found discussing and negotiating matters with Mr Catsburg extremely difficult given his rigid mindset about his unfair position. However since 2013, Ms Wills has not actively sought to find solutions to resolve the parties' inability to agree on even relatively straightforward painting quotes, although I acknowledge that the matters facing Ms Wills would have seemed insurmountable due to Mr Catsburg's unrealistic stance in relation to his claims.

[80] Notwithstanding the valuations, because of the problems with the lack of a Code of Compliance and the need for remedial work, it is difficult to know what [address 2 deleted] will realise on sale. I therefore consider that the focus of my calculation for occupation rent, should be on a rental basis rather than based on interest on a capital sum.

[81] Adopting the lower end of the assessed rental which I consider to be a fairer reflection of the market rent, I calculate the compensation based on a rental basis as follows:

Rental 48 weeks (full occupation unlikely) @ \$900 per week	\$43,200.00
Less repairs and maintenance (5% gross rental)	\$2,160.00
Less property management fee @ 8.5%	<u>\$ 3,672.00</u>
Sub total	\$ 37,368.00
x 5 years	\$186,840.00
Less rates and insurance for 5 years	\$ 20,539.14
Compensation for occupation rent for 5 years (half \$166,300.86)	\$83,150.43

Issue (ix) - Compensation

[82] Mr Catsburg claims reimbursement for half the costs he has incurred in relation to [address 2 deleted] including compensation for his labour (\$2,582, \$32,400; and \$8,250). It is abundantly clear that the costs Mr Catsburg has incurred and his labour, primarily relate to the subdivision. This is a new project, solely for the benefit of Mr Catsburg which has occurred post-separation. Ms Wills has no liability to compensate Mr Catsburg for the costs of subdividing or development of the section.

[83] I do not consider that Mr Catsburg should be compensated for maintaining [address 2 deleted]. It was clear from his own evidence that his time and energy has been primarily expended on the section.

[84] Some painting and maintenance work has been carried out on [address 2 deleted]. Mr Catsburg has painted $\frac{3}{4}$ of the outside for which he had to use scaffolding. He has done some interior repainting in the kitchen, dining and lounge areas. It is difficult to assess the benefits or level of workmanship of this painting.

[85] Since separation, Mr Catsburg has not had to pay any outgoings while living at [address 2 deleted], other than rates and insurance.

[86] In exercising my discretion, I intend to make a small allowance to nominally compensate Mr Catsburg for some of the interior painting, noting that the majority of his claims relate to subdivision of his section. I also note that some of his work may have to be redone. Accordingly, I allow \$1,000.

[87] Summarising my findings in relation to issues (xiii) and (ix), I exercise my discretion and order Mr Catsburg to pay compensation under s 18B(2)(a) of \$82,150.43 to Ms Wills.

Issue (x) – Ancillary claims

(a) Notice of claim

[88] In view of my findings in relation to [address 1 deleted], Mr Catsburg must remove his notice of claim against [address 1 deleted] immediately. The notice is not sustainable.

(b) Indemnity

[89] Counsel for Ms Wills seeks an order that Mr Catsburg indemnify Ms Wills in respect of any future claims by purchasers of [address 2 deleted] in relation to the Code of Compliance work and issues including water tightness, including remedial work already done, or to be done on [address 2 deleted].

[90] [Address 2 deleted] was a joint enterprise. Both parties were living together and involved in the building and development of [address 2 deleted]. I consider that Ms Wills has responsibilities along with Mr Catsburg to ensure that a Code of Compliance is issued and in respect of future purchasers of [address 2 deleted]. The parties may have to sell [address 2 deleted] without a code of compliance. Issues relating to future liability may need to be addressed in any agreement for sale and purchase which the parties may enter into in relation to [address 2 deleted]. What is critical, is that the parties put aside their differences and immediately address the need for remedial work to be undertaken.

[91] Clearly, I am unable to make assessments about the standard of workmanship in relation to the necessary remedial work on [address 2 deleted] as this work has not been completed. Both parties have agreed to meet the costs for the necessary remedial work, equally.

[92] If the parties cannot work together and agree, they may have to pay Mr Rediken to come back to inspect [address 2 deleted], reassess what is required and project manage the necessary repairs and / or remedial work. They need to focus on having their substantial mortgage free asset sold for the best price possible and cooperate with each other, to expedite a sale.

(c) Costs

[93] Ms Willis is entitled to reimbursement of one half setting down fee, filing and service fees and costs of bundles. Mr Catsburg is to pay Ms Wills his ½ share of \$3,375.25.

[94] Calculation of Division of Relationship Property

Putting the [address 2 deleted] property to one side, the parties have the following relationship property to be divided:

Ms Wills' nett property - (see [15])		\$276,745.32
Mr Catsburg's nett property – (see [15])	\$151,937.25	
<u>Plus</u> : Network Resources shares (issue v)	\$ 17,000.00	
Plus: Mr Catsburg's nett Bank accounts (issue vii)	<u>\$407,190.00</u>	
Mr Catsburg's property	\$576,127.25	
Total value of relationship property(excluding [address 2 deleted])		
$\$276,745.32 + \$576,127.25 = \$852,872.57$		
½ share in relationship property	<u>\$426,436.28</u>	<u>\$426,436.28</u>

[95] Calculation of sum due to Ms Wills:

Half share less Ms Wills' nett property – (\$426,436.28 less \$276,745.32) being the sum due to Ms Wills to correct imbalance in division		\$149,690.96
<u>Plus</u> nett compensation payable to Ms Wills (see Issues (viii) and (ix))		\$82,150.43
<u>Plus</u> costs payable to Ms Wills (Issue (x)(c))		\$3,375.25
<u>Less</u> payment due to Mr Catsburg from Ms Wills (see issue (iii))	\$ 440.00	
		<u>\$234,776.64</u>

[96] Summary of Orders:

- (1) The date of separation is 29 November 2010.
- (2) The value of the Network Resources shares is determined as \$17,000.00.

- (3) Mr Catsburg's bank accounts and overdraft at the date of separation, at an agreed nett value of \$407,190.00 are relationship property.
- (4) The property at [address 1 deleted], Wellington is not relationship property. It is the separate property of the [name of trust deleted].
- (5) There is no compensation to be paid to Mr Catsburg for economic disparity.
- (6) There are no extraordinary circumstances that make equal sharing repugnant to justice. All relationship property is subject to equal division between the parties.
- (7) Mr Catsburg is to pay Ms Wills the sum of \$234,776.64 as per paragraph [95]. This may be reduced by half the interest received by Ms Wills' on her PIE savings account for the period 20/9/10 to 29/11/10.
- (8) Interest on any unpaid portion of the sum ordered in [96] (7) is to be paid at the rate of 3% per annum from the date of this judgment until payment is made to Ms Wills.
- (9) The property at [address 2 deleted] (less the subdivided section) is to be placed on the market for sale no later than 30 April 2016. The nett proceeds of sale after deduction of the costs of remedial work, advertising costs on the sale, agent's commission, legal fees on the sale and any refund of GST which may be due to the Inland Revenue Department are to be divided equally and paid to each party. (Subject to payment of any outstanding sum due to Ms Wills under order [96] (7)).

- (10) The notice of claim over [address 1 deleted] is to be removed immediately, at Mr Catsburg's sole cost.
- (11) The section at [address 2 deleted] valued at \$120,000 is to be the separate property of Mr Catsburg who is to be solely liable for all past and / or future subdivisional or development costs relating to the section.
- (12) Leave is reserved to seek further directions or orders in relation to:
 - (a) implementation of these orders
 - (b) sale of [address 2 deleted]
 - (c) any claims for compensation under s 18C, or regarding necessary remedial work on [address 2 deleted] which is completed after 29 January 2016, being the date the hearing concluded.
- (13) Costs are reserved.

J A Binns
Family Court Judge