IN THE SUPREME COURT OF NEW ZEALAND

SC 50/2014
[2015] NZSC 26

	BETWEEN	CHRISTINE HAMILTON THOMPSON Appellant
	AND	MICHAEL LEITH THOMPSON Respondent

Hearing: 4 December 2014

Court: Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ

Counsel: A E Hinton QC and S H Ambler for Appellant
D A T Chambers QC for Respondent

Judgment: 13 March 2015

JUDGMENT OF THE COURT

A **The appeal is allowed and the judgment of the Court of Appeal is set aside.**

B **The $8 million restraint of trade payment received by Mr Thompson is declared to be relationship property.**

C **The case is remitted to the Family Court for the making of such orders as may be necessary to give effect to the declaration.**

D **The appellant is awarded costs of $25,000 together with disbursements to be fixed by the Registrar in respect of the appeal to this Court and costs and disbursements in respect of the proceedings in the Family Court, High Court and Court of Appeal to be fixed by those Courts.**

REASONS

(Given by William Young J)

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A dispute about a restraint of trade

[1] Michael and Christine Thompson have reached substantial agreement on the division of their assets under the Property (Relationships) Act 1976 but one issue remains in dispute. This arises out of the sale in December 2006 of a family health foods/dietary supplements business. Associated with this sale was a payment of $8 million by the purchaser to Mr Thompson in return for a restraint of trade covenant. This appeal turns on how this payment should be classified for the purposes of the Act.

[2] In the Family Court, Judge Rogers concluded that the payment was separate property under s 9(4)(a) of the Act because it was received by Mr Thompson after separation, and that no portion of the payment should be treated as relationship property.[1] Mrs Thompson appealed to the High Court with partial success.[2] Andrews J agreed that the payment was the separate property of Mr Thompson[3] but then exercised her discretion under s 9(4) of the Act to treat part of the restraint of trade payment to Mr Thompson as relationship property.[4] She did not determine how substantial that part was. Rather, she directed that if the parties failed to reach agreement on apportionment, additional evidence would be required at a further hearing.[5]

[3] Mr Thompson's subsequent appeal to the Court of Appeal was successful with that Court concluding that (a) the $8 million payment was, in its entirety, his separate property,[6] and (b) it would not be right to exercise the s 9(4) discretion to treat it (in whole or in part) as relationship property.[7]

Some further background

The setting

[4] Mr and Mrs Thompson married in 1971 and have five adult children. Mr Thompson worked in the health foods/dietary supplements industry. In 1984, they established Nutra-Life Health and Fitness Ltd ("Nutra-Life"). Health Foods International Ltd ("HFI") was formed in 1989. Its function was to hold the shares in Nutra-Life and associated companies. The control and value of the Nutra-Life business thus lay, ultimately, in the HFI shares. These were initially held by Mr and Mrs Thompson but in 1994 they were sold to the ML Thompson Family Trust ("the MLT Trust"), one of a number of trusts established by the Thompsons to hold assets acquired during the marriage. The sale price was $1.11 million, which was the

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1 *CHT v MLT* [2013] NZFC 306, [2014] NZFLR 224 (Judge Rogers) [Family Court judgment] at [37].
2 *Thompson v Thompson* [2013] NZHC 2001 (Andrews J) [High Court judgment].
3 At [82].
4 At [88]–[99].
5 At [99].
6 *Thompson v Thompson* [2014] NZCA 117, [2014] 2 NZLR 741 (Randerson, Stevens and Miller JJ) [Court of Appeal judgment] at [38]–[61].
7 At [81].

assessed fair market value of the HFI shares at the time. Mr Thompson was a trustee of the MLT Trust along with a solicitor (Mr Bruce Dell) and an accountant (Mr Dean Ellwood).

[5] Mr and Mrs Thompson separated in August 2002. From that time until the time of the transactions in issue in this appeal, Mr Thompson continued to work in the business.

[6] In November 2006 Next Capital Health Ltd (Next) indicated a willingness to acquire the Nutra-Life business. Events proceeded quickly. The proposal which emerged was for $72.3 million to be paid for the business (including goodwill) and for $8 million to be paid to Mr Thompson in consideration for him agreeing to a two-year restraint of trade. As well, Mr Thompson was to have a continuing role as a director of Next and he was to invest $12 million in that company for a 19.95 per cent stake in it.

[7] Under the ownership structure, the decision whether or not to accept the offer rested with trustees of the MLT Trust. They obtained advice from two sources: Deloitte and Simmons Corporate Finance. The former reported that the total offered (that is $80.3 million) "compares favourably" to amounts paid in relation to two other heath food/nutrition businesses. $80.3 million represented 8 times the forecast EBITDA[8] of Nutri-Life. The multiples in respect of the two other transactions were 7.6 and 8 respectively. $72.3 million (that is the $80.3 million less $8 million for the restraint of trade) was 7.2 times the forecast EBITDA. Of this figure Deloitte said:[9]

> [W]e believe that the Next Offer of 7.2x forecast EBITDA (if the Restraint of Trade payment is excluded) also compares very favourably to these transactions both standalone (ie, if compared directly to the 7.6x and 8.0x multiples), but more importantly once it is recognised that both these transactions would have had commercial restraints on the vendors and hence these multiples have not been adjusted downward to compare to the 7.2x, which has this element carved out.

Deloitte then commented on the restraint of trade and $8 million payment in this way:

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8 Earnings before interest, taxes, depreciation and amortisation, a measurement used as an indicator of company's financial performance.

9 In a memorandum dated 27 November 2006.

> Given Next's stated position that [Mr Thompson's] ongoing transition role, given his close knowledge of both businesses, is critical in bringing the two companies together and maximising the synergies between them, we believe that the value Next would ascribe to the transaction without [Mr Thompson's] contractual and equity commitment would be materially reduced. In fact, it is possible (and indeed likely) that Next (or any other prospective buyer) would [not be] interested in Nutra-Life at all without these commitments.

Simmons Corporate Finance said:[10]

> In our view, if the Restraint of Trade was not entered into, a purchaser would likely price the Transaction at a lower value as it would consider the acquisition to be more risky due to the increased possibility of competition.

In this second report, the fair market value of the then proposed two-year restraint was assessed at between $6.2 million and $9.6 million.

[8] The trustees[11] agreed to support the sale of the business assets to Next for $72.3 million and the transactions were then entered into as proposed, save that the duration of the restraint of trade restriction was increased from what had been first proposed.

The agreements

[9] The detail of the sale and purchase agreement is largely immaterial for present purposes and there are only three features which we need to mention.

[10] The first is that the purchase price of $72.3 million was apportioned as to $49.4 million for goodwill and intellectual property and $22.9 million for the other assets.

[11] The second is cl 6.1 which is in these terms:

> **6.1 Conditions**
>
> Completion, and the [parties'] obligations at Completion, are conditional upon the following:

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10 In a valuation assessment from December 2006.

11 In fact Messrs Dell and Ellwood, as Mr Thompson did not participate in the relevant decision-making given his personal interest in the transactions.

(a) Michael Leith Thompson (or nominee) agreeing to contribute the lesser of $12,000,000 and the sum necessary to subscribe for 19.95% of the ordinary share capital in Next Capital Health Group Limited at Completion (on an as-converted, fully diluted, basis) in cleared and immediately available funds to subscribe for stapled units in Next Capital Health Group Limited immediately after Completion occurring under this Agreement on the terms agreed between [the MLT Trust] and Next Capital Health Group Limited on the Execution Date (as may be subsequently varied in writing by those persons);

(b) Michael Leith Thompson agreeing to a personal restraint of trade for the longer of five years from Completion and two years from the date on which he ceases to be a director of Next Capital Health Group Limited and its subsidiaries that is substantially similar to the restraint included in clause 11 and agreeing to provide services to allow the smooth transition of the sale of the Business, that are incidental to the Transaction and that will be for a temporary period commencing on Completion on the terms agreed between [the MLT Trust] and the Purchasers on the Execution Date (as may be subsequently varied in writing by those persons);

…

[12] The third is that cl 11.2 contained a "non-compete" obligation which provided:

> … the Vendors and the Covenantors undertake that neither the Vendors, nor the Covenantors (solely in their capacities as trustees of the M. L. Thompson Family Trust), nor any company that is a related company of any of them, will during the Restraint Period and in the Restraint Area:
>
> (a) directly or indirectly carry on or be engaged in, whether solely or with another person and whether for himself or itself or as manager, employee, director or agent for any other person, or in any other capacity whatsoever, any Restricted Activity; or
>
> (b) hold any interest in any company, corporation, partnership, joint venture, association or other business entity which directly or indirectly carries on or is engaged in, whether solely or with another person and whether as manager, employee, director or agent for another person, or in any other capacity whatsoever, any Restricted Activity in New Zealand, Australia.

As will be apparent from the language of the clause, the covenantors were the trustees of the MLT Trust but were bound only in their capacities as trustees of that trust.

[13] The covenant in restraint of trade in issue was provided for in a separate document. The introduction made the following acknowledgements:

> C. MLT [Michael Leith Thompson] has knowledge, skill and experience that, if utilised by a competitor of Next, would be detrimental to the business to be acquired by Next under the Sale and Purchase Agreement.
>
> D. Accordingly, Next has required MLT to enter into a restraint of trade for a period equal to the longer of five years after Completion and two years after he ceases to be a director of Next Capital Health Group Limited and its subsidiaries, and to provide certain incidental temporary, transition, services to Next.
>
> …

[14] Clause 1 provided:

> **1. NON-COMPETE**
>
> **1.1 Definitions**
>
> For the purposes of this Section 1, "Restricted Activity" means any activity or business which is the same as or similar to the businesses of the Vendors as of the Completion Date, including in respect of the research, development, manufacture, production, marketing, distribution or worldwide sale of nutritional products, supplements, herbal and sports nutrition products, and the licensing of certain trade marks.
>
> **1.2 No competition**
>
> Subject to clause 1.5, MLT agrees that he will not, during the Restraint Period (as defined in clause 1.3) and in the Restraint Area (as defined in clause 1.4):
>
> (i) directly or indirectly carry on or be engaged in, whether solely or with another person and whether for himself or as manager, employee, director or agent for any other person, or in any other capacity whatsoever, any Restricted Activity; or
>
> (ii) hold any interest in any company, corporation, partnership, joint venture, association or other business entity which directly or indirectly carries on or is engaged in, whether solely or with another person and whether as manager, employee, director or agent for another person, or in any other capacity whatsoever, any Restricted Activity.

[15] The "Restraint Period" was described in cl 1.3 as the greater of five years from the completion date under the sale agreement, or two years after Mr Thompson

ceases to be a director of Next and its subsidiaries. And, under cl 1.4, the "Restraint Area" comprises New Zealand, Australia, the Middle East, the United Kingdom and Asia.

[16] Clause 1.8 is in these terms:[12]

> 1.8 **Reasonableness of restraint**
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> MLT acknowledges that each of the restrictions imposed by this clause 1:
>
> (i) is reasonable in its extent (as to duration, geographical area and restrained conduct) having regard to the interests of each party to this Agreement; and
>
> *(ii) extends no further in any respect, than is reasonably necessary and is solely for the protection of [Next] in respect of the goodwill of the Business.*

[17] Transition services were provided for in this way:

> 2. **PROVISION OF TRANSITION SERVICES**
>
> 2.1 **Agreement by MLT to provide transition services**
>
> MLT agrees to provide Next with transition services to allow the smooth transition of the sale of the businesses of the Vendors to Next under the Sale and Purchase Agreement (the **"Transition Services"**).
>
> The Transition Services will be incidental to the sale of such businesses and will be for a temporary period commencing on Completion.
>
> 2.2 **Scope of services**
>
> MLT and Next will agree on the scope of the Transition Services from time to time (each acting reasonably).
>
> 2.3 **Compensation**
>
> Next shall not be obliged to pay MLT any salary or other form of remuneration or compensation for the provision of the Transition Services.

[12] Emphasis added.

The significance of the HFI shares being held by the MLT Trust

[18] As noted, the shares in HFI were held by the MLT Trust. So at the date of separation they were not owned by Mr and Mrs Thompson and accordingly they are not relationship property. An important feature of the case, however, is a finding by Judge Rogers in the Family Court that Mr and Mrs Thompson had agreed that the assets of the MLT Trust were to be treated "as in effect relationship property". This finding (or more particularly submissions based on it, which were made by counsel for Mrs Thompson) were contested by counsel for Mr Thompson. We will refer in detail to the evidence as to this issue later in these reasons.

[19] We should also note at this point that:

(a) Mrs Thompson's original application to the Family Court challenged the transfer of the HFI shares to the MLT Trust. The formal basis of the challenge was that the transfer had been for the purpose of defeating her rights under the Act and she relied on s 44 which provides for remedies in the case of such transfers. She also claimed in her affidavit that misrepresentations had been made to her at the time of the transfer. As it turned out, she did not proceed with this challenge.

(b) Mrs Thompson also relied on s 44C of the Act. She claimed that if the effect of the transfer of the HFI shares to the MLT Trust was to adversely affect her position under the Act, she should be compensated under s 44C. This claim was not abandoned but was rejected, albeit for different reasons, by Judge Rogers and Andrews J. We will record their reasons for this when we discuss their judgments.

The relevant provisions of the Act

[20] Relationship property is provided for by s 8 which relevantly provides:

> **8 Relationship property defined**
>
> (1) Relationship property shall consist of—

…

(e) subject to sections 9(2) to (6), 9A, and 10, all property acquired by either spouse or partner after their marriage, civil union, or de facto relationship began; and

…

(l) any income and gains derived from, the proceeds of any disposition of, and any increase in the value of, any property described in paragraphs (a) to (k).

[21] Section 9 provided:[13]

9 Separate property defined

(1) All property of either spouse or partner that is not relationship property is separate property.

…

(4) The following property is separate property, unless the Court considers that it is just in the circumstances to treat the property or any part of the property as relationship property:

(a) all property acquired by either spouse or partner while they are not living together as husband and wife or as civil union partners or as de facto partners:

…

[22] Also material are ss 1M and 1N which provided:[14]

1M Purpose of this Act

The purpose of this Act is—

(a) to reform the law relating to the property of married couples and civil union couples, and of couples who live together in a de facto relationship:

(b) to recognise the equal contribution of husband and wife to the marriage partnership, of civil union partners to the civil union, and of de facto partners to the de facto relationship partnership:

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[13] This wording has been amended by the Marriage (Definition of Marriage) Amendment Act 2013.

[14] This wording has been amended by the Marriage (Definition of Marriage) Amendment Act 2013.

(c) to provide for a just division of the relationship property between the spouses or partners when their relationship ends by separation or death, and in certain other circumstances, while taking account of the interests of any children of the marriage or children of the civil union or children of the de facto relationship.

1N Principles

The following principles are to guide the achievement of the purpose of this Act:

(a) the principle that men and women have equal status, and their equality should be maintained and enhanced:

(b) the principle that all forms of contribution to the marriage partnership, civil union or the de facto relationship partnership, are treated as equal:

(c) the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners arising from their marriage, civil union, or de facto relationship or from the ending of their marriage, civil union, or de facto relationship:

(d) the principle that questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.

[23] As we have noted, Mrs Thompson advanced a claim under s 44C of the Act to which we will make reference later in these reasons. To provide a context for that discussion, it is appropriate to set out the text of s 44C(1) and (2):

44C Compensation for property disposed of to trust

(1) This section applies if the Court is satisfied—

(a) that, since the marriage, the civil union, or the de facto relationship began, either or both spouses or partners have disposed of relationship property to a trust; and

(b) that the disposition has the effect of defeating the claim or rights of one of the spouses or partners; and

(c) that the disposition is not one to which section 44 applies.

(2) If this section applies, the Court may make 1 or more of the following orders for the purpose of compensating the spouse or partner whose claim or rights under this Act have been defeated by the disposition:

(a) an order requiring one spouse or partner to pay to the other spouse or partner a sum of money, whether out of relationship property or separate property:

(b) an order requiring 1 spouse or partner to transfer to the other spouse or partner any property, whether the property is relationship property or separate property:

(c) an order requiring the trustees of the trust to pay to 1 spouse or partner the whole or part of the income of the trust, either for a specified period or until a specified amount has been paid.

The authorities as to the treatment of goodwill and restraints of trade under the Act

[24] There are four considered decisions which are material.

[25] The first, and most important, of the decisions is that of the Court of Appeal in *Z v Z*,[15] to which, for reasons which will become apparent, we refer to generally as *Z v Z (No 1)*. This case concerned the valuation of the goodwill in the legal practice operated by the husband. Two assessments of its realisable value had been made:

(a) the first, of $80,000, assumed that on sale the husband would give an appropriate covenant in restraint of trade; and

(b) the second, of $25,000, assumed a sale without a restraint of trade.

[26] The Family Court Judge held that the practice should be valued on the assumption that a restraint of trade would be provided. An appeal to the High Court by the husband was successful. Holland J saw no reason to impose upon the husband a notional obligation to give up his ability to work in the area and practice chosen by him so as to increase the value of the business for the purposes of division under the Act. The wife then appealed to the Court of Appeal, which preferred the approach taken by the Family Court Judge.

[27] Richardson J observed:[16]

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15 *Z v Z* [1989] 3 NZLR 413 (CA).
16 At 415.

> In the hypothetical market the willing but not anxious seller must be taken to seek the maximum price obtainable from what is available for sale. Protection against the hypothetical seller's competition through a covenant in restraint of trade is an element of goodwill increasing the price a hypothetical buyer would otherwise be prepared to pay. As an element in the goodwill the covenant attaches to the business and cannot properly be characterised as a purely personal attribute.
>
> In my view it is no answer to say that the husband in this case, or more accurately the hypothetical seller, was entitled to practise post separation. The test is the value of the property on a hypothetical sale, and on that hypothetical sale the husband may be included in the classes of hypothetical sellers and hypothetical buyers. The valuation does not vary depending on whether the actual disposal of the practice is to the husband or a third party. If he is to continue the practice in his own right he should not have it at a concessionary price. Furthermore, a properly limited covenant in restraint of trade does not stop a practitioner from practising his or her profession in the future. It does not affect his or her future personal capacity in that sense. What it does is to protect the goodwill attaching to the practice by preventing the practitioner from taking business away through retaining access to the existing and potential clientele notwithstanding the sale of the business.

[28] Casey J's approach was similar:[17]

> The answer to the question formulated in this way is clear. A vendor in such circumstances … would want to maximise the price he might obtain by selling his practice with a covenant, and it is unlikely that any purchaser would be found to take it without one. … The valuation of matrimonial assets is to be made solely by reference to a hypothetical market price, and personal considerations which might affect the proprietor's sale decisions must generally be irrelevant. Otherwise, for example, a spouse wanting to retain occupation of a house could insist on a valuation being made on that basis only.

[29] Bisson J was of the same opinion:[18]

> It is accepted that the wife is entitled to an equal share with her husband in matrimonial property, including the law practice carried on by the husband. A just division requires its true market value to be assessed on a hypothetical sale to the best advantage in the interests of both partners in the matrimonial partnership. This necessarily contemplates such a sale being accompanied by a covenant in restraint of competition by the husband so as to achieve the real market value of the practice as a going concern. Without such a covenant the wife would receive less than her fair share in the value of an asset in which she is entitled to share equally by virtue of her contribution to the matrimonial partnership and the husband would receive more than his half share in the asset being vested in him.

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17 At 417.
18 At 418.

[30] The second case, although unrelated to *Z v Z (No 1)*, is reported as *Z v Z (No 2)*.[19] This case is of contextual significance only. It concerned the valuation of the husband's partnership interest in an international accounting firm. For present purposes, what is primarily significant is that the Court concluded that the earning capacity of the husband (including its enhancement during the course of the marriage) was not "property" for the purposes of division under the Act.[20]

[31] The third case, *Briggs v Briggs*, dealt with the value of the shares in a financial services company operated by the husband.[21] The argument for the husband in the Family Court was that much of the apparent value of the business was "personal goodwill" and should not form part of the valuation assessment. The Family Court Judge noted that argument and then the contention for the wife which was recorded as being:[22]

> That the argument to assert a distinction between personal goodwill and company goodwill was artificial given the restraint of trade condition.

As Thorp J indicated on appeal, that was plainly a reference to *Z v Z (No 1)*.[23] The Family Court Judge went on to say:[24]

> I am not persuaded that the value of the company should be discounted by the distinction that Mr Millar would have me draw on behalf of the respondent between company goodwill and personal goodwill.

Thorp J went on to say:[25]

> It was one of Mr Hansen's principal arguments on this aspect of the case that the granting of a restraint of trade covenant does not exclude the possible significance of personal goodwill.

And then:[26]

> In my view, that argument has merit. The situation will depend, of course, on the degree to which the particular business relies upon the personal

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19 *Z v Z (No 2)* [1997] 2 NZLR 258 (CA).
20 At 281–282.
21 *Briggs v Briggs* FC Auckland FP1210/94, 10 August 1995 [*Briggs v Briggs* (FC)]; and *Briggs v Briggs* [1996] 14 FRNZ 404 (HC) [*Briggs v Briggs* (HC)].
22 *Briggs v Briggs* (FC), above n 21, at 17.
23 *Briggs v Briggs* (HC), above n 21, at 411.
24 *Briggs v Briggs* (FC), above n 21, at 19.
25 *Briggs v Briggs* (HC), above n 21, at 411.
26 At 411.

> qualifications of the vendor. But plainly the giving of a restraint of trade covenant would not ensure the retention by a purchaser of the whole of the clientele of a business in which trade is closely attached to the personal qualifications of the vendor of the business. The effect of *Z v Z* would be very slight in the case, for example, of a public relations business 'depending for its viability almost exclusively on the ability and business connection' of its proprietor … .

[32] Thorp J also adopted the following passage from the May 1995 edition of *Canada Valuation Service*:[27]

> Personal goodwill is related to the business skills of an entrepreneur, personal contacts built up by individuals in a certain environment, reputations of those engaged in business or in professional undertakings, and so on. Personal goodwill may give rise to so-called 'excess profits' (or generate a rate of return in excess of that required on net tangible assets), but not be of a transferable nature or possess a market value. To have commercial value, goodwill must be transferable.

[33] In *Briggs v Briggs*, the Family Court Judge had arrived at a value of the shares in the company of $1.4 million by applying a capitalisation rate to his assessment of the future maintainable profit of the company, based on the assumption that Mr Briggs was going to continue to run the business.[28] The decision of Thorp J was to discount that arithmetically derived valuation figure of $1.4 million to $1.1 million to allow for what he called "the personal goodwill factor".[29] That decision is not inconsistent with *Z v Z (No 1)*. Rather, the Judge's approach was based on his view that, without Mr Briggs but assuming a restraint of trade, the company's future maintainable profit was less than that assessed by the Family Court. In other words, the company with Mr Briggs on board was likely to be appreciably more profitable than it would be without him. Because the higher level of profitability (that is, with Mr Briggs still involved) could not be transferred to a purchaser, the value of the business should be assessed on the basis of the lower level of future maintainable profit than that adopted in the Family Court.

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27 At 412.

28 That this is so is apparent from the discussion in *Briggs v Briggs* (FC), above n 21, at 407–408 as to how the level of future maintainable profit had been calculated and at 412 as to the assumptions of the valuer relied on by the Family Court Judge – that the husband would continue working for the company but be paid a salary.

29 *Briggs v Briggs* (HC), above n 21, at 414. He did so by applying a simple discount to the figure arrived at in the Family Court rather than by re-assessing future maintainable profit on the assumption that Mr Briggs was no longer with the company but had provided a covenant in restraint of trade.

[34] The fourth case, *Brownie v Brownie*, involved the classification of benefits received by the husband which were, in part, consideration for a covenant in restraint of trade.[30] The parties had sold their shares in a company which manufactured mattresses and both gave covenants in restraint of trade. Under the agreement for sale and purchase, the husband was to be paid a retainer of $60,000 per annum for five years.[31] The continuing obligations of the husband to the company were far from onerous and the Family Court Judge concluded that one sixth only of the retainer (that is, $10,000 per annum) should be regarded as remuneration for services, with the balance, $50,000 per annum or $250,000 in total, being referable to the covenant in restraint of trade.[32] He decided the case by reference to s 9(4) of the Act, concluding that it was just to treat the $250,000 which he saw as referable to the restraint of trade as matrimonial property.[33]

[35] The Judge's conclusion was upheld on appeal by Chisholm and William Young JJ. They saw the dispute as controlled by *Z v Z (No 1)* and went on to say:[34]

> That is not to say that the case is an entirely easy one. The restraint accepted by Mr Brownie is more extensive than that contemplated in the 1989 decision. It has the effect of precluding Mr Brownie from engaging in his chosen field of commerce (manufacture and sale of mattresses) anywhere in New Zealand for 8 years. Whatever the practical effect on Mr Brownie in this case (in terms of his age and economic aspirations), in some instances such a covenant will have a major economic effect on the covenator by way of sterilisation of future earning capacity and thus diminution of what would otherwise be separate property. There is, however, a fundamental policy issue involved and the problem for Mr Brownie is that, as we see it, this issue of policy has already been resolved against him.
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> As already noted, the judge relied in his decision on s9 (4) of the Matrimonial Property Act. We think that he could have relied, in the alternative, on s8 (f) which declares as matrimonial property:
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> > "… the proceeds of any disposition of … any property described in paragraphs (a) – (ee) of this section."
>
> The shares in the company were plainly caught by one or more of s8 (c) and (e). Applying *Z v Z* [1989] 3 NZLR 413 broadly, it appears to us that the retainer, to the extent to which it is not in the nature of genuine remuneration for services to be rendered, can be treated as representing the proceeds of a

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30 *Brownie v Brownie* (1997) 16 FRNZ 54 (FC) [*Brownie v Brownie* (FC)]; and *Brownie v Brownie* HC Christchurch AP217/97, 4 April 1998 [*Brownie v Brownie* (HC)].

31 *Brownie v Brownie* (FC), above n 30, at 56.

32 At 61.

33 At 65.

34 *Brownie v Brownie* (HC), above n 30, at 12–13.

> disposition of those shares. That the disposition did not occur until after separation must be immaterial to the application of s8 (f). However, if we are wrong as to this and the case does fall to be considered under s 9 (4), we can see no substantial basis for any challenge to the exercise by Judge Strettell of his discretion under that sub-section. In substance the retainer must be treated as representing a realisation of what is matrimonial property, namely the shares in the company.

The authorities as to the application of s 9(4)

[36] The authorities as to the approach to be taken in respect of s 9(4) are sparse. What was referred to as the discretion under s 9(4) was described in *Morris v Morris* as having been "conferred in the broadest terms" and as "not expressly fettered in any way".[35] The comment was also made that, "[it] must … be exercised having regard to the purposes of the legislation."[36] To the same general effect is the judgment in *Brown v Brown*.[37] In both instances, the property in question had been acquired after separation from the proceeds of sale of relationship property.

[37] *M v B* was a rather more complex case.[38] Somewhat unwisely as it turned out, that litigation had proceeded on the basis of a separation date value of the husband's interest in a legal practice and in issue was the appropriate treatment of that portion of his post-separation income which represented super-profits derived from his partnership interest. William Young P observed:

> [178] If, at the date of separation, the husband had owned shares in a publicly listed company, the dividend income which he subsequently derived on those shares prior to a final relationship property wash-up with the wife would plainly be relationship property. A similar approach would apply in a case where the husband owned shares in a private company ... although there would have to be an allowance for remuneration for the husband's own exertions. The same approach would be appropriate in this case if the husband's firm had been structured as a limited liability company (assuming that such a structure was legally permissible). In such a case, it would be appropriate for the Court to apportion the income he earned from the separation date down to the hearing date between return on capital (which would be relationship property) and salary (which would be separate property). For this purpose, it would not matter whether the income derived by the husband was denominated as dividends or salary. Given this context, it seems to me to be obvious that the proportion of the husband's income between dates of separation and hearing which represent super-profit are able to be classified as relationship property.

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35 *Morris v Morris* (1981) 5 MPC 99 (CA) at 100.
36 At 100.
37 *Brown v Brown* [1982] 1 NZLR 513 (CA).
38 *M v B* [2006] 3 NZLR 660 (CA).

> [179] I consider a broad-brush assessment is necessary to produce an outcome which is "just" for the purposes of ss 1N(c) and 9(4) and conforms to the principle expressed in s 1N(c) that a "just division" requires the Court to have "regard to the economic advantages" to the husband "arising from" the marriage and its ending. What is "just" for the wife must not, of course, be at the expense of what is unjust for the husband. But I see no injustice to the husband in taking a plain words approach to the language of the statute and in particular to ss 8(1)(l) and 9(4).

[38] Section 9(4) has been resorted to successfully in relation to property received by one party after separation which was closely referable to pre-separation activities. Thus a bonus payment received by one party shortly after separation which is substantially referable to that party's pre-separation employment performance is a candidate for reclassification under s 9(4).[39]

The approaches taken in the Courts below

Family Court judgment

[39] Judge Rogers concluded that the parties had agreed that the assets of the MLT Trust were to be treated as if relationship property but the shares in HFI were in fact trust and not relationship property.[40] She thought it was arguable that the restraint of trade payment was part and parcel of the proceeds of the business, but if that were so, the payment would be trust property and not relationship property. The Judge then turned to the argument that the payment constituted relationship property under s 8(e) of the Act as property acquired by Mr Thompson after the marriage began. The argument was rejected. The $8 million, once received by Mr Thompson, became his separate property under s 9(4)(a) because it was received after separation.[41]

[40] The Judge was of the view that if the shares in HFI had remained in the ownership of Mr and Mrs Thompson, the $8 million payment would have been relationship property. She was not, however, prepared to exercise the s 9(4)(a) discretion in favour of Mrs Thompson. In dealing with this aspect of the case, she said:[42]

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39 See for instance *DJE v TJAE* [2012] NZFC 830 at [24]–[37].
40 Family Court judgment, above n 1, at [34].
41 At [37].
42 At [40]–[41].

> But I come back to my point that while it may be arguable that the restraint of trade is a by product of the Nutra-Life business in the sense that were it not for the existence of the business Mr Thompson would not have been in a position to offer a restraint of trade or receive a sizeable payment for the same, Nutra-Life is not relationship property and has not been since 1994.
>
> One of the fundamental purposes of the Act as set out in s 1N(c) is to provide for a just division of relationship property between the spouses when their relationship ends. The principles set out in s 1N of the Act particularly s 1N(c) also emphasise the importance of a just division of relationship property. Having regard to the emphasis on relationship property and the clear factual distinctions between this case and the authorities referred to me by the applicant, I am simply not persuaded that the applicant has established the interests of justice require me to treat the separate property restraint payment as relationship property.

[41] Judge Rogers addressed Mrs Thompson's claim under s 44C of the Act. Because she accepted that if the HFI shares had remained relationship property, the $8 million payment would have been relationship property, she concluded that the transfer of the shares to HFI had defeated what would otherwise have been Mrs Thompson's claim in respect of the $8 million.[43] This finding meant that it was open to her to make orders under s 44C of the Act compensating Mrs Thompson. She, however, declined to do so:[44]

> [I]n this case I think justice does not require such compensation. In coming to that view I note that the relationship property was disposed of to the trust some 12 years prior to the making of the restraint payment. The disposition was for market value consideration and was agreed to by both spouses. The provision of the restraint of trade which imposes restrictions and obligations upon Mr Thompson affects him solely but has benefited both him and Mrs Thompson so as to achieve a sale price almost double the original estimated value of Nutra-Life.

High Court judgment

[42] Andrews J considered that the restraint of trade was given to protect the value of the Nutra-Life business.[45] To the extent that this was so, the $8 million payment was referable to "business goodwill".[46] But, as well, the covenant restrained Mr Thompson from using his personal skills and attributes.[47] She then went on to say:

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43 At [46].
44 At [48].
45 High Court judgment, above n 2, at [64].
46 At [64].
47 At [65].

> [66] While both counsel in their submissions took an "all or nothing" approach (the RoT payment was entirely for business goodwill or entirely for personal goodwill) it is clear from *Briggs v Briggs* that both can co-exist in a business. In that case, while recognising the significance of Mr Briggs to the success of the company, Thorp J did not accept the submission on behalf of Mr Briggs as to the value to be put on the personal goodwill element. The expert opinion evidence for Mr Briggs was that, in the absence of Mr Briggs' personal skills, the company should be valued at $569,000, a discount of approximately $830,000 from the valuation given in the expert evidence for Mrs Briggs (indicating that Mr Briggs' personal goodwill should be valued at $830,000). However, his Honour allowed a discount of $300,000. This indicates that a considerable portion of Mr Briggs' personal attributes attached to the business goodwill of the company, rather than to his personal goodwill.
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> [67] When deciding whether the payment to Mr Thompson for the RoT covenant was relationship property, it is necessary to consider the effect of the covenant in protecting the business goodwill of the HFI/Nutra-Life business. At the same time, as noted in *Briggs v Briggs*, only business goodwill attaches to the business so as to become potentially, relationship property. In this case, it was not disputed that the value of the HFI/Nutra-Life business was increased by virtue of the RoT covenant. The question is, did it increase the value of the business to $72.3 million (the purchase price) or to $80.3 million (the purchase price plus the payment to Mr Thompson).
>
> [68] Put another way, I am required to decide whether the payment to Mr Thompson for the RoT covenant diverted value from the "total" purchase price of $80.3 million by paying to him the amount by which the value of the HFI/Nutra-Life business was increased by virtue of the covenant, or whether the purchase price of $72.3 million took into account the value of the RoT covenant.

And having reviewed the evidence she concluded:

> [81] In this appeal, it is for the appellant to establish that the Judge was wrong to conclude that the payment to Mr Thompson was not relationship property under s 8(1)(e) and/or (1) of the Act. To do this, the appellant must establish that the payment was for business goodwill, not for personal goodwill. It is a matter of re-considering the evidence presented to the Family Court, and bearing in mind the authorities referred to, in particular the strong policy statements made in *Z v Z (No 1)*, and noted in *Brownie v Brownie* (HC).
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> [82] Having considered those matters, and applying a balance of probabilities standard, I am not satisfied that the appellant has established that the payment to Mr Thompson for the RoT covenant was for business goodwill. Rather, on the same standard, I accept that payment for the business goodwill of the HFI/Nutra-Life business was incorporated in the purchase price of $72.3 million. The payment to Mr Thompson was for his personal goodwill and is not, therefore, relationship property under s 8(1)(e) or (1).

[43] On the application of s 9(4), she found partially in favour of Mrs Thompson. While she recognised that Mr Thompson's personal skills and abilities were not property under s 2 of the Act, she considered that the division of roles in the relationship substantially helped Mr Thompson to develop his skills to such an extent that Next was prepared to pay Mr Thompson $8 million for his covenant.[48] She expressed the view that what was required before otherwise separate property should be held to be relationship property was "some connection between the existence of the separate property and the earlier marriage partnership".[49] She then said:

> [93] In my view such a connection between the existence of the [restraint of trade] payment and the efforts during the marriage exists in this case. By Mrs Thompson looking after the children and the home, this enabled Mr Thompson to develop his skills and abilities to an extent he could not otherwise have done. He was able to build up HFI/Nutra-Life into an extremely valuable company due to this division in roles. It is for these developed skills and abilities, or for them not to be used, as well as Mr Thompson's demonstrated performance, that Mr Thompson was paid the $8 million RoT payment. These skills, abilities, and performance are causally linked to the efforts in the relationship. Therefore there is some connection between the RoT payment and the relationship.
>
> [94] The mere presence of a connection between the RoT payment and the relationship does not, however, automatically mean that it is just to treat the whole $8 million RoT payment as relationship property under s 9(4). In addition to determining whether there is a connection between the RoT payment and the relationship, it is also necessary to determine the character of the RoT payment. …
>
> [95] If the RoT payment was purely forward looking … then I find that it would not be just to treat the payments as relationship property under s 9(4). However, if some of the RoT payment was not solely to compensate future disruption to Mr Thompson's employment, and instead was based on rewarding Mr Thompson for his performance as director of HFI/Nutra-Life during the relationship, then in relation to this portion of the payment, I find that it would be just to treat this portion as relationship property. This is the same distinction as was made in *Brownie v Brownie* (HC), between compensation for future earnings or services rendered, and the payment in respect of skills and attributes acquired during the marriage.

On this basis she concluded:

> [98] I find that it would be unjust not to treat the portion attributable to Mr Thompson's business performance during the relationship as relationship property. This is in line with the obiter comment in *Brownie v Brownie* (HC), where the High Court considered that even if the portion of the retainer attributable to the restraint of trade was separate property, it would be just to

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48 At [92].

49 At [92], quoting *Cossey v Bach* [1993] 3 NZLR 612 (HC) at 625 per Fisher J.

> treat it as relationship property. I find that it is just to treat this portion of the RoT payment attributable to the past performance — the portion not acting as compensation for future disruption — as relationship property.

As to the apportionment exercise, she considered that further evidence would be required and directed that there be a further hearing should the parties not be able to reach agreement.[50]

[44] She rejected Mrs Thompson's s 44C claim because, and in disagreement with Judge Rogers on this point, she was of the view (albeit that she did not express it in these precise terms) that the $8 million payment would have been separate property even if the HFI shares had remained relationship property.[51]

The approach of the Court of Appeal

[45] The Court of Appeal considered that the starting point was that from 1994 all of the shares in HFI were owned by the trustees of the MLT Trust and that there had been no challenge to the value at which those shares were transferred to the trustees.[52] It was accordingly for the trustees to deal with those assets as they saw fit. The purchase price for the business included all associated business goodwill but necessarily not the personal attributes of Mr Thompson, in particular his personal knowledge and experience.[53] It rejected an argument as to "principal's goodwill" advanced by Mrs Hinton QC to which we will shortly refer.[54] And it concluded:

> [58] In summary, we are satisfied that the sum of $72.3 million for the business represented a sum considerably higher than would have been paid for the business, had the covenant not been given by Mr Thompson. The $8 million that Mr Thompson was paid was for the restriction on the use of his personal attributes or personal goodwill in the future and the other obligations he assumed. There was no element of "principal's goodwill" to be taken into account. Nor was there any element of business goodwill involved in the payment to Mr Thompson under the covenant. This is not a situation where value that ought properly to have attached to the business was wrongly transferred to Mr Thompson.
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> [59] It follows that the payment of $8 million was Mr Thompson's own separate property. Accordingly there is no basis for a conclusion that part of the business goodwill could be said to reside in Mr Thompson and so be

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50 High Court judgment, above n 2, at [99].
51 At [107]–[108].
52 Court of Appeal judgment, above n 6, at [38].
53 At [44].
54 At [45].

> available as an item of relationship property under [s 8(1)(e)] of the Act. Further, there was no reason to conclude that the sale of the business goodwill through payment for the restraint of trade covenant represented the proceeds of any disposition of relationship property under [s 8(1)(e)] of the Act.

[46] On the s 9(4) argument, the Court was of the view that the starting point for the ascertainment of property resulting from a marriage partnership is the date of separation with property acquired after that date usually being considered the separate property of the acquiring spouse.[55] The Court also, however, recognised that exceptions were required:[56]

> The Act recognises the need to make provision for the period, whether months or years, which normally elapses between separation and final determination of property rights. Section 9(4) is one statutory means of doing so. The legislative policy behind this provision (and the other provisions which complement it) is to ensure each party gets their rightful share in the net assets of the relationship, together with the benefit or burden of any post-separation changes in the form of, or value inherent in, the assets themselves. Additionally, and conversely, the legislative policy is to ensure that post-separation assets, liabilities and changes in value that have been due to the post-separation conduct of, or changes in, fortunes of one party alone, are not shared.

[47] The Court observed:

> [73] The key factor in deciding whether to attribute to one or both parties, the benefit or burden of changes in assets and liabilities after separation is the presence or absence of a causal link with the relationship, and the assets and liabilities that link has produced. This is consistent with the objectives listed in the long title: to recognise the equal contribution of the husband, wife or partners to the relationship; to provide for a just division of property when the relationship ends; and to give the parties a clean break from the relationship.

[48] The Court concluded this aspect of its judgment in this way:

> [76] We agree with the observation of Andrews J that Mr Thompson's skills and abilities are not property under s 2 of the Act. We also agree with the Judge's comment that "[b]y Mrs Thompson looking after the children and a home, this enabled Mr Thompson to develop his skills and abilities to an extent he could not otherwise have done".
>
> [77] Where we part company with the Judge is as to the role the payment for the restrictive covenant had in relation to those skills. We do not consider that this payment was compensation for the time in which these skills were

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55 At [71].
56 At [72].

developed. Rather, we consider the skills, abilities and performance of Mr Thompson are what would have been used by him, following a clean break, to have enabled him in the future to earn a living and embark on new and different entrepreneurial ventures. He was precluded from doing that for a time, at least in the health food/dietary supplements industry, by the restraint required by Next. That was a forward-looking restriction.

[78] We consider a better analogy to be that Mr Thompson's skill set (developed as it no doubt was while he was managing director of NFI/Nutra-Life) was, at the end of the marriage, the equivalent of a spouse's enhanced earning capacity. This Court in *Z v Z (No 2)* has firmly rejected the notion that enhanced earning capacity is matrimonial property. One of the reasons for that conclusion was that the fruits of this earning capacity are often reflected in the tangible wealth accumulated during the marriage. Mrs Thompson was able to, and did, share in that wealth, at least for present purposes through the sale of HFI/Nutra-Life. But when enhanced earning capacity is not reflected in tangible assets, it counts for nothing. Neither in our view can it be called in aid to justify the exercise of the discretion in s 9(4) to treat it as relationship property.

[79] The second limb of the reasoning of Andrews J was to examine the character of the payment. On this aspect the Judge found the payment was "not purely forward-looking". Rather, it was in part rewarding Mr Thompson for his performance as a director of HFI/Nutra-Life.

[80] We disagree. We have fully analysed the character of the payment when addressing the first issue. We do not repeat that analysis set out at [51]–[58] above. But we do repeat that, in addition to those considerations, no part of the sale agreement with Next or the restraint covenant was challenged as a sham. It was a negotiated arm's length transaction in which a critical presence was the trustees as owners of the HFI/Nutra-Life shares. The genuineness of the transaction is not in question.

[81] At the end of the day, the $8 million was what a hard-nosed commercial buyer was prepared to pay to Mr Thompson in order to protect the goodwill of $49.4 million paid for the business and to acquire Mr Thompson's services for a period in the future. It follows that we see no principled basis upon which it would be just to treat any part of the $8 million separate property as relationship property. The particular circumstances of these transactions do not support such a conclusion.

[49] Mrs Thompson did not rely on s 44C in the Court of Appeal.

Did the restraint of trade payment represent the monetisation of a property right which was personal to Mr Thompson but derived during the relationship and thus relationship property?

[50] Mrs Hinton's primary argument on appeal was that Mr Thompson's practical ability to insist on a payment for the restraint of trade covenant was itself a "right or interest which is capable of being monetised, without personal effort". And she claimed that such a right is "property" for the purposes of the Act. On her approach,

the "property interest" which she attributed to Mr Thompson came into existence after marriage but before separation and for this reason was relationship property. It was this property interest to which she referred in her submissions in the Court of Appeal as "principal's goodwill".

[51] She drew some support from the approach taken in the Simmons Corporate Finance report which stated, "The Restraint of Trade is a finite life identifiable intangible asset". More significantly, she also suggested that that *Z v Z (No 1)* and *Brownie* were decided on this basis.

[52] This is quite an elusive argument. The asserted property interest proved to be not entirely easy to capture in words. Assuming it existed, it could only be "sold" in conjunction with the goodwill of the Nutra-Life business. If described in positive terms (along the lines of the ability to make a good living in the industry or, more plausibly, a subset of that ability referable to personal contacts, knowledge of the way the business operated, etc) it rather resembles the earning capacity in issue in *Z v Z (No 2)* which the Court of Appeal considered not to be property for the purposes of the Act. If put in negative terms, along the lines of an ability to diminish the realisable value of the Nutra-Life business unless bought off, it does not resemble an orthodox property interest. We note in passing that Mrs Hinton did not ask us to reconsider the approach taken by the Court of Appeal in *Z v Z (No 2)*.

[53] Contrary to Mrs Hinton's submissions, *Z v Z (No 1)* was not decided on the basis of the idea that the practical ability to obtain payment in consideration for a restraint of trade covenant associated with the sale of business was an independent property right. Rather, it proceeded expressly on the basis that business assets should be valued on the assumption that such restraint of trade covenants as are necessary to ensure the practical transfer of the goodwill of the business will be available on sale. As both *Z v Z (No 1)* and *Brownie* make clear, what is being valued is the business and not the ability of one or other of the parties to extract a payment for a necessary restraint of trade.

[54] In this respect, *Z v Z (No 1)* is entirely consistent with the approach that the courts have taken to the validity of restraints of trade associated with the sale of a

business. It is trite that such a restraint is valid only to the extent to which it protects the goodwill of the business to be acquired by the purchaser. A restraint which goes beyond what is necessary to protect that goodwill is void.[57] The underlying idea is that the purchaser pays full price for the acquisition including its goodwill which will not be effectively transferred if the vendor/covenantor is free to trade in competition. Unless such restraints are valid, someone who builds up a business will be unable to sell it to best advantage. But on the other hand, restraints which go beyond that purpose are just restrictions of competition, are contrary to public policy and will not be enforced.[58] The view that a person in the position of Mr Thompson has something to sell which is independent of the goodwill of the business being sold is flatly inconsistent with the relevant legal principles.

[55] To the extent to which the restraint accepted by Mr Thompson went beyond what was necessary to protect the goodwill which was being sold, it was invalid. It will, however, be recalled that the agreement which provided for the restraint recorded an acknowledgment by Mr Thompson that the restraint:

> extends no further in any respect, than is reasonably necessary and is solely for the protection of [Next] in respect of the goodwill of the Business.

[56] For these reasons we are of the view that Mrs Hinton's principal's goodwill argument is not sound.

Our approach

Overview

[57] For reasons which we are about to explain, we are of the view that:

(a) the parties proceeded on the basis that the trust assets were to be treated as "in effect relationship property";

(b) if the HFI shares had remained relationship property, the $8 million payment would have been relationship property; and

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57 See, for instance, *Brown v Brown* [1980] 1 NZLR 484 (CA).

58 By way of illustration only see John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (4th ed, LexisNexis NZ Ltd, Wellington, 2012) at [13.9.3] and [13.9.9].

(c) it is appropriate under s 9(4) to classify the $8 million payment as relationship property.

The parties proceeded on the basis that the trust assets were to be treated "as in effect relationship property"

[58] It will be recalled that in her originating application in the Family Court (which was filed in July 2006), Mrs Thompson sought orders in relation to the MLT Trust under:

(a) s 44 of the Act, setting aside the transfer of the HFI shares to the MLT Trust on the basis that the transfer was effected in order to defeat her rights under the Act; and

(b) s 44C of the Act, awarding her compensation on the basis that the transfer of the shares had the effect of defeating her rights.

As well, Mrs Thompson had some more general concerns. She was dissatisfied with what had been said to her at the time the HFI shares were transferred to the MLT Trust and her relationship with the trustees was generally fraught as she saw them as being in Mr Thompson's camp.

[59] There are numerous references in the affidavits to it being common ground and agreed that all assets, whether owned in trust, or otherwise, would be shared equally. This was the position of the trustees from as early as September 2002[59] and they have maintained this stance ever since. What they seem to have envisaged was that the assets of the trust would be distributed equally between, on the one hand, Mr Thompson and associated trusts and, on the other, Mrs Thompson and associated trusts.

[60] Mrs Thompson, however, was not entirely satisfied by this as indicated by the application which she filed in July 2006. In her affidavit in support of her application Mrs Thompson said that she would seek a declaration that "the

[59] In a letter of 25 September 2002, one of the trustees told Mrs Thompson's counsel, "You can rest assured that there will be total transparency and, as [Mrs Thompson] knows, there will not be and never has been any wish to deny her her full 50% entitlement of all assets and liabilities."

establishment of the [MLT] Trust is void for the misrepresentations made to me" unless Mr Thompson accepted that, "all assets are to be treated, in effect, as if they are relationship property". Although this was somewhat awkwardly phrased, we take it, in the context of the affidavit as a whole, to at least include her s 44 challenge to the transfer of the HFI shares to the MLT Trust.

[61] There was a meeting on 9 February 2007 between the trustees and Mrs Thompson along with their legal representatives. It is clear that at the meeting it was agreed that the trust assets would be distributed equally. As to this, we note that:

(a) A memorandum filed by Mr Thompson's former counsel in the Family Court on 1 June 2007 referred to of Mrs Thompson's affidavit and then went on:

> [The trustees] have, in effect, treated the assets of [the MLT Trust] as relationship property by undertaking an equal distribution of its net assets, although certainly not for the reason advanced by the applicant.

Although the memorandum does not explicitly say so, it is at least implicit in its content that Mr Thompson's position was that Mrs Thompson's demand had been met. This is because the memorandum proceeds on the assumption that the s 44 claim was no longer live. And indeed, that claim was not persisted with.

(b) A memorandum on behalf of the trustees of the same date recorded that the trustees had reached agreement with Mrs Thompson on 9 February 2007 and that as a result they believed that there were no outstanding issues between them and Mrs Thompson.

(c) The affidavit of Mr Ellwood, one of the trustees, of 23 December 2011 makes clear what was in any event implicit in the memoranda to which we have just referred that the agreement reached on 9 February 2011 was that "the trust property would be divided 50/50 for [Mr and Mrs Thompson's] benefit".

[62] The parties addressed the agreement as to the trust assets in the affidavits which were filed in late 2011 in anticipation of the hearing in the Family Court. In his affidavit of 22 December 2011, Mr Thompson referred to Mrs Thompson's assertion, based on the 1 June 2007 memorandum, that it had been agreed that the assets of the MLT Trust would be treated in effect as relationship property. He said that there had never been an agreement that the $8 million would be divided equally and he then went on:

> Nor do I accept that there was an agreement that the assets of the trust would be treated for all purposes as relationship property. Rather, I was intending to refer to the agreement in principle that the trust property would be divided equally for the benefit of Christine and I through trusts and direct equal distributions to both of us. … In the sense that the trustees' intentions result in equal treatment of Christine and I it is analogous to the equal sharing of relationship property after a long marriage. It was this aspect I was meaning when I referred to the assets as being treated as relationship property. Effectively the trustees are requiring that half of the total funds are resettled into new trusts which protect the children's interests. In this respect they are not being treated as relationship property. I do not seek to resile from that intention. However, this is different from the agreement claimed to exist by Christine.

[63] In his affidavit of the 22 December 2011, Mr Dell, another trustee, said:

> Christine claims that the trustees have agreed to treat the Trust assets as "in effect" relationship property. I deny that I ever agreed to treat trust assets as relationship property. I am very clear that they are trust assets, and as such must exercise my powers as trustee over those assets in accordance with my duties as trustee.
>
> Having said that, I have always been cognisant that both Mike and Christine wanted the Trust assets to be split 50:50, and I have no problem with that, subject to proper consideration being given to the position of all beneficiaries.

To the same general effect was the affidavit of Dean Ellwood to which we have already referred.

[64] In her judgment, Judge Rogers found that Mr and Mrs Thompson had agreed that the assets of the MLT Trust were to be treated as "in effect relationship property".[60] In other words, she accepted Mrs Thompson's characterisation of the agreement. Andrews J did not expressly disagree with this finding but when she explained the position she did so by reference to the position of the trustees which

[60] Family Court judgment, above n 1, at [8].

was that there was an agreement that trust assets would be divided equally.[61] The point was not addressed by the Court of Appeal.

[65] Mrs Thompson's argument on this aspect of the case is substantially based on (a) her stated position that she would be challenging the transfer of the HFI shares to the trust unless Mr Thompson accepted that "all assets are to be treated, in effect, as if they are relationship property"; (b) the memorandum of his counsel to the Court which we read as amounting to such acceptance; and (c) her abandonment of the challenge to the transfer of the HFI shares to the trust. The responses in the affidavits from Messrs Thompson, Dell and Ellwood seem to us to address contentions other than those actually advanced by Mrs Thompson. Obviously there was no agreement to the effect that the assets of the trust were relationship property. They remained trust assets and under the administration of the trustees. Nor was it suggested by Mrs Thompson that there was an agreement that the $8 million payment be regarded as relationship property. There was, however, no specific challenge to the assertion that it was agreed that the trust assets would be treated in effect as relationship property. And while it might be possible to use slightly different language to describe the agreement, those words, which both parties used in their affidavits, seem to us to encompass its substance.

[66] For these reasons we accept the finding of Judge Rogers on this issue. We will therefore approach the case on the basis that there was an agreement as to the trust assets as asserted by Mrs Thompson. The practical effect of that agreement was that the transfer of the HFI shares to the trust would not be allowed to operate to the prejudice of Mrs Thompson.

If the HFI shares had remained relationship property, the $8 million payment would have been relationship property

[67] We were not invited to, and do not propose to, revisit the approach taken in *Z v Z (No 1)*. If the value of the Nutra-Life business had fallen to be determined before sale but on the basis that it was known that a buyer would be prepared to pay $80 million providing Mr Thompson provided a covenant in restraint of trade to protect the business, the application of *Z v Z (No 1)* would have been very

[61] High Court judgment, above n 2, at [13].

straightforward. The business would have been valued at $80 million. And if Mr Thompson had said that he was not prepared to give a covenant in restraint of trade, the Court would have treated him as buying (or having sold) the business for $80 million and would thus have required him to account to Mrs Thompson for $40 million.

[68] In respectful disagreement with the Court of Appeal, we think it immaterial that in this case there was an actual sale and a payment had been made which was referable to the covenant in restraint of trade. Let us assume for a moment that just before the Court of Appeal hearing in *Z v Z (No 1)* the husband had sold his practice for $60,000 and had demanded and been paid another $20,000 for a covenant in restraint of trade insisted on by the purchaser. Had that been the situation, the Court of Appeal would obviously have treated the $20,000 payment as relationship property. As explained in *Brownie* (where just such a payment was held to be relationship property), what is now s 8(1)(l) would be directly applicable.

[69] Counsel for Mr Thompson challenged this line of reasoning on the basis that in this case the agreement for sale and purchase defined and attributed a value to the goodwill of the business and that the additional payment to Mr Thompson was associated with what she said was, on the basis of *Briggs*, his "personal goodwill". As is apparent from our discussion of *Briggs*, the expression "personal goodwill" was used in relation to that portion of the company's profits which were not transferable even assuming a full restraint of trade. More generally, given the broad language of the statute and the public policy issues raised by restraint of trade agreements, the issue is not controlled by either the structure of the agreements or how various payments were labelled, a point which is illustrated by *Brownie*.

[70] The validity of a restraint of trade given on the sale of a business depends upon the restraint being reasonably necessary for the protection of the goodwill acquired by the purchaser. As we have pointed out, the agreement in which Mr Thompson's restraint appears contains an acknowledgement by him that the restraint:

> extends no further in any respect, than is reasonably necessary and is solely for the protection of [Next] in respect of the goodwill of the Business.

The restraint envisaged by the Court of Appeal in *Z v Z (No 1)*, while in one sense appreciably less extensive than that accepted by Mr Thompson, was, in principle at least, identical in that it too was confined in purpose to the protection of the purchaser in relation to the goodwill which was acquired. We thus disagree with the Court of Appeal as to the significance of the scope of the restraint accepted by Mr Thompson.

[71] The purpose of the restraint which Mr Thompson accepted was solely to protect the goodwill of the business acquired by the purchaser. That this is so is apparent from the acknowledgement to which we have just referred and the legal principles as to the validity of covenants in restraint of trade which we have discussed. Prior to *Z v Z (No 1)* there was scope for argument whether the giving of such a covenant should be assumed when valuing a business. The conflicting considerations are referred to in both *Z v Z (No 1)* and *Brownie* and the policy decision was made that the giving of such a covenant should be assumed. The necessary corollary of that policy decision is that a payment which is referable to the giving of such a covenant is relationship property. This follows as a matter of logic from *Z v Z (No 1)*, as was recognised in *Brownie*.

[72] In *Brownie*, a portion of the consideration paid in respect of the restraint of trade covenant was held to be in the nature of remuneration for post-separation services which the husband provided and thus not relationship property. Before us, counsel for Mr Thompson noted that Mr Thompson is not being remunerated for his role in the new company. We take this to be a reference to the requirement for Mr Thompson to provide "transition services to allow the smooth transition of the sale of the businesses". These services were described as being "incidental" to the sale.[62] When discussing *Brownie*, she suggested that on this basis it was "indisputable that at least part of the payment should be classified as Mr Thompson's separate property" as being effectively remuneration in advance. This submission was never developed in argument and the proposed treatment would not sit easily with the contractual terms under which (a) the $8 million payment was expressly linked to the goodwill of the business and (b) it was agreed that Mr Thompson not be remunerated for his transition services. As well, no attempt was made in the

[62] The contractual provisions are set out above at [17].

evidence to quantify what, if any, proportion of the $8 million payment should be regarded as remuneration. In those circumstances, it would be inappropriate to make an allowance of the kind suggested.

It is appropriate under s 9(4) to classify the $8 million payment as relationship property

[73] As we have indicated, we see the agreement that the assets of the MLT Trust were to be treated in effect as relationship property as meaning that Mrs Thompson should not be prejudiced by reason of the transfer.

[74] It will be appreciated that the s 9(4) issue we are dealing with is very similar to the s 44C argument which Judge Rogers addressed. She was of the view that if the HFI shares had remained relationship property, the $8 million payment would have been relationship property. She therefore concluded that the transfer of the shares to the MLT Trust had the effect of defeating Mrs Thompson's claim and, as she recognised, this meant that she had a discretion under s 44C which she could have exercised by awarding Mrs Thompson compensation. We have set out above at [41] her reasons for not doing so: that the transfer of the shares occurred 12 years before the sale and was at market value and agreed to by Mrs Thompson; and the fact that the restrictions affected Mr Thompson personally but had been to the benefit of both in obtaining a substantial price for the business (and one which was much higher than the value assessed by Mrs Thompson's accountant).

[75] We regard her approach to s 44C as too austere. In conjunction with the way in which the transaction with Next was structured, the effect of the transfer of the HFI shares to the MLT Trust was to reduce by $4 million what would otherwise have been Mrs Thompson's share of the payout associated with the sale of the Nutra-Life business. This was a consequence which Mrs Thompson could never have anticipated at the time of the transfer. In light of this, the date and details of the transfer are of, at best, limited materiality. Treating the impact of the restraint of trade on Mr Thompson as being of controlling significance is inconsistent with the policy decision made in *Z v Z (No 1)*. On this basis, it would have been well open to Judge Rogers to have awarded Mrs Thompson compensation even in the absence of the agreement that the assets of the MLT Trust were to be treated as in effect

relationship property. As it turned out, Judge Rogers did not refer to that agreement when dealing with the s 44C claim (or in relation to s 9(4) for that matter). On her judgment, the assets of the MLT Trust were not treated as being in effect relationship property; if they had been, the $8 million payment would have been held to be relationship property. There is no explanation in her judgment of why she did not give effect to the agreement.

[76] We can see no reason why we should not give effect to the agreement and the only way we can see of doing so is to exercise the s 9(4) discretion in favour of Mrs Thompson and to declare that the $8 million payment is relationship property.

Disposition

[77] Accordingly:

(a) The appeal is allowed and the judgment of the Court of Appeal is set aside.

(b) The $8 million restraint of trade payment received by Mr Thompson is declared to be relationship property.

(c) The case is remitted to the Family Court for the making of such orders as may be necessary to give effect to the declaration.

(d) The appellant is awarded costs of $25,000 together with disbursements to be fixed by the Registrar in respect of the appeal to this Court and costs and disbursements in respect of the proceedings in the Family Court, High Court and Court of Appeal to be fixed by those Courts.

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