What is the real impact of *Clayton v Clayton* – (Claymark Trust)

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There are two Supreme Court decisions in *Clayton v Clayton*. The first, which was considered in the last publication of *The Property Lawyer* (Vol 16-4) relates to the Vaughan Road Property Trust and a claim under the Property (Relationships) Act 1976.[1] The second decision, which is considered in this article, relates to the Claymark Trust and a claim under s182 of the Family Proceedings Act 1980 ("Act").[2]

Background Facts

Mr and Mrs Clayton commenced a de facto relationship in 1986 and married in 1989. They separated in 2006 after 17 years of marriage. The marriage was then dissolved in 2009. The Claytons have two daughters to their relationship.

Shortly before their marriage Mr and Mrs Clayton signed a s21 Agreement, contracting out of the provisions of the then Matrimonial Property Act 1976.

When Mr and Mrs Clayton met, Mr Clayton owned a small timber supply business, which owned two blocks of land in Vaughn Road, Rotorua. Mr Clayton also owned a block of land near Rotorua on which the parties later built their family home. At the date of separation Mr Clayton's business (the Claymark business) which was owned and controlled by companies and trusts (including the Claymark Trust) in New Zealand and the United States was a multi-million dollar enterprise.

The Claymark Trust

The Claymark Trust ("Trust") was a discretionary trust that was settled in 1994. Mr Clayton was the settlor and, as settlor, held the power to appoint and remove trustees.

The beneficiaries of the Trust were defined by their relationship with Mr Clayton and included Mr Clayton as settlor, his wife, any former wife, his widow, and his children or grandchildren and their spouses.

The assets of the Trust included properties leased to Claymark Limited and shares in Kaimai Developments Limited (which owned an avocado orchard and a vehicle).

The Trust was settled primarily for business purposes, to keep "*assets out of the circle of bank guarantees*".[3]

Claims

Mrs Clayton argued the Trust was a nuptial settlement in terms of s182 of the Act, because the Trust was set up during the marriage. Mrs Clayton also argued she had an expectation that she would benefit under the Trust and that she would no longer benefit from the Trust following the dissolution her marriage.

Mr Clayton and the Trustees argued the Trust was not a nuptial settlement as the Trust was settled for business purposes. It was also argued Mrs Clayton had no reasonable expectation she would benefit from the Trust as the s21 Agreement recorded Mrs Clayton would not receive anything from Mr Clayton's business interests.

Section 182 of the Act

Section 182 of the Act provides:

(1) *On, or within a reasonable time after, the making of an order under Part 4 of this Act or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963, a Family Court may inquire into the existence of any agreement between the parties to the marriage or civil union for the payment of maintenance or relating to the property of the parties or either of them, or any ante-nuptial or post-nuptial settlement made on the parties, and may make such orders with reference to the application of the whole or any part of any property settled or the variation of the terms of any such agreement or settlement, either for the benefit of the children of the marriage or civil union or of the parties to the marriage or civil union or either of them, as the court thinks fit.*

(2) *Where an order under Part 4 of this Act, or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963, has been made and the parties have entered into an agreement for the payment of maintenance, a Family Court may at any time, on the application of either party or of the personal representative of the party liable for the payments under the agreement, cancel or vary the agreement or remit any arrears due under the agreement.*

(3) *In the exercise of its discretion under this section, the court may take into account the circumstances of the parties and any change in those circumstances since the date of the agreement or settlement and any other matters which the court considers relevant.*

> "The Supreme Court held there is a two stage process under s182 of the Act. The first stage is to determine whether a Trust is a "nuptial settlement". The second is to assess whether and in what manner the Court's discretion under section 182 should be exercised.

(4) *The court may exercise the powers conferred by this section, notwithstanding that there are no children of the marriage or civil union.*

(5) *An order made under this section*

may from time to time be reviewed by the court on the application of either party to the marriage or civil union or of either party's personal representative.

(6) *Notwithstanding subsections (1) to (5), the court shall not exercise its powers under this section so as to defeat or vary any agreement, entered into under Part 6 of the Property (Relationships) Act 1976, between the parties to the marriage or civil union unless it is of the opinion that the interests of any child of the marriage or civil union so require.*[4]

The Decisions of the Lower Courts

Family Court Decision

Judge Munro held the Trust was set up for business purposes and as such it was not intended Mrs Clayton would benefit from the Trust. Judge Munro also suggested the Pre-Nuptial Agreement (which was found to be seriously unjust and was set aside) created the awareness for both parties that Mrs Clayton would not share in any business interests of Mr Clayton.[5]

High Court Decision

Justice Rodney Hansen upheld Judge Munro's decision. In his view, the Trust was undoubtedly formed for business purposes, and in light of the Pre-Nuptial Agreement which existed at the beginning of the marriage, Justice Hansen found there was no basis for finding that the dissolution of the marriage affected Mrs Clayton's expectations when the Trust was formed.[6]

Court of Appeal Decision

The Court of Appeal also upheld the decisions of the lower Courts' finding the Trust was not a nuptial settlement. For that reason, no order could be made under section 182 of the Act.

The Court of Appeal relied on the decision in *Ward v Ward* and held:[7]

"The focus under s182 is on the expectations of the parties, especially the applicant at the time of settlement... These expectations are to be ascertained from all relevant evidence and not just the settlement itself

The Trust was established for business purposes and not as a means by which Mrs Clayton would acquire an interest or expectation in business assets. The problem for Mrs Clayton is not the characterisation of the trust, but that there are concurrent findings of fact that Mr and Mrs Clayton did not have the necessary expectations

That the dissolution of marriage did not affect Mrs Clayton's expectations

There was no good basis to depart from the findings in the courts below".

Issues Before the Supreme Court

There were two questions before the Supreme Court on appeal:

Was the Court of Appeal correct in its interpretation and application of section 182 of the FPA?; and

Was the Court of Appeal correct to make an order under section 44 of the PRA?

The Supreme Court held there is a two stage process under s182 of the Act. The first stage is to determine whether a Trust is a "*nuptial settlement*". The second is to assess whether and in what manner the

Court's discretion under section 182 should be exercised.[8]

What is a Nuptial Settlement?

The Supreme Court agreed with the suggestion in *Ward v Ward* that "*there should be a generous approach to interpretation of the term settlement*".[9] But the Court also noted there was no need in that case to assess whether there was a nuptial settlement as that was agreed between the parties.

The Court suggested, to come within the term settlement as used in s182, any arrangement must be one that "*makes some form of continuing provision for both or either of the parties to the marriage in their capacity as spouses with or without provision for their children*".[10]

> "When considering if there is a nuptial settlement, the primary consideration will be the construction of the settlement documentation, which should be construed in accordance with the ordinary principles of interpretation.

It added the requirement that the settlement be for both or either of the parties "*in their capacity as spouses*" means only that there must be a "*connection*" or "*proximity*" between the settlement and the marriage[11]..."*where a Trust is set up during the currency of the marriage, with either or both of the parties to the marriage as beneficiaries, there will almost inevitably be that connection*".[12]

The Supreme Court also made it clear that discretionary family trusts can be settlements for the purposes of s182. Further, property acquired by a Trust after a Trust has been settled can also come within the definition of settlement.

There may be an exception when a third party forms a Trust and there are substantial other beneficiaries apart from the parties to the marriage and their children. However, it may also be that, as long as there is a relevant connection to the marriage and one or both of the parties are beneficiaries, the trust will be a nuptial settlement.[13].

It was further suggested, a settlement on a future spouse who is a possible beneficiary, who was not in contemplation at settlement may not be a nuptial settlement. However, it may be that each disposition of property to the trust after marriage could constitute a post nuptial settlement.[14]

When considering if there is a nuptial settlement, the primary consideration will be the construction of the settlement documentation, which should be construed in accordance with the ordinary principles of interpretation.[15]

The Supreme Court later suggested that, irrespective of the origin of the assets in a Trust, all assets vested in a Trust form part of a nuptial settlement (if the settlement is found to be a nuptial settlement). This is because the Trust itself is the settlement. Any Trust property, whenever it is acquired, must be part of the settlement.[16]

Was the Claymark Trust a nuptial settlement?

The Supreme Court found the Trust was a nuptial settlement for the following reasons:

- the Trust was a conventional discretionary Family Trust;
- there was a clear connection between the marriage and the settlement as the Trust was settled during the parties' marriage and just after the birth of the couple's second child;
- Mr Clayton was a beneficiary of the Trust and other primary beneficiaries were identified by their relationship to Mr Clayton; and
- it was clear from the class of beneficiaries, Mr Clayton's immediate family were intended to be the core beneficiaries under the Trust.[17]

The Supreme Court held while the Trust was set up for business purposes, to take assets out of the circle of bank guarantees, the purposes was surely to protect the assets for the family. The Supreme Court also held the nature of the assets settled on the Trust was not relevant to whether there was a nuptial settlement under s182.[18]

The Court's discretion under section 182

The Court suggested both ante and post nuptial settlements are premised on the continuing marriage (or civil union) and that one of the purposes of s182 was to "*prevent one party from benefiting unfairly from the settlement at the expense of the other party in changed circumstances*".[19]

The Supreme Court then considered the Supreme Court's suggestion in *Ward v Ward*:[20]

"*The proper way to address whether an order should be made under s182, is to identify all relevant expectations which the parties and in particular the applicant party, had of the settlement at the time it was made. These expectations should then be compared with the expectations the parties, and in particular the applicant party, have of the settlement in the changed circumstances brought about by the dissolution. The Court's task is to assess how best in the changed circumstances the reasonable expectations the applicant had of the settlement should now be fulfilled. If the dissolution has not affected the implementation of the Applicants previous expectations, there will be no call for an order*".

The Supreme Court noted the above proposition was not a "*general test applicable in all cases*"[21] and that the views expressed were specific to *Ward v Ward* and if applied generally, would not be consistent with the intentions of s182.

The Supreme Court went onto suggest there can be "*no formulaic or presumptive approach*".[22] The correct test is not the difference between the dissolved position and the position at the time of the settlement. Rather, it is from the parties' current position following dissolution of the marriage, as opposed to the position they would be in had the marriage continued.[23]

The Supreme Court suggested in considering the "expectations" of the parties (which is not determinative)[24] an objective test is to be applied.[25]

The Supreme Court noted the expectations of an applicant are particularly difficult to assess in the context of a discretionary Family Trust. This is because there is no guarantee a discretionary beneficiary will benefit from the Trust.

The Supreme Court went on to suggest in the case of a discretionary Family Trust, the situation must be looked at from the perspective of the family unit of which the applicant is part.[26] The Court is to look at how the applicant would have continued to benefit directly or indirectly from the Trust had the marriage continued. The examples include distributions personally to the parties or their children or simply that the assets are being protected for later generations.

"Ultimately it is the task of the Judge to take into account all relevant circumstances in each particular case. Primarily they are to consider the expectations that a nuptial settlement would provide on the continuation of a marriage or civil union, as compared with the position the applicant finds themselves in after the relationship has broken down".[27]

The Supreme Court also noted there is no pre-requisite of need under s182. It went onto suggest the character and origin of the assets vested in the Trust may or may not be significant to any exercise of discretion.

Should the Courts have exercised their discretion under s182?

The Supreme Court held Mrs Clayton had benefited from the Trust throughout the marriage by virtue of the use of a vehicle. Mrs Clayton expected that benefit to continue. Since the parties separated (and the dissolution of their marriage) Mrs Clayton no longer received the benefit from the Trust and had been charged for her use of that vehicle. On that basis the Supreme Court also concluded it appeared unlikely the trustees would exercise their discretion to make a distribution in Mrs Clayton's favour in the future (even though she was still a discretionary beneficiary) given she was a former wife.

There was also evidence to show there were distributions made to Mr and Mrs Clayton's children. There was also evidence following separation that Mr Clayton was receiving monies to the value of $500 per week into bank accounts for his children.

The Supreme Court found there was *"a clear basis for exercising the discretion. The next question is how this should be exercised in the circumstances of this case".*[28]

The Court was not required to make any orders under s182, as the parties settled the proceedings prior to the Judgement being released. The Court noted however, if it was to determine the matter, it would have settled the Trust on two equal Trusts as in *Ward v Ward,* as the parties children did not require specific consideration given their age.

Effect of sections 44 and 44C of the Property (Relationships) Act 1976

It was submitted on behalf of the trustees that sections 44 and 44C of the PRA should be seen as Parliament's chosen remedies for dealing with relationship breakdowns. It was argued s182 of the FPA should not be interpreted in a manner which encroaches on those provisions.

> "Trusts are subject to a greater level of scrutiny and more claims now than ever before. As such, the importance of a forward-thinking approach to Trust formation and distributions to beneficiaries of Trusts, cannot be overemphasised.

The Supreme Court rejected that argument and the implication ss44 and 44C partially implicitly repealed section 182 of the Act. The Supreme Court noted there was a *"clear and conscious retention of section 182 when s44C of the PRA was introduced..."*

The Court also noted the premise which underpins each Act, and the remedies available under the two Acts are distinct. (An example being there is no entitlement or presumption of equal sharing or any other fractional division of property under s182.)

Did the Courts below apply the proper approach?

The Supreme Court distinguished the case of *Ward v Ward* and the present case on the basis there was no need to consider whether or not there was a nuptial settlement in *Ward v Ward.*

The Supreme Court held the Court of Appeal (and the lower courts) *"wrongly conflated the two stages of the process under s182".* On that basis, the Supreme Court found there had been an error of law or principle.

It was also noted the Family Court had wrongly taken into account the s21 Agreement, despite the s21 Agreement being set aside (this was upheld in the High Court and was not challenged in the Court of Appeal). The Supreme Court also commented: *"An agreement that relates primarily to what would occur on the breakdown of a marriage cannot be relevant to the consideration of the position assuming a continuing marriage".*

In deciding against exercising its discretion under s182, the Court found the lower Courts placed too much emphasis on the parties' subjective expectations and also their expectations at the date of the settlement and following dissolution, as opposed to during the marriage and following dissolution.

Summary

Nuptial Settlement

In any application under s182 of the Act, the first inquiry will be whether there is a settlement. A generous approach should be applied to that question.

For the Court to find a nuptial settlement, there must be some form of continuing provision for both or either of the parties to the marriage, in their capacity as spouses, with or without provision for their children. Put simply, there must be a connection or proximity between the settlement and the marriage or civil union.

The purpose of the settlement (i.e. in this case a Trust) and the origin of the assets are not determinative of whether the settlement is a nuptial settlement or not.

Discretion

The second inquiry under s182 is whether the Court should exercise its discretion.

The Court has unfettered discretion under s182 and is able to take into account

any relevant circumstances, as it sees fit, in light of the purposes of s182. One of the purposes is to prevent one party from benefiting unfairly from the settlement at the expense of the other party in changed circumstances.

The claimant's subjective expectations are not the focus, rather it is an objective concept. The claimant's expectations at settlement may or may not be relevant. The correct test is to identify what the claimant expected to receive had the marriage continued (which will be based on what they received during the marriage, which may simply include consideration by the trustees as an eligible beneficiary), and what they will receive following dissolution of the marriage.

The Implications of *Clayton v Clayton* on s182 Applications

As suggested in the writer's previous article in relation to Trusts in the context of PRA claims, the area of Trusts is a constantly evolving area of law.

The Courts continue to show a willingness to exercise what discretion they have to achieve a just outcome for parties involved in various forms of "family" litigation.

Trusts are subject to a greater level of scrutiny and more claims now than ever before. As such, the importance of a forward-thinking approach to Trust formation and distributions to beneficiaries of Trusts, cannot be overemphasised.

There is a need to be continually mindful about the present and future implications of Trusts and in particular, the ambit of beneficiaries and thus possible future claimants.

It is clear from this Supreme Court decision that the range of potential claimants under s182 of the Act is wide. It could include claimants that may not be known (other by definition of marriage) or in existence (i.e. children and their spouses) at the date of settlement. This is illustrated by the objective expectations of the claimant party being premised on the continuation of the marriage, as opposed to any expectations at the date of settlement. The focus is on what benefits, if any, were received during the marriage, or may have been received in the future as against the changed circumstances and likely benefits following dissolution of the marriage.

A further implication of the decision arises from the obiter statement about whether a s21 (contracting out) Agreement is relevant to s182(6) of the Act, (given it is premised on the breakdown of a marriage as opposed to its continuation). The statement provides for some further common law debate and possible development.

If the Courts adopt the approach of the Supreme Court in relation to s182(6) of the Act and distinguish between s21 and s21A Agreements under the PRA, that will be a significant development. If a party to a s21 Agreement was not excluded from making a claim under s182 (by virtue of s182(6)), there is likely to be a significant increase in claims under s182 in order to deal with Trust assets. This may be particularly so where s44 or 44C of the PRA are not satisfied, it is too costly to bring those claims, or s44 or 44C does not provide sufficient remedies.

Trusts are under constant threat from all angles, both in the family context and also in terms of creditor claims. It is a timely reminder about the importance of understanding each client's individual needs and considering not only the immediate but also the future impacts of any asset structure and how the structure is operated on an ongoing basis.

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1. *Clayton v Clayton* (as trustee of the Vaughan Road Property Trust) [2016] NZSC 29.
2. *Clayton v Clayton* (Claymark Trust) [2016] NZSC 30 ("Clayton SC").
3. See *Clayton* (SC); above at [10].
4. Section 182 Family Proceedings Act 1980 ("Act")
5. *MAC v MAC* FC Rotorua, FAM 2007-063-652, 2 December 2011 (Judge Munro)
6. *Clayton v Clayton* [2013] NZHC 301 [2013] 3 NZLR 236, (Rodney Hansen J)
7. *Ward v Ward* [2009] NZCA 139 [2009] 3 NZLR 336 (Ward (CA))
8. *Clayton SC* at 2 above [27]
9. *Ward* (CA) 7 above at [27]
10. *Ward* (CA) 7 above at [27]
11. *Ward* (CA) 7 above at [27]
12. *Clayton SC* at 2 above [34] citing *Worsley v Worsley* (1869) 1 LRP&M 648 at 651 as
13. endorsed in *Melville v Melville* [1903] p159 (CA) at 71
14. *Clayton SC* at 2 above [35]
15. *Clayton SC* at 2 above [36]
16. *Clayton SC* at 2 above [38]
17. *Clayton SC* at 2 above [33] and [68], *Ward* (CA) 7 above at [32] and [33]
18. *Clayton SC* at 2 above [40]
19. *Clayton SC* at 2 above [41]
20. *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31at [15] and [20] ("*Ward* (SC)")
21. *Ward v Ward* (SC) at 19 above [25]
22. *Clayton SC* at 2 above [47]
23. *Clayton SC* at 2 above [57]
24. *Clayton SC* at 2 above [53] – [54]
25. *Clayton SC* at 2 above [49]
26. *Clayton SC* at 2 above [48]
27. *Clayton SC* at 2 above [50]
28. *Clayton SC* at 2 above [60]
29. *Clayton SC* at 2 above [78]
30. *Clayton SC* at 2 above [62]
31. *Clayton SC* at 2 above [65]
32. *Clayton SC* at 2 above [69]
33. Clayton SC at 2 above [72]