

DISPARITY IN *JACK V JACK*: JUDICIAL OVERREACH OR A JUST RESULT AT LONG LAST?

*Susannah Shaw**

This article discusses the approach taken to enhanced income awards under s 15 of the Property (Relationships) Act 1976 in the recent decision of the High Court in Jack v Jack. The Court upheld the Family Court's award of 70 per cent of the relationship property pool to Mrs Jack to compensate her for economic disparity arising out of the division of functions in the relationship, on the basis she helped Mr Jack enhance his career and sacrificed her own earning potential. The author argues that in upholding the Family Court's findings on causation and accepting the broad brush assessment of quantum, the Court has increased the chances of a successful claim for an enhanced income award. In light of the underutilisation of the enhanced income aspect of s 15, this decision is a welcome step towards the fulfilment of the provision's aims.

I INTRODUCTION

The recent High Court decision in *Jack v Jack* heralds a significant and welcome change in the application of s 15 of the Property (Relationships) Act 1976.¹ In *Jack v Jack* the High Court upheld the Family Court's decision awarding 70 per cent of the couple's \$1.77 million relationship property pool to Mrs Jack, on the basis she helped Mr Jack further his career and in doing so sacrificed her own earning potential.

Mr and Mrs Jack, who have two children, met in 1980 and separated in 2008 after a 24 year marriage. On entering the relationship, Mrs Jack was working as an enrolled nurse and owned her own home. Mr Jack was training in the field of medicine, and is now a highly successful medical specialist working in private practice – earning a taxable income for the years ending 31 March 2008 and 31 March 2013 of between \$800,328 and \$1,069,143. Mrs Jack worked part-time until

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¹ *Jack v Jack* [2014] NZHC 1495, upholding *Carpenter v Carpenter* [2013] NZFC 8396, [2014] NZFLR 9.

1996 when the parties agreed that she should cease working in order to stay at home. She did not re-enter the workforce until 2012. Her taxable income for full-time work as a receptionist at a beauty salon for the year ending 31 March 2013 was \$26,238. During the marriage, Mr and Mrs Jack spent three years overseas while Mr Jack fulfilled postings in Australia and the United Kingdom. The couple returned to New Zealand in 1990 and Mr Jack set up his private practice. Throughout their marriage, Mrs Jack was responsible for caring for the children and for running the family home.

The *Jack* decision raises important questions concerning the operation of s 15 awards as assessed by the courts in New Zealand. Section 15 was introduced by amendment to the principal Act in 2002 and forms a key part of this important social legislation. The provision allows a departure from the presumption of equal sharing that underpins the Act by providing for an adjustment in division of relationship property where the conditions of s 15 are met.² It is designed to give proper recognition to less tangible, non-material contributions such as raising children and domestic duties.³

The primary concern of this article is the High Court's approach to enhanced income claims under s 15. This article focuses on two key aspects of the decision. First, the Court's focus in determining causation on the realities of the division of functions rather than how the parties could have arranged their affairs differently; and secondly, the Court's determination of quantum. A number of notable aspects of the quantum assessment are discussed including the acceptance of the broad brush approach adopted in the Family Court, the Court's view of the relevance of the size of the relationship property pool in determining quantum and the absence of expert evidence.

II SECTION 15 – THE FRAMEWORK TO DATE

There are three discrete elements to an assessment under s 15: first, the court must be satisfied that after the division of relationship property, a significant disparity between the income and living standards of one party relative to the other exists; secondly the court must be satisfied that this disparity has been caused by the effects of the division of functions within the relationship; and thirdly, the court must be satisfied that it would be "just" to exercise its discretion to make an award.⁴

In obiter comments the courts have recognised enhanced income claims:

- "we are satisfied in principle that both the depression of A's earning capacity and the enhancement of B's earning capacity are relevant in the s 15 context ..."⁵

2 Property (Relationships) Act 1976, s 11. Section 15 overrides ss 11 to 14A of the Act: s 15(4).

3 (29 March 2001) 591 NZPD 8625 per Hon Margaret Wilson MP.

4 Property (Relationships) Act 1976, s 15.

5 *P v P* [2005] NZFLR 689 (HC) at [56].

- "a woman who stays at home and looks after children frees up her partner's time and energy, and in this way, may facilitate an enhancement of his earning capacity";⁶ and
- "... the courts will need to consider s 15 compensation ... when a person has supported a spouse to obtain qualifications and experience which provide that spouse with an enhanced future earning capacity".⁷

There have also been cases in which the courts were satisfied of a causal link between the role of a spouse at home and the income earning potential of his or her other half.⁸ However the courts have been reluctant to calculate quantum by reference to that factor, even where it formed part of the determination on causation, preferring instead to focus on the loss of a claimant's income earning potential.⁹ To date, there have only been two cases in which the Court determined quantum by reference to the enhanced earning potential of a spouse.¹⁰

The failure of the courts to take into account enhanced income has been criticised in academic circles,¹¹ by practitioners¹² and extra-judicially.¹³ In 2011, Dame Sian Elias remarked on the

6 *M v B* [economic disparity] [2006] 3 NZLR 660 (CA) at [200] per William Young P.

7 *X v X* [2009] NZCA 399, [2010] 1 NZLR 601 at [49]–[50] per Robertson J.

8 See, for example, *Sainsbury v Sainsbury* [2013] NZFC 867, [2013] NZLFR 1056 at [28]; *RMAFH v LTS* [2012] NZFC 7543 at [64]–[66]; *Smith v Smith* [2007] NZFLR 33 at [65]–[67] and [89]; *K v K* FC Papakura FAM-2003-055-406, 3 July 2007 at [138]; *PNK v JMB* FC Wellington FAM-2009-032-92, 5 October 2010 at [136].

9 See for example *P v P*, above n 5, at [60]–[61]; *K v K*, above n 8; *Sainsbury v Sainsbury*, above n 8; *RMAFH v LTS*, above n 8.

10 In *H v H* [2007] NZFLR 297 (HC), discussed below in Part IV.A "The Broad Brush Assessment"; and in *Smith v Smith*, above n 8, where the Judge identified the future income disparity between the two parties and then multiplied that figure by the number of years within which the application could be expected to re-establish her earning potential. See also the first case on s 15: *Fischbach v Bonnar* [2002] NZFLR 705 at [63]–[64].

11 See for example Mark Henaghan "What can you do about Inequality Post Separation and Post Division?" (paper presented to Relationship Property – your big (legal) day out!, New Zealand Law Society Intensive, August 2010) 89; Mark Henaghan "Dealing to disparity" (2008) 6 NZFLJ 51; and Claire Green "Economic disparity claims in New Zealand: Will *C v C* [2013] NZFC 8396, [2014] NZFLR 9 herald a change?" (2014) 8 NZFLJ 1.

12 Green, above n 11. The author wrote her PhD dissertation on this subject, drawing on research canvassing practitioners' views on the section: "The impact of section 15 of the Property (Relationships) Act 1976 on the vexing problem of economic disparity" (PhD thesis, University of Otago, 2013). See also Brendan Lyne and Andrea Manuel "Valuing Compensation Claims" (paper presented to New Zealand Law Society Family Law Conference, Auckland, November 2011) 205; Anita Chan "Economic Disparity the New Zealand Approach" (paper presented to the International Academy of Matrimonial Lawyers, Shanghai, September 2006); and Vivienne Crawshaw "Section 15 – a satellite overview" (2009) 6 NZFLJ 155.

13 Jan Doogue "Sections 15 and 15A of the Property (Relationships) Act 1976 – six years on: certainty or uncertainty?" (2007) 5 NZFLJ 282.

reluctance to use s 15 and called on the courts to "make conscientious use of the powers Parliament has provided, in the spirit intended".¹⁴

The reality is that on separation the party with the income-earning capacity leaves the relationship with a significant additional asset, notwithstanding the equal division of relationship property. This is despite the plain advantage afforded to the income earning partner due to their spouse's support in the home.

As homemaker roles have traditionally been predominantly performed by women, the difficulties that have plagued s 15 claims have been largely to their detriment. The intent of the section is clear: to recognise unpaid work in the home as significant and worthy of recognition in an adjusted award where it is linked to a significant disparity in income and living standards post-separation. Nevertheless there has been problematic dicta in the courts, the key example being the argument that a nanny could have performed the same role as the spouse at home.¹⁵ That attitude combined with the difficulties in establishing a causative link and calculating quantum has hindered the provision from realising its potential.

Against this background, the advancement of the law through the High Court's decision in *Jack v Jack* renders the decision one of considerable public importance. The key aspects of the decision warrant close analysis.

III REALITIES OF DIVISION AS ACTUALLY OCCURRED – DEALING TO THE NANNY ARGUMENT ONCE AND FOR ALL?

Mr Jack disputed the Family Court Judge's determination that there was a causative link between the effects of the division of functions within the relationship and the significant disparity in income and living standards that existed between the parties on separation. In relation to the enhanced income aspect, the High Court simply asked: "Did Mrs Jack support Mr Jack to obtain his qualification and gain the experience that provided him with an enhanced earning capacity?"¹⁶

The nub of Mrs Jack's claim on the ground was succinctly summarised in her evidence:¹⁷

... the reality is that [Mr Jack] led a busy, demanding, and successful career. However, he did not have to come home and cook a meal. He did not have to tend to the children's daily needs, make lunches,

14 Sian Elias "Separate Property – *Rose v Rose*" (address to Family Court Conference, Wellington, August 2011) at 16.

15 Discussed in further detail below in the context of *M v B [economic disparity]*, above n 6 and *JES v JBC* [2007] NZFLR 472 (HC).

16 *Jack v Jack*, above n 1, at [41].

17 At [47].

attend school functions, or arrange play dates. He did not attend most of their sporting commitments. We had a very traditional division of labour. This was in part our choice, but in part determined by [Mr Jack's] career which came first and foremost.

Mr Jack essentially argued he was destined for the high earners' table, the couple could have hired a nanny if Mrs Jack had not cared for the children, and his overseas postings were not necessary ingredients in his career success.¹⁸ These arguments are commonly raised by respondents seeking to resist a s 15 claim.¹⁹

The nanny argument raised by Mr Jack found sympathy with William Young P in *M v B*.²⁰ The High Court in *Jack v Jack* however firmly rejected this argument, holding:²¹

It is also too simplistic to postulate that the hiring of a nanny or other assistance in the home and in his workplace in the early years of establishing his practice would have inevitably led to the same result. This contention underestimates both the value of Mrs Jack's contribution as well as the undisputed 24/7 nature of Mr Jack's private practice.

The Court reasoned that the proper focus is on what the parties chose to do, not what they could have done:

To effect a just division of relationship property the Court must take into account the contributions of both parties to the relationship and the economic advantages arising from that relationship. In this case, what the parties chose to do and how they organised their joint lives conferred an actual economic advantage on Mr Jack through the indirect contributions of Mrs Jack.

In doing so the Court put to rest the unsatisfactory nanny argument. This is undoubtedly the right decision. It flows from obiter statements made by Robertson J in *X v X* that the benefits Mr X received from Mrs X's full-time focus on the couple's children and maintenance of the home were a consequence of the realities of the division of functions as they actually occurred.²² The judgment gives Mrs Jack due recognition for what she contributed during the relationship. Whether or not the parties could have hired a nanny is beside the point. The fact is the parties decided Mrs Jack would work in the home and Mr Jack's career benefited as a result. As the High Court found, "the raising

18 At [38].

19 It was accepted by the High Court in *M v B* (reported as *B v M* [2005] NZFLR 730) that the husband would have obtained a lucrative partnership in New Zealand by virtue of his significant ability without his experience in London: at [123]. See also *RMAFH v LTS*, above n 8, at [65] in which the Court rejected the husband's argument that the family's various overseas moves were not motivated by his career choices.

20 *M v B* [*economic disparity*], above n 6, at [201]. This reasoning was also applied by Miller J in *JES v JBC*, above n 15, at [32].

21 *Jack v Jack*, above n 1, at [51].

22 *X v X*, above n 7, at [108] per Robertson J.

of their children and the pursuit of his career were both part of the joint enterprise of their marriage, in which each played an important role".²³

The Court's reasoning also recognises that if the nanny argument were accepted, a s 15 claim for enhanced income could not succeed in any case where the household income was capable of supporting domestic assistance. This could not be Parliament's intention, and would lead to an inconsistent and unfair application of the law.

In finding a causative link was established, the Court referred to Mrs Jack's role in the home while Mr Jack studied for his challenging Part II examination (a required course for his line of profession), her support of him while he worked overseas,²⁴ her role at home as primary caregiver for the children while he established his practice and her assistance with his networking and at times his practice.²⁵ These factors provided "a foundation for concluding that she supported him to obtain what he needed to be successful".²⁶

The Court concluded:²⁷

Standing back and looking at the situation of this partnership over its lengthy duration, there is little doubt that Mrs Jack assisted Mr Jack in his career in tangible ways. In conclusion on this aspect, there was a mutually agreed division of labour along traditional lines which utilised and maximised the relative strengths and skills of the parties. The successful outcome of that partnership is attributable to the combined talents and contributions of both parties.

This finding accords with the purposes and principles of the Act.²⁸ Causation must be assessed in a holistic manner on the basis of what the parties have achieved as a joint enterprise. It would be artificial to look solely at what Mr Jack had achieved in his career. The Court more properly looked at what he had achieved at work and in his private life over the course of the marriage with the support of Mrs Jack.

The High Court's decision also brings New Zealand case law further in line with the position reached in the United Kingdom as set out by the House of Lords in *Miller v Miller; McFarlane v*

23 *Jack v Jack*, above n 1, at [48].

24 The Court found that Mr Jack's overseas postings enhanced his professional reputation and his career path, which were important factors in his success in private practice: at [49]–[50].

25 At [46].

26 At [46].

27 At [52].

28 To provide for a just division of the relationship property between the spouses (Property (Relationships) Act 1976, s 1M) and 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 (s 1N(c)).

McFarlane.²⁹ Baroness Hale recognised that the breadwinner's unimpeded earning capacity is a powerful resource to replace capital lost through unequal division of relationship property and that strictly adhering to equal sharing can decrease the primary carer's living standards and increase the breadwinner's.³⁰ The ultimate objective of the division of property and ancillary relief under the United Kingdom Matrimonial Causes Act 1973 was considered to be "to give each party an equal start on the road to independent living".³¹ This notion closely aligns with that underpinning s 15.

IV DETERMINATION OF QUANTUM – HAS THE COURT STRUCK THE CORRECT BALANCE?

A The Broad Brush Assessment

On appeal to the High Court, counsel for Mr Jack argued that calculation of the award in the Family Court was both "obscure and problematic". The High Court disagreed, accepting that the broad brush approach to the quantum assessment adopted in the Family Court is appropriate with enhanced income claims. This represents a significant move away from the set methodology favoured by the majority of the Court of Appeal in *X v X*.³² The High Court identified the relevant factors that underpinned the quantum assessment as being the position of parties upon entering relationship, the length of the marriage, the size of the economic disparity, the marked inequality of income earning capacity and Mrs Jack's contribution towards Mr Jack's income earning capacity. These factors were assessed in the round.

The award was not halved in *Jack*. The Court in *X v X* recognised that halving would not always be necessary.³³ As such the High Court considered halving was not required because an award on the facts of *Jack* would "not invert the parties' relative levels of income and standard of living and create any fresh unfairness".³⁴

The broad brush approach accepted by the High Court accords with the approach endorsed by Robertson J in *X v X* and is arguably the aspect of the decision that will have the greatest impact on how s 15 awards are approached in the future by parties and their counsel. A broad discretion in weighing factors and reaching an adjusted award as the Judge sees fit represents a significant broadening of the quantum assessment. Such an approach recognises the inherent difficulties in

29 *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618.

30 At [142].

31 At [144].

32 *X v X*, above n 7, at [169]–[243] per O'Regan and Ellen France JJ.

33 *X v X*, above n 7, at [236].

34 *Jack v Jack*, above n 1, at [85].

quantifying precisely the financial advantage gained by a spouse from the division of functions within the relationship.

However, it is interesting to contrast the broad brush assessment that found favour in *Jack* with the approach applied by Ronald Young J in *H v H* when assessing an enhanced income award.³⁵ The facts of *H v H* must first be briefly canvassed. Mr and Mrs H were married for 27 years and had three children. The parties met when they were teenagers; throughout their marriage Mrs H cared for the children and supported Mr H in gaining the necessary experience and qualifications to become a skipper. Upon separation Mrs H had limited career options with no qualifications and no work experience. She obtained employment for \$25,000 per year. Mr H earned an average of \$158,000 per year for the previous four years, and \$236,000 for the most recent year.

On appeal, Ronald Young J upheld the finding of causation and reasoned on quantum:³⁶

When the parties began living together, the husband had no qualifications and the wife had no qualifications. The wife continued to look after the children throughout the marriage. This was particularly significant in this case because the husband was often away up to 50 percent of the year. The husband in turn has been able to pursue his career. He has obtained valuable qualifications and experience which has now allowed him to obtain a high paying job. He has only been able to do this because his wife was prepared to stay at home and look after the children and the household. I am satisfied, therefore, all of the factors set out in subs 15(1) are established.

His Honour assessed compensation based on the "added value" model. This assessment analysed the increase in income Mr H was able to achieve because of Mrs H's support compared with his expected income if he had shared the household responsibilities. In turn, Mrs H's potential earning capacity was reassessed based on the same propositions as they applied to her. The Judge considered that to be the fair and just approach because it took into account both Mr H's advantages and Mrs H's disadvantages, arising out of the division of functions within the relationship. This precise calculation method stands in contrast to the broad brush assessment applied in *Jack*, with only one of the factors weighing in the discretionary assessment being the marked inequality of income earning capacity. Precisely why *H v H* did not gain any traction in the Family Court is unclear. Since delivery of the decision it does not appear to have been cited in support of an enhanced income claim.

If *Jack* is appealed to the Court of Appeal, the Court may well look to reassert greater precision in the quantum assessment and still find in Mrs Jack's favour on the merits. While the broad brush assessment in *Jack* affords the Court with a flexible discretion to do justice between the parties, which is particularly important given the inherent difficulties in quantifying a contribution to the

³⁵ *H v H*, above n 10.

³⁶ At [25].

income earner's enhanced career, a level of consistency in the Family Court applying that approach in the exercise of the discretion may be difficult to achieve. In the meantime however, as the latest word from the courts on the quantum assessment, *Jack* will now be the authority parties look to for guidance in calculating the likely amount of an adjusted award under s 15 of the Act.

Endorsement of the broad brush approach to quantum in *Jack* is also notable given the facts raised concurrent causative links to the disparity between the parties – namely, career forgone and enhanced income were both present. The Family Court did not squarely deal with the *X v X* majority's indicative view that where both causes are present, the set methodology ought still to be applied to the career forgone aspect of the quantum determination.³⁷ In adopting the broad brush approach the Court sidestepped applying the prescribed methodology to the career forgone aspect of Mrs Jack's claim. The High Court recognised this in stating (somewhat obliquely) that the Family Court "could have calculated with more precision" the career forgone aspect of the award.³⁸ Notwithstanding, the Court was satisfied that Mr Jack's enhanced income was the predominant factor in assessing quantum and upheld Judge Grace's award (given all of the factors identified).

The High Court's assessment of this issue appears to stem from its view as to its appellate role in reviewing the exercise of a discretion. In *Kacem v Bashir* the Supreme Court confirmed that where an appeal lies against a discretionary decision the court is confined to correcting patent error.³⁹ The court should not interfere unless satisfied the lower court Judge acted on a wrong principle, or failed to take into account some relevant matter, or took account of some irrelevant matter, or was plainly wrong.

Applying that approach the Court did not consider the Family Court Judge's assessment of quantum was plainly wrong. To the contrary, the Court wholly upheld the Judge's reasoning. Although the Court in *X v X* were careful not to confine a future court's approach to the quantum assessment and the Court's obiter observations on enhanced income claims are not binding on the High Court, the guiding view from the Court provides persuasive authority in the High Court. If Mr Jack seeks leave to appeal it will be interesting to see the Court of Appeal's take on this aspect of the decision.

In my view it is problematic that the High Court did not expressly deal with the issue of whether the Judge fell into error in the Family Court by omitting to apply the methodology in *X v X* to the career forgone aspect of the claim. That formula has been applied in a number of cases and has the advantage of certainty. It is worth noting that the certainty provided by the *X v X* methodology is important. This is particularly so in light of the principle in s 1N(d) of the Act that questions about

37 *X v X*, above n 7, at [238].

38 *Jack v Jack*, above n 1, at [82].

39 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [31].

relationship property should be resolved as inexpensively, simply and speedily as is consistent with justice; and given many parties seek to settle relationship property disputes, with proceedings in the Family Court being a mechanism of last resort.

While I agree that an enhanced income award does not lend itself to precise quantification and Mr Jack's enhanced income was the predominant cause of the disparity between the parties here, the career forgone aspect of the Family Court's decision could have been subjected to further scrutiny. Application of the *X v X* formula, at least in respect of career forgone, would have injected further precision to the calculation.

B The Relevance of the Size of the Relationship Property Pool to Quantum

One of the factors taken into account by both the Family Court and the High Court in *Jack* in applying a broad brush assessment was the size of the relationship property. It is important to recall that any award under s 15 is limited by the relationship property pool. In this case the disparity was significant, but the relationship property pool was relatively modest in light of Mr Jack's income. The question of what Mrs Jack had to show for her efforts is a factor that was weighed by the Family Court⁴⁰ and the High Court.⁴¹

It is questionable whether the size of the relationship property pool is properly regarded as a relevant factor in determining an award. The reluctance of the courts to assess the merits of joint decisions made during the course of marriage is reflected in the presumption of joint decision making.⁴² There is nothing to suggest that the couple's expenditure during the relationship was not jointly decided upon (with a corresponding omission to amass a large amount of assets in light of Mr Jack's income). The parties chose to live a high-flying expensive lifestyle.⁴³ The Court's decision that the division of roles in the marriage was a choice made by the parties, applying s 15, operates in Mrs Jack's favour in the context of this case and is appropriate; however the choice of the parties to live a certain lifestyle and to not save a certain amount of assets operates against Mr Jack. This latter point is not strictly relevant to the s 15 criteria of the division of functions in the relationship. Taking this point to its logical conclusion, supposing the relationship property had been \$8 million, it is not immediately apparent that the Court would still have awarded a 70/30 per cent division between the parties. This illustrates that while the limits placed on s 15 due to the size of the

40 *Carpenter v Carpenter*, above n 1, at [134].

41 *Jack v Jack*, above n 1, at [69], [74] and [83].

42 *X v X*, above n 7, at [102]–[106].

43 Mrs Jack's counsel submitted that the couple's high-flying lifestyle left little relationship property: *Carpenter v Carpenter*, above n 1, at [134].

relationship property may be problematic in cases where there is insufficient property to remedy residual inequality,⁴⁴ the size of the pool itself ought not to be relevant to the quantum assessment.

C Expert Evidence

The Court's view that expert evidence would not necessarily be expected, or even considered particularly helpful, is also significant. The Court has previously required comparative evidence in order to establish an enhanced income claim. In *P v P*, the Court stated:⁴⁵

[W]e doubt that the evidence was adequate to establish that Mr P's income necessarily reflected an enhanced element attributable to the division of functions within this marriage. Was his past, and likely future, earning capacity simply attributable to his training and skill? Even accepting that an issue of this kind is to be resolved as inexpensively, simply and speedily as is consistent with justice, we think that some comparative evidence was necessary to enable Mr P's earnings pattern to be assessed against that of [others]. Otherwise resort to speculation was required.

The High Court in *Jack* did not require such evidence, observing that it would likely "be difficult to obtain and inherently unreliable, as each marriage and career will necessarily be fact sensitive".⁴⁶ Even with the benefit of such evidence, it would be difficult to calculate with any precision the financial advantage gained by Mr Jack from the division of functions within the relationship.

Removing the expectation for expert evidence in establishing quantum is likely to make s 15 awards on the enhanced income ground more accessible to the supporting partner in the future. In light of the underutilisation of the section and the underpinning purpose of affording protection to the disadvantaged partner, on balance the approach taken in *Jack* is to be welcomed.

D Maintenance

Mr Jack argued that interim maintenance addressed any disparity in income and living standards that existed as a result of division of functions within the relationship. The Family Court rejected this argument on the basis that once those payments ceased Mrs Jack's lifestyle would be substantially reduced relative to Mr Jack's.⁴⁷

However, the Judge did not address the issue of whether the payment of over \$300,000 in interim maintenance may be treated as addressing disparity arising out of the effect of the division of functions within the relationship.

44 See for example Joanna Miles "Dealing with Economic Disparity: An Analysis of Section 15 Property (Relationships) Act 1976" [2003] NZ Law Review 535 at 550–551.

45 *P v P*, above n 5, at [61].

46 *Jack v Jack*, above n 1, at [81].

47 *Carpenter v Carpenter*, above n 1, at [105] and [119].

The inter-relationship between s 15 and maintenance is not entirely settled and is further complicated where proceedings take years to resolve. Nevertheless, it is doubtful that the payment of interim maintenance is relevant to a s 15 award. The purpose of interim maintenance is to protect the position of the party who does not have adequate means pending the determination of the substantive proceedings. Given her limited income, it is unlikely Mrs Jack would have been able to instruct senior counsel to bring proceedings against Mr Jack without the assistance of interim maintenance. Her only alternative would have been to erode her capital by seeking an interim distribution order.

While Mr Jack was unsuccessful in his arguments on interim maintenance, Mrs Jack was also unsuccessful in obtaining a final maintenance order in the Family Court. Her counsel agreed that the cross-appeal on this point need not be determined in the High Court if the s 15 award was upheld. If however leave is sought and granted to appeal to the Court of Appeal and the s 15 award is overturned, that Court may need to revisit whether Mrs Jack is entitled to a final maintenance order.

V CONCLUDING REMARKS

Jack v Jack is unique in that the bulk of the award was founded on the enhanced income ground, rather than the loss sustained by Mrs Jack as a result of her forgone career. In almost all cases involving s 15 the main operating factor in calculating quantum has been career forgone. While obiter comments from the courts have suggested a willingness to compensate for contributions to enhanced income, there have only been limited instances in which enhanced income has been reflected in the quantum of the award. *Jack* presented the ideal case to lay down the framework for how s 15 is to be applied to a claim for an enhanced income award given the relative strength of Mrs Jack's claim on enhanced income in comparison to her claim for career forgone.

The High Court's endorsement of the finding of causation, acceptance of the broad brush approach to assessing quantum, and the Court's view that this area does not lend itself easily to expert evidence, are all timely developments that sharpen the ability of s 15 to remedy inequalities where the conditions of the section are met.

While there are some drawbacks to the High Court's overall approach in light of the desire for sufficient certainty and guidance for the Family Court, the parties and their lawyers, it may be appropriate for certainty to give way in the context of the broad discretion afforded by Parliament in an otherwise prescriptive regime. On balance, the Court's application of a key mechanism in the Act to remedy residual inequality on separation is a significant and welcome step.

As set out by the Select Committee:⁴⁸

48 Matrimonial Property Amendment Bill 1998 and Supplementary Order Paper No 25 (109-3) (select committee report), cited in *de Malmanche v de Malmanche* [2002] 2 NZLR 838 (HC) at [163] and *Jack v Jack*, above n 1.

[A]lthough the ability to earn an income at a particular level is undoubtedly dependent on the personal attributes, training and skills of the person in question, the ability to devote time to cultivating those skills and attributes is likely to be affected by the division of functions during the relationship.

Despite that being a "likely" scenario, the provision to date has not fulfilled its promise. The approach taken by the High Court in *Jack* aligns with Parliament's intention. In the language of s 15, a "just" outcome was produced. Whether the volume of parties and counsel seeking a like result in reliance on *Jack* increases in the future remains to be seen.

