



Super Profits - valuing future earnings



By Maria Kazmierow

Typical of the litigation being taken to appellate level, the parties in *M v B* [2006] 3 NZLR 660 were affluent professionals. The wife stayed at home with the children, forgoing a promising career in market research, while the husband's career as a litigation partner in a prominent law firm was on a stellar path.

Super profits

In the High Court, counsel for the wife, Deborah Hollings (now QC), argued the husband's future earnings included super profit – classifiable as a relationship asset, to be quantified and divided. Counsel for the husband, Mark Vickerman, disputed this.

The burden of proof was on the wife to prove this, according to Justice Allan (*B v M* [2005] NZFLR 730 at 751). In considering whether there were super profits, and how they would be assessed for division as relationship property, His Honour found that super profits were "excess earnings": where the share of the profit from partnership exceeds the partner's own earning capacity. Effectively, profit derived from membership from the firm.

Justice Allan found that the husband, an equity partner in an established and highly regarded law firm, had earnings exceeding those appropriate as remuneration for his experience, skills, responsibilities, and future efforts. It was arguable that his future earnings would include an element of super profit.

His Honour found that, if it was likely that future earnings included super profit, it was arguable that the present value of future super profit was relationship property, to be assessed in a way akin to assessments made of superannuation rights. This was grounded in the Court of Appeal's decision of *Z v Z* [1997] 2 NZLR 258.

Valuing super profits

The High Court then turned to the valuation assessment of the super profit. The parties engaged two expert forensic accounting specialists to assist in this. The experts largely agreed on the necessary steps, but the variables made the outcomes divergent in the extreme. What to assess included:

- Determining likely future earnings at the firm;
- Identifying the portion of those earnings due to the husband's skill, experience, and responsibilities;
- Establishing the future growth rate in earnings;
- Determining the period of time over which the husband will earn the super profits;
- Allowing for the risk that super profits will not be received; and
- Allowing for any other entitlements of the partnership.

The super profit calculation proved challenging, as the methods of determining (b) were many and varied. Hollings submitted that assessing income likely to be derived by the husband in (b) was possible by a comparison with a salaried partner at the firm, a staff solicitor in the firm, and, particularly, a position at the independent bar. Of these, His Honour held the independent bar to be the best comparator.

In the end, Justice Allan held the burden of proof had not been made out by the wife, and that it was not possible to conclude that super profits were being received by the husband in comparison to the income he could have derived at the independent bar.

In the Court of Appeal

In considering the super profit issue, Justice Robertson identified the bundle of rights possessed by the husband in the partnership, which was valued in the High Court as \$1,341 - 1,446 million by the wife's accountants, and \$182,000 by the husband's.

His Honour considered the rejection of the finding that this included super

profit. He identified the 'clone' at the independent bar approach as the primary reason for rejecting super profits in the High Court. Also, he factored in the High Court's focus on the date of separation (rejecting the post-separation advantages accruing to the husband as impacting on the valuation calculations).

On review of the evidence, the Court found that super profits existed. The relevant factors in determining the multiplier at which super profits were calculated at separation were:

- Husband's age (50);
- If he stopped being a partner, no residual value would be paid to him;
- Heavy reliance on crown work (lower lever of remuneration); and
- Degree of capture due to the restricted nature of the work undertaken.

The relationship property interest in the firm was three times the future maintainable earnings. It helped to check the increase by comparing this with the way the husband's earnings had increased on a lock step percentage basis; the difference between a full equity partner's income and his salaried partner's income.

His Honour found this to be a relationship property item by virtue of section 8(1)(e) of the *Property (Relationships) Act 1976*.

Onus of proof

The Court of Appeal clearly rejected the need for the applicant in the majority of relationship property cases to bear the burden of proof. Justice Robertson found that notions of burden of proof "sit uncomfortably within this legislative regime", as the Act and its regulations make it clear that, "although there is not a fully inquisitorial system, a Court needs only to be satisfied about a state of events which has existed, or which exists" (at [39]). The total disclosure and cooperation required by both parties in affidavit evidence was sufficient.

The High Court's findings that the onus was on the wife were rejected by the Court of Appeal, with *Y v Y* [1977] 2 NZLR 385 being distinguished. The change of legislation since *Y v Y* was reached in 1977 and *Fisher on Marimonial and Relationship Property* were relied on for this.

The Court of Appeal restricted the application of its previous decision in *Nation v Nation* [2005] 3 NZLR 46. Justice Robertson found *Nation* was limited in its effect in requiring an applicant to provide an evidential basis for the Court in the context of section 9A of the Act. His Honour found "where the Act does not indicate an onus either way, the notion of an onus on one party will be inappropriate" (at [45]).

The view from the bar

Vickerman said the decision is remarkable in many respects, not least of which is the willingness of the Court of Appeal to make findings of fact on matters not argued or canvassed in the lower Court. Even more helpful are Justice Robertson's observations that the law relating to relationship property disputes requires total disclosure and cooperation between people who are parties in such litigation.

Hollings was, unsurprisingly, pleased at the judgment. In her view, the Court of Appeal findings were obviously important in terms of super profits' valuations. However, as most relationship property cases don't involve such bundles of rights in partnerships, this was of lesser importance to litigants in the relationship property arena. Of more significance in her view was the Court of Appeal's decision on the onus of proof in relationship property cases. It was particularly important for section 15 cases where, currently, in her view, claims made, particularly by women, failed because the Court considered the onus of proof was on the applicant. Applicants were sometimes being required to "prove" the unprovable; ie what their income would have been but for children – "an almost parallel universe sliding doors scenario".

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