IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-241
[2018] NZHC 1541

BETWEEN	JACQUELINE JOHNSTONE Plaintiff
AND	JAMES STEWART JOHNSTONE Defendant

Hearing: 25 June 2018

Appearances: A Ho for the Plaintiff
N Taefi for the Defendant

Judgment: 25 June 2018

ORAL JUDGMENT OF ASSOCIATE JUDGE R M BELL

Solicitors:
Martelli McKegg (A Ho), Auckland, for the plaintiff
Glaister Ennor (M Robertson), Auckland, for the defendant
Copy for:
Nura Taefi, Auckland, for the defendant

[1] On 9 February 2017, Mr and Mrs Johnstone made an agreement under s 21A of the Property (Relationships) Act 1976. Under the agreement Mr Johnstone was to pay Mrs Johnstone $1,100,000.00 within one calendar month of settlement of the sale of shares or the business of a company, in which he had an interest, or no later than 12 months from the date of the agreement, whichever occurred first. There has been no sale of the shares or the business. As 12 months have passed since the agreement, Mrs Johnstone seeks payment. She sues for the $1,100,000 and applies for summary judgment. In opposition, Mr Johnstone says that it was an implied term of the agreement that he would not be required to pay until the shares were sold; he is entitled to relief on the ground of contractual mistake; and (a matter that was raised late) the agreement should be set aside as giving rise to serious injustice under s 21J of the Property (Relationships) Act 1976.

[2] Mr and Mrs Johnstone began a de facto relationship in January 1997. While they had children from earlier relationships there are no children of this relationship. They married in March 2007 and they separated in June 2015. On 22 August 2016, they made an interim relationship property agreement. That was also a separation agreement. Under the interim agreement Mr Johnstone paid out Mrs Johnstone for an interest in a property at Hahei. They made a final agreement settling the division of relationship property on 9 February 2017, after taking part in a private mediation.

[3] The agreement of 9 February 2017 includes these provisions:

> 2. This agreement, together with the interim agreement dated 22 August 2016 (copy attached as document A) shall constitute a full and final settlement as between them and shall also be a full and final settlement of any claim of any kind that Jacqui may have otherwise been able to pursue as against the Johnstone Family Trust (the Trust) or against any property owned by such trust.
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> 3. Following a private mediation held on 9 February 2017 the parties have reached agreement that Jim and/or the Johnstone Family Trust will pay to Jacqui the sum of one million and one hundred thousand dollars ($1,100,000) in full and final settlement of any relationship property claim Jacqui has intimated or could have otherwise made against Jim or the Trust (or any property owned by the Trust). Such payment shall be paid:-

(i) Either no later than 12 months from the date of this agreement; or

(ii) Or within one calendar month after settlement of the sale of the shares or the business of [Mr Johnstone's company];

whichever first occurs.

In the event of default of payment of the settlement sum, any unpaid portion shall incur penalty interest at 8% per annum calculated on a daily basis.

...

6. Jim will take all steps as may be required to enable the Trust to distribute to him sufficient funds to pay the $1,100,000 settlement to Jacqui. On receipt of such payment, any claims that Jacqui might otherwise have been able to pursue (including, but not restricted to any claim pursuant to section 182 of the Family Proceedings Act 1980) against the Trustees of the Trust, or any property owned by the Trust shall be deemed to have been satisfied and settled in full.

...

9 BINDING IN ALL CIRCUMSTANCES

9.1 This agreement shall be binding on the parties in all circumstances in which their property rights would, in the absence of this agreement, be determined under or be affected by the Act or the principles of law or equity.

9.2 Without prejudice to the foregoing clauses, this agreement shall not be affected by bankruptcy, the taking of property in execution by creditors, separation (whether on one or more occasions), reconciliation, and dissolution of marriage or the death of one or both parties, and shall apply notwithstanding the occurrence of any one or more of those events.

...

12 COMPROMISE OF RIGHTS

12.1 The parties acknowledge that the provisions of this Agreement are accepted by them in full satisfaction and discharge all claims by them whether against the other or his or her estate in respect of relationship property and separate property under the Property (Relationships) Act 1987 or section 182 of the Family Proceedings Act, constructive trust, equity or otherwise.

[4] The agreement has standard provisions as to liability for debts owed to third parties, full and frank disclosure to each other of their assets and receipt of independent legal advice. There is also a provision under which they release their lawyers from

any liability for obtaining further valuations of property. The agreement meets the formal requirements of s 21F of the Property (Relationships) Act 1976. In particular, they each had a lawyer who witnessed their signatures and certified that before their client signed the agreement the lawyer gave them independent legal advice and explained the effects and implications of the agreement.

[5] Mr Johnstone is a director of a company which has the South Island distributorship for selling and servicing commercial vehicles. His family trust has a 45.05 per cent shareholding in the company. Mr Johnstone is one of the trustees. The property relationship agreement was a settlement of claims by Mrs Johnstone not only against Mr Johnstone personally for relationship property, but also for any claims in respect of Mr Johnstone's trust. The fact that Mr Johnstone owned assets in a family trust is not surprising. Equally, while I do not have details, it is possible that Mrs Johnstone may be able to muster arguments that even though assets were held in a trust she may have a claim in respect of them: that might arise under s 182 of the Family Proceedings Act; she may be able to claim that they were relationship property and rely on the decision of the Supreme Court in *Clayton v Clayton*,[1] to say that the shares held on trust were in fact Mr Johnstone's personal property; she may be able to make a constructive trust claims in respect of assets held on trust; or that she provided services which added value to the shares to give her a claim under s 9A of the Act.

[6] The fact that Mrs Johnstone entered into an agreement under s 21A of the Property (Relationships) Act provides the trustees with a defence to any claim she might make under s 182 of the Family Proceedings Act 1980. Section 182(6) says:

> (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.

There is no suggestion that the interests of any children of Mr and Mrs Johnstone require that any order be made under s 182.

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1 *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551.

[7] In 2017, Mr Johnstone and his fellow directors and shareholders were planning to sell the business or its shares. At the time of the agreement he expected that any sale would go through within six months. That is why he agreed that he would pay out his wife within 12 months, even if no sale had gone ahead.

[8] Matters did not go smoothly. The overseas manufacturer announced in August 2017 that it was intending to sell the rights to import its commercial vehicles into New Zealand. Mr Johnstone explains that this delayed any sale of his company or the shares in it, because there would need to be a new distributorship agreement with the new importer. The foreign manufacturer directed that the sale of Mr Johnstone's company should not take place until the transfer of the import rights had been completed. The manufacturer indicated that that was likely to happen by the end of 2017.

[9] Mr Johnstone says that his company has been negotiating with the North Island distributor for that company to acquire his business. He has attached to his evidence a letter of November 2017 with redactions of commercially sensitive information. It is a letter between lawyers that shows a serious interest in proceeding with a purchase of the business of Mr Johnstone's company, although it is not contractually binding. Mr Johnstone says that once the transfer of the rights to the new importer has been resolved, there is likely to be a sale of shares or the business of his company by no later than October 2018. His case is that he would not have agreed to pay his wife $1,100,000 by February 2018 if he had known that the sale would be delayed. He still intends to make the payment once the sale is completed. His evidence shows that he lacks the means to pay Mrs Johnstone the full amount of the agreement while any sale of the shares or the business has not been completed.

[10] In a plaintiff's application for summary judgment the plaintiff has the onus of satisfying the court that the defendant has no defence to the plaintiff's claim. That means that the plaintiff must show that there is no real issue to be tried. Where there are disputes of fact on which the case turns, summary judgment is not normally appropriate. The court will not normally try to resolve conflicts on the facts where credibility or plausibility of averments is in issue. The court is, however, entitled to scrutinise affidavits to ensure that they pass the threshold of credibility. The court is

also entitled to take a robust approach to dismiss defences that do not stand up to scrutiny. That must also be balanced with judicial caution according to the facts of the case.

[11] There is an added feature because of Mr Johnstone's argument that the property relationship agreement can be set aside under s 21J of the Property (Relationships) Act. Normally the court has jurisdiction to decide all matters in a proceeding before it. That is only a general statement. There are cases where an issue before the court may have to be determined by another court or tribunal. That is the case with arguments that an agreement under s 21A should not be enforced because it may be set aside under s 21J. The Family Court is the court of original jurisdiction for applications under s 21J of the Property (Relationships) Act. Ellis J decided that in *Gould v Timm*.[2]

[12] Accordingly, Mr Johnstone has filed an application to stay this proceeding to allow his application to set aside the agreement under s 21J to be heard in the Family Court. He filed his application for stay late on Friday, 22 June 2018. At the start of the hearing Mr Ho indicated that while he had considered seeking an adjournment to allow his client to give a further affidavit, he decided that he could proceed with the hearing on the merits today without the need for an adjournment.

[13] In a summary judgment application, the test on the stay application is the same as if this court had jurisdiction to decide the setting aside application under s 21J. The onus remains on the plaintiff to show that the defendant has no defence. That means that Mrs Johnstone needs to show that Mr Johnstone does not have an arguable case for relief under s 21J of the Property (Relationships) Act.

The implied term argument

[14] Ms Taefi, for Mr Johnstone, proposes that a term can be implied into the agreement that he would not be required to pay until there had been a sale of the shares or of the business. That argument founders on the express terms of clause 3. That makes it clear that Mrs Johnstone is entitled to be paid no later than 12 months after

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2 *Gould v Timm* [2013] NZHC 2743, [2014] NZFLR 54.

the date of the agreement, even if the shares have not been sold. Given that express wording, the proposed implied term must fail for inconsistency with clause 3.

The contractual mistake argument

[15] Mr Johnstone refers to the delays in the sale of the business caused by the manufacturer announcing a change in importer. He says that he would not have agreed to pay his wife by February 2018 if he had known that the sale of the shares or the business would be delayed. He says that Mrs Johnstone shared his views as to when the sale of the business was likely to go ahead and that was a mistaken belief within s 24(1)(a)(ii) of the Contract and Commercial Law Act 2017 (formerly s 6(1)(a)(ii) of the Contractual Mistakes Act 1977).

[16] In response, Mrs Johnstone says that she appreciated that the sale of the business may be delayed for reasons beyond Mr Johnstone's control. To accommodate this, she agreed to defer payment for 12 months after the agreement or one month after the sale of the shares. She was unwilling to wait for the sale to be completed. She did not want payment to be wholly conditional on the sale of the business. I put her evidence to one side, plausible as it is. That is because on this summary judgment application I cannot dismiss Mr Johnstone's evidence as implausible or lacking in credibility. If this case were to go to trial Mr Johnstone's evidence may be believed. Because of that his evidence should not be dismissed out of hand at the summary judgment stage.

[17] The question is whether Mr Johnstone's evidence shows a relevant mistake. Section 23(1) of the Contract and Commercial Law Act 2017 says:

> **23 Interpretation**
>
> (1) In this subpart, unless the context otherwise requires, mistake means a mistake, whether of law or of fact.

It adds that a mistake in the interpretation of a document is a mistake of law. A person does not make a relevant mistake of law when they make a mistake as to the interpretation of the contract in issue.[3] Mr Johnstone cannot claim that he

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[3] Contract and Commercial Law Act 2017, s 25.

misunderstood the effect of clause 3. Besides, his lawyer certified that he had explained the effect of clause 3 to him.

[18] There is a mistake of fact when a person has a mistaken belief as to past or present facts or states of affairs. Where a person is under a mistake of fact, it should be possible to state at that time whether a belief as to a state of affairs is correct or not. Mr Johnstone has not shown a mistake of fact in that sense. The mistake he relies on is that the sale of shares or the business did not happen within the time that he expected. That is a mistake of expectation. The Court of Appeal has made it clear that a mistake as to expectation is not a mistake under the contractual mistakes legislation. In *Compcorp Ltd v Force Entertainment Centre Ltd*, it said:[4]

> Contracting in the expectation of a course of events does not give rise to vitiating mistake if matters do not turn out as expected.

[19] Ms Taefi submitted that there was a mistake of fact because the parties made a mistake as to the liquidity of the shares. At the time of the agreement the shares were not liquid. While there was an intention to sell the business, there was no concluded agreement which would result in immediate payment of funds. Moreover, a belief as to liquidity - as to when assets might be realised and turned into funds - is a belief as to events that might occur in the future. It is an expectation belief and accordingly is caught by the dictum of the Court of Appeal in *Compcorp Ltd v Force Entertainment Centre Ltd.* Because there is not a relevant mistake under Part 2 subpart 2 of the Contract and Commercial Law Act 2017, Mrs Johnstone succeeds on the mistake issue.

Is it reasonably arguable that the agreement may be set aside for serious injustice under s 21J of the Property (Relationships) Act?

[20] Section 21J says:

> **21J Court may set agreement aside if would cause serious injustice**
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> (1) Even though an agreement satisfies the requirements of section 21F, the Court may set the agreement aside if, having regard to all the circumstances, it is satisfied that giving effect to the agreement would cause serious injustice.

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4 *Comcorp Ltd v Force Entertainment Centre Ltd* CA212/02, 13 June 2003 at [34].

(2) The Court may exercise the power in subsection (1) in the course of any proceedings under this Act, or on application made for the purpose.

(3) This section does not limit or affect any enactment or rule of law or of equity that makes a contract void, voidable, or unenforceable on any other ground.

(4) In deciding, under this section, whether giving effect to an agreement made under section 21 or section 21A or section 21B would cause serious injustice, the Court must have regard to—

(a) the provisions of the agreement:

(b) the length of time since the agreement was made:

(c) whether the agreement was unfair or unreasonable in the light of all the circumstances at the time it was made:

(d) whether the agreement has become unfair or unreasonable in the light of any changes in circumstances since it was made (whether or not those changes were foreseen by the parties):

(e) the fact that the parties wished to achieve certainty as to the status, ownership, and division of property by entering into the agreement:

(f) any other matters that the Court considers relevant.

...

[21] Mrs Johnstone needs to show that when all the matters under s 21J are considered, the court must be satisfied that no useful purpose would be served by staying the proceeding to allow the Family Court to decide whether the agreement should be set aside for serious injustice. I emphasise that the test is for serious injustice. Under earlier law before the Property (Relationships) Amendment Act 2001 took effect, the test was whether it would be unjust to give effect to an agreement.[5] The serious injustice test was introduced because there was dissatisfaction with the willingness of the courts to set aside agreements. That harder test of serious injustice means that there is greater focus on subsection (4)(e): that the parties wished to achieve certainty as to the status of ownership and division of property by entering into an agreement.

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5 Matrimonial Property Act 1976, s 21(8)(b).

[22] For compromise agreements under s 21A of the Property (Relationships) Act, it is relevant to enquire into any disparity between what a party has received under an agreement and what they would receive in court. But even before the 2001 amendments, the courts accepted that there may be disparities between what a party received under an agreement and what they might get in court without leading to any relevant injustice.[6] In a case decided after the 2001 amendment, *Harrison v Harrison*,[7] the Court of Appeal held that for contracting-out agreements under s 21, serious injustice was more likely to be found in unsatisfactory process than in inequality of income, but recognised that the position may be otherwise for compromise agreements. It said:[8]

> It may be different for settlement agreements, as such agreements are entered into in respect of entitlements already accrued and should usually reflect the reality of those entitlements.

It recognised that a significant departure from the division under the statutory scheme may be relevant. It said:[9]

> In most compromise cases, the parties will presumably set out to provide for a division of property which accords, at least broadly, to what would be ordered under the statutory regime. So where there is a significant discrepancy between what the agreement provides and the way in which the relevant statutory regime would have operated, this in itself may well suggest that the agreement is unfair or unreasonable and, as well, may well require explanation.

[23] In this case there is no suggestion that there was any relevant disparity in values between what Mr Johnstone was to retain under the agreement and what Mrs Johnstone was to receive. It appears that there was no attempt to obtain full valuations of the shareholding. That is shown by the parties' willingness to release their lawyers from liability for obtaining full valuations. The parties appear to have bargained with each other and reached a settlement without requiring an exact accounting.

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6 *Aldridge v Aldridge* [1983] NZLR 576 (CA).
7 *Harrison v Harrison* [2005] NZFLR 252 (CA).
8 At [112].
9 At [81].

[24] Mr Johnstone's claim of serious injustice does not involve any claim that the exchange agreed under the agreement was unequal or lopsided and he does not contend that if he were to pay out Mrs Johnstone there would be any serious injustice. His complaint is as to timing—he is required to pay now, even though a sale of the shares or the business has not gone through.

[25] In some cases, values of assets fluctuate between the time of the agreement and the time of settlement, when the agreement is to be carried out. The courts have generally been unsympathetic to claims of fluctuation of values as requiring the agreement to be adjusted. For example, in *Cox v Cox* the Court of Appeal said:[10]

> The mere fact things have not worked out as expected does not, in those circumstances, dictate some rescue by reversal.

That was a decision under the unjust test. Another case under the unjust test is *Hall v Hall*, where, in light of the 1987 share market crash, Williamson J said:[11]

> There must also be many cases where by virtue of economic changes or accidents the return from matrimonial assets is considerably less than had been calculated at the time of a matrimonial property agreement. Indeed the share crash of October 1987 no doubt left some separated persons who had accepted shares as part of their property in a disadvantageous position compared to the other party who had accepted real property.

[26] Seen in the light of that view as to fluctuations in value, Mr Johnstone's position is not as serious as it is for those who agreed to take assets which have declined in value after the agreement was made. If the courts generally do not intervene when the values of assets taken under an agreement have fallen, there is less reason to intervene when there is no suggestion that there has been any relevant change in asset value.

[27] Mr Johnstone is in difficulty because the time for payment has fallen due and he cannot presently arrange matters to pay out Mrs Johnstone. He says that he cannot access finance. His affidavit shows that, except for the shares, he has limited means to raise finance. He alleges hardship, but that hardship was foreseeable at the time of

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10 *Cox v Cox* [1992] 1 NZLR 390 (CA) at 394.
11 *Hall v Hall* (1992) 9 FRNZ 30 (HC) at 37.

the agreement. That is expressly contemplated under clause 3 because he was required to pay his wife even if a sale of the shares had not gone through inside the 12 months.

[28] Ms Taefi submitted that under s 21J "giving effect to an agreement" entails what would happen if any judgment on the agreement were enforced. That is true to a certain extent, but giving effect to the agreement also entails recognising that a valid agreement has been entered into and that the agreement should be upheld. In other words, giving judgment in favour of Mrs Johnstone in a proceeding on the agreement is giving effect to the agreement. There is a separate question whether enforcement of the agreement might also cause hardship to Mr Johnstone.

[29] To a large extent, the latter aspect, the enforcement of any judgment, may regulate itself without requiring the assistance of the Family Court under s 21J. Mr Johnstone will not be able to obtain funds for his wife until a sale of the shares or sale of the business goes through. It is unlikely to be in Mrs Johnstone's interest to jeopardise any proposed sale. If she were to have Mr Johnstone bankrupted, he would no longer be a director of his company and his removal from the company as a director would not assist negotiations for the sale of his shares or for the sale of the business. She is likely to understand that. Besides, it would be a relevant consideration he could raise on any bankruptcy application. If he were bankrupted, it is not clear that the shares would vest in the Official Assignee, because they are held on trust. Similarly, if Mrs Johnstone were to try other execution remedies, Mr Johnstone may have plausible arguments for a stay of execution pending the sale. In short, the processes of this court may be sufficient to avoid a serious injustice to Mr Johnstone, even if judgment is given to Mrs Johnstone on this application.

[30] Aside from that consideration, I am not satisfied that Mr Johnstone's cashflow difficulties are so significant that there could be a reasonable argument in the Family Court that they have given rise to a serious injustice under s 21J. I say that having regard to the matters under s 21J(4). The agreement did contemplate the present circumstances. The agreement is not unjust in the division of assets between Mr and Mrs Johnstone. There is no suggestion that the agreement is unjust apart from the circumstances as to payment. Mr Johnstone has raised the matter when enforcement of the agreement has been sought. The lapse of time does not count against him. The

agreement was not unfair or unreasonable in the circumstances known at the time it was made. Mrs Johnstone could legitimately ask not to be delayed indefinitely to await the sale of the business. The 12-month limit was set as a deadline to ensure that Mr Johnstone did move promptly with the sale of the shares. The unfairness that Mr Johnstone relies on is the change in circumstances since the agreement. The delay was beyond his control. While it may cause hardship to Mr Johnstone, that fact alone is not of such a degree that it could reasonably be claimed to be serious injustice. Overriding all this, the parties wanted to achieve certainty as to the division of property by entering into the agreement. It would be regrettable if the parties could not be held to the agreement which they made.

[31] I enquired of counsel how long it would take for Mr Johnstone's application for relief under s 21J to be heard in the Family Court. Both estimated that it might take a year. Within that time Mr Johnstone expects that he will be able to obtain the funds to pay out Mrs Johnstone. Seen in that light, the proposal that I stay the proceeding to allow the Family Court to decide whether the agreement would cause serious injustice means that I would be deciding conclusively in Mr Johnstone's favour now, because by the time of any Family Court hearing the matter will be all done and dusted.

Conclusion

[32] Taking matters overall, I am satisfied that Mrs Johnstone has shown that Mr Johnstone does not have a reasonably arguable case for setting aside the agreement under s 21J of the Property (Relationships) Act. Accordingly, I enter judgment in her favour for $1,100,000.00, with interest under the agreement and costs. I dismiss the application for stay of the proceeding. If the parties cannot agree costs, memoranda may be filed.

Associate Judge R M Bell