**NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS.**

**IN THE FAMILY COURT**
**AT MANUKAU**

**FAM-2014-092-000413**
**[2016] NZFC 5782**

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| **IN THE MATTER OF** | **PROPERTY (RELATIONSHIPS) ACT 1976** |
| BETWEEN | KACIE MYRTLE<br>Applicant |
| AND | CAMERON STUDWICK<br>Respondent |

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| Hearing: | 8 July 2016 |
| Appearances: | C O'Donnell for the Applicant<br>L Dunraj for the Respondent |
| Judgment: | 2 August 2016 |

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**RESERVE DECISION OF JUDGE A-M SKELLERN:**
**APPLICATION FOR LEAVE TO BE HEARD OUT OF TIME SECTION 24**

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## Introduction

[1] This is a determination of an application by Ms Myrtle for an Order under s 24 of the Property Relationships Act 1976 ("the Act") extending the time for making an application under the Act.

[2] The substantive application by Ms Myrtle is under s 21J of the Act to set aside a relationship property agreement ("the agreement").

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[3] The agreement was entered into under s 21A of the Act post separation, on 13 February 2008. The basis for the application to set aside the agreement is that to give effect to it would cause serious injustice.

[4] The relationship of these parties is fraught. Each has filed evidence which is irrelevant to the consideration required by the Court and gives the appearance of being designed for each to malign the other.

[5] His Honour Judge Walsh directed the application for extension of time be set down as a Preliminary Hearing rather than being heard with the substantive application. This half-day fixture was a Submissions Only hearing to argue the issue of leave.

**Proceedings Filed**

[6] In these proceedings, I will refer to Ms Myrtle as the applicant and Mr Studwick as the respondent.

[7] The applicant initially filed an application to set aside the agreement on 30 January 2014. The parties had separated on 15 October 2005 and the expiry of time for filing such an application was therefore 15 October 2008.[1] No application to extend the time for filing was made.

[8] On 17 February 2014 the applicant filed an application extending time to file but without specific supporting evidence.

[9] On 1 September 2014 Her Honour Judge Southwick QC, directed the applicant to file within seven days an amended application to file out of time together with a brief affidavit which specifically addresses the time taken to make her application.

[10] An amended application and affidavit in support were filed on 11 September 2014.

[1] Property (Relationships) Act 1976, s 24(1)(c)

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[11] Essentially, the applicant claimed that the value of "a company" namely [name of company 1 deleted] ("[the Company]") was excluded from the agreement and details of the company and its value misrepresented to her at the time of entering the agreement.[2]

[12] On 16 January 2015 Her Honour Judge Southwick QC, heard the preliminary application in respect of the application for leave to be granted for filing out of time. She found, in relation to the value of the parties' interests in [the Company], that: [3]

> …without the answers to the questions proposed by the lawyer for the applicant, it is not possible for the Court to properly judge the merits of the case. The fact is that if [the Company] did have value at the date of separation, it was appropriate not only that the value was disclosed but that division occurred as between these parties. I do not accept even now the facts in relation to value are clear.

Her Honour noted that the parties were agreed that the matter is best resolved by the further information in relation to this company being provided enabling the applicant to make a decision as to whether to pursue this application. She made Orders and directions including:

(a) The application to be adjourned;

(b) Within seven days the applicant was to clarify all information required in connection with the valuation of [the Company];

(c) Within 21 days the respondent was to file an affidavit from the current company accountant responding to requests together with documentary evidence to support the response; and

(d) Within 14 days counsel for the applicant was to file a Memorandum advising the Court:

(i) Whether more time was required by the accountant and if so how much; and

[2] Affidavit of applicant sworn 11 September 2014, paragraph 2
[3] Decision of Judge Southwick QC 19 January 2015 at paragraph 8

(ii) Whether the applicant seeks leave to withdraw her application.

**The Value of the [the Company] Shares**

[13] On 1 May 2015, the applicant filed an affidavit sworn by Roderick White ("Mr White"), a Financial Analyst. Mr White is part of a specialist team providing expert financial advice primarily for the purpose of dispute resolution, including litigation. Mr White annexes a letter to counsel for the applicant in which he values the shares in [the Company] at various dates.

[14] Mr White, whilst acknowledging the difficulty in quantifying the value associated with ventures such as [the Company], assesses the possible value of the respondent's shares in [the Company] at $621,000 at present day [4] and in the same document, at the separation agreement date of March 2008, an indicative value of $345,000 to $414,000.

[15] Mr White makes his assessment of the separation agreement date value, based on a figure discounted from $2.50 per share - which was the price at which the company issued shares in [Date deleted] 2009 - to $1.25 to take into account the fact that the company entered a major contract with [details deleted].

[16] Mr White assesses the present day value based on the $2.25 per share price as at October 2014.

[17] Mr White acknowledges in conclusion "…it is a very difficult task to quantify the value associated with such ventures…" [5]

[18] On 10 June 2015, Murray John Lazelle ("Mr Lazelle") a Forensic Accountant swore an affidavit in response to that of Mr White.

[4] Affidavit of Roderick White sworn 1 May 2015 at page 6 of annexure
[5] At page 5 of the annexure

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[19] Mr Lazelle has been providing specialist forensic accounting and litigation support services for 20 years.

[20] Mr Lazelle says the values he arrives at, are indicative only and not a comprehensive valuation. This is because the valuation is based on limited information.

[21] Mr Lazelle's opinion is that the most appropriate method of valuing the shares is the "discounted cash flow" method given that [the Company] is a start up company where returns for shareholders are still well in the future.[6]

[22] Mr Lazelle concludes there is no value attaching to the shareholding at March 2008 [7] and there is no evidence that there is currently any market for the shares and no link between the share issue price and value of the company.[8]

[23] Unfortunately at the date of this hearing, notwithstanding the opportunity for him to do so, Mr White has not commented on Mr Lazelle's opinion, because he considered that to do so, would be "comparing apples with oranges."[9]

[24] The Court is therefore left with two valuations, completely at odds with each other, apparently based on the same material provided to each valuer.

[25] A determination of which assessment is to be preferred is a matter for the substantive hearing if leave is granted.

[26] On 8 July 2016 I heard submissions from both counsel amplifying the written submissions that each had filed.

**The Law relating to time limits for filing applications under the Act**

**[**24 **Time limits for making applications**

(1) The following time limits apply in relation to applications made under this Act:
(a) an application made after a marriage **[[**or civil union**]]** has been dissolved by an order dissolving the marriage **[[**or civil union**]]** must be made before the

[6] Affidavit of Murray John Lazelle sworn 10 June 2015 at page 4 of annexure
[7] At page 8 of annexure
[8] At page 10 of annexure
[9] Oral Submissions of Counsel for Applicant -8 July 2016

expiry of the period of 12 months after the date on which that order takes effect as a final order:

(b) an application made after an order has been made declaring a marriage **[[**or civil union**]]** to be void *ab initio* must be made before the expiry of the period of 12 months after the date of the making of the order:

(c) an application made after a de facto relationship has ended must be made no later than 3 years after the de facto relationship ended.

(2) Regardless of subsection (1), the Court may extend the time for making an application after hearing—

(a) the applicant; and

(b) any other persons who would have an interest in the property that would be affected by the order sought and who the Court considers should be heard.

(3) The Court's power under this section extends to cases where the time for applying has already expired.

(4) If 1 of the spouses or **[[**partners**]]** has died, the application of this section is modified by section 89 (except in a situation described in section 10D(1)).**]**

[27] In terms of the exercise of discretion to grant an application for extension of time under s 24, it has long been established that in determining the overall justice of the case, the Court must have regard to four factors being:[10]

(a) The length of time between the expiry of the statutory time limit and the filing of the application.

(b) The applicants' explanation for that delay.

(c) The merits of the case; and

(d) Any prejudice arising to the respondent.

**(a) The Length of time between the expiry of the statutory time limit and the filing of the application**

[28] The statutory time limit for filing the proceedings to set aside the agreement expired on 15 October 2008. The proceedings were filed on 30 January 2014, some five and a half years later.

[10] *Beuker v Beuker* (1977) 1 MPC 20 (SC)

[29] Extensions of 15 years, [11] and 19.5 years [12] have been granted in the particular circumstances of such cases. Conversely an application for an extension of less than one year has been declined on the facts of that case.[13]

[30] The High Court has cautioned against the court placing undue weight on the length of time between the expiry of the time limit and the bringing of the application. The longer the delay however, the greater likelihood of an injustice to a respondent.[14]

[31] The High Court has summarised the weight to give the length of delay as a factor in the decision in this manner, "… it all depends on the facts of the case and the overall interests of justice."[15]

[32] The delay in these proceedings is not at a level where it could be considered fatal to the application.

[33] The enquiry must be wider-ranging.

**(b) The Explanation for the delay**

[34] The applicant claims the reason for her delay in filing her application as follows;

(a) Prior to 2010 she had engaged in formal discussions directly with the respondent and then in 2010, requested a lawyer to formally seek further information about the value of the company [the Company].[16]

(b) The respondent took an aggressive stance with her.[17]

(c) She found the subject matter evoked post traumatic stress disorder.[18]

(d) The respondent suffered a stroke in 2013.[19]

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[11] *JNL v DN* FC Wanganui FAM 2004-083-363, 21 August 2006
[12] *Ritchie v Ritchie* [1992] NZFLR 266
[13] *RLA v SJA* FC Waitakere FAM 2008-090-791, 3 August 2010
[14] *Ritchie v Ritchie* (1991) 8 FRNZ 197
[15] *West v Perry* [2002] NZFLR 796 at Para 26
[16] Affidavit of 11 September 2014 at Para 2
[17] Paragraph 3
[18] Paragraph 4

(e) The applicant herself suffered ill-health and in 2013 had major health issues herself as well as her elderly father in Australia dying of brain cancer.

[35] The applicant asserts that immediately after the execution of the agreement in 2008, she sought to resolve matters informally directly with the respondent, up until 2010.[20]

[36] In 2010, the applicant took formal steps including instructing Mr Barry MacLean, a lawyer specialising in Family Court matters. Mr MacLean wrote to Counsel for the respondent seeking certain financial information from her. Counsel for the respondent replied and the matter stalled at that point until May 2011 when the applicant wrote to the respondent "requesting some compassion and redress." [21]

[37] The applicant deposes that there was one point in 2010 when the respondent initially verbally agreed to have an independent person look at the property settlement however he has since then refuted any claims that she has made to him.[22]

[38] The respondent does not directly refute that assertion in his affidavit in response.

[39] In 2012, the applicant instructed current counsel. Correspondence took place between them during 2012 and 2013. Ill-health of both parties intervened and proceedings were finally issued in 2014.

[40] This is not a straightforward case where the applicant suddenly seeks to overturn an agreement executed six years previously. Her concerns in respect of the terms of the agreement have been expressed to the respondent from time to time, since shortly after it was executed.

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[19] Paragraph 5
[20] Submissions of Counsel for the Applicant 14 January 2015 Para 7(a)
[21] Affidavit of Applicant sworn 11 September 2014 Para 3
[22] Affidavit of Applicant sworn 30 January 2014 at Para 29

**(c) The Merits of the case**

[41] I approach this question purely on the basis of whether the applicant's application to set aside the agreement pursuant to s 21J of the Act, prima facie, has merit.

**Setting aside an Agreement**

**21J Court may set agreement aside if would cause serious injustice**

(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.
(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.
(5) In deciding, under this section, whether giving effect to an agreement made under section 21B would cause serious injustice, the Court must also have regard to whether the estate of the deceased spouse or **[[**partner**]]** has been wholly or partly distributed.

[42] The agreement complies in all respects with the formalities contained in s 21F of the Act and accordingly 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.[23]

[23] Section 21J(1)

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[43] Counsel for the respondent properly refers to the intention of the legislature to make it more difficult to set aside an agreement entered into under s 21A by replacing the test of giving effect to an agreement being unjust to being seriously unjust.

[44] The onus of proof is on the party seeking to have the agreement set aside.

**(i) Serious Injustice**

[45] Defining the term serious injustice, in the case of *Clark v Sims* [2004] 2 NZLR 501 at[36] Paterson J said:

> A Judge, in my view, should not set aside an agreement unless there has been a substantial injustice of sufficient gravity for the Judge to determine that in conscience the Court should intervene. That one party can establish that he or she did not receive what she may have received under the provisions of the Act, will not in itself be a sufficient ground to set aside an agreement although gross inequality may well be a factor which weighs heavily in the determinative process of the Courts.

[46] Further in deciding whether giving effect to the agreement would cause serious injustice the court must have regard to - [24]

(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:

(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 the court considers relevant.

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[24] Section 21J(4)

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### (ii) The Provisions of the Agreement

[47] On the face of it the agreement is clear. The parties have intended to divide the relationship property pool, equally. They have agreed on values of the property available for division. The applicant has made a $40,000 payment to equalise the division.

[48] The agreement is completely silent as to the existence or value of the [the Company] shares or any interest in the company.

### (iii) Length of time since the agreement was made

[49] The agreement was made six years prior to the issuing of the proceedings. Although the respondent has relied upon it since it was executed, he has been aware for a significant period that the applicant was concerned about what she considered to be the disparity in values in property she and the respondent received at separation. The applicant has advised the respondent that she does not accept that the shares were and are valueless as he says.

### (iv) Was the agreement unfair or unreasonable in the light of all the circumstances at the time it was made?

[50] The Court of Appeal has stated separation agreements are more likely to be vulnerable to challenge than compromise agreements if they do not reflect broadly each party's entitlement under the Act: [25]

> 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…

[51] The agreement is a separation agreement and as such is more susceptible to successful challenge, if it results in a significant disparity in the shares each of the parties takes in the property division than a compromise agreement would be.

[52] If the value of the shares at the time the separation agreement was executed, is anything approaching the value placed on them by Mr White, a significant disparity in the

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[25] *Harrison v Harrison* [2005]2 NZLR 349 at [81]

parties' shares has resulted. The agreed pool of relationship property between the parties is $849,000 [26] and accordingly if the shares in [the Company] were worth up to $414,000 at the date of separation agreement, that sum constitutes a significant percentage of the property pool.

[53] The shares in [the Company] were excluded from the agreement altogether. Although the respondent refers to the applicant "knowing" they were valueless, there was no basis for the applicant to make this assessment, given that no valuation of the property was carried out. Such a valuation should either have taken place or if the decision not to value the shares was a deliberate and informed decision, there should be documentary record of the discussion and the information upon which the decision was made.

[54] The respondent says that the applicant was insistent on signing the agreement at the time. The applicant does not refute that evidence. Indeed it would be difficult for her to do so as she sent an e mail to the respondent, begging him to settle with her.

[55] Nonetheless, the fact remains that [the Company] shares were simply omitted from the agreement and apparently any correspondence between counsel for the parties at the time.

[56] There is a real possibility that the agreement was unfair or unreasonable at the time it was made. Whether it was, depends on the Court's determination of the ultimate value of the shares.

**(v) Has the agreement become unfair or unreasonable in the light of any changes in circumstances since it was made?**

[57] The applicant argues that given the exclusion of valuable shares in [the Company] in the property division; she has gone on to be significantly financially disadvantaged since the agreement was made. She had to sell the former family home, which she took as part of her entitlement under the agreement, because she could not sustain the cost of remaining living there. She says the respondent has not contributed sufficiently to the care of the daughter of the relationship and that these are the circumstances that have

[26] The property includes real estate owned by a trust of which the respondent is settler and discretionary beneficiary

contributed to the increasing unfairness of the agreement. She says "If I had been given a fair settlement I wouldn't have needed to sell my home and we would be much better off than we are now, with a secure financial future."[27]

[58] The applicant also says that "Not long after signing the property agreement, Cameron announced that he was going to be placing a manager in to work for [name of company 2 deleted] and that Cameron would be working full time for [the Company] and would be spending several months at a time overseas."[28] The respondent does not disagree that these arrangements were made.

[59] The respondent considers the applicant received a fair share of the property under the agreement and the financial changes subsequent to the execution of the agreement were due to choices the applicant made, not due to any changes in circumstances since it was made, that were beyond the applicant's control.

[60] If the agreement was as heavily weighted in favour of the respondent as the applicant's evidence suggests, an argument exists to support the contention that the applicant's comparatively less secure financial position as a result of the division, resulted in her having to sell the home, and constitutes a change of circumstances since the agreement was entered into, which renders the agreement unfair or unreasonable.

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

[61] The parties to the proceedings undoubtedly sought to achieve certainty with regard to the status, ownership and division of property by entering the agreement.

[62] The High Court determined that the importance of the principle that there should be reasonable certainty that agreements entered into with adequate advice will be upheld overrode the disparity in a division between husband and wife that favoured the husband by a 53% share of property to him and 47% to the wife.[29]

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[27] Affidavit of Applicant sworn 30 January 2014 Para 21
[28] Affidavit of Applicant sworn 30 January 2014 Para 23
[29] *Clark v Sims* [2004] 2 NZLR 501 at [62]

[63] The desirability of certainty cannot take priority over all else in determining the overall justice of each case. If the disparity between the share of these parties is to the degree argued by the applicant, such a division does not accord with the purposes of the Act set out at s 1M(c) which is to provide for a just division of the relationship property when their relationship ends, while taking account of the interests of any children of the relationship. Certainty is less crucial than a just division.

**(d) Any prejudice arising to the respondent**

[64] The respondent may well suffer prejudice as a result of any leave granted to proceed out of time to set the agreement aside. However, any prejudice must be considered against the fact that he has known for a significant period that the applicant sought to re-open the terms of the negotiated settlement and that the possibility existed that he may have to account to the applicant for the value of the [the Company] shares.

[65] The prejudice to him is not at such a level that on the assessment of all outweighs the prima facie merit of the applicant's case.

**Conclusion -the overall justice of the case**

[66] I now stand back and consider the overall justice of the case.

[67] The Court needs to determine whether there is the extent of the disparity in division as advanced by the applicant. There is at least prima facie evidence that there is a very marked difference in the property each would have received if ordered by the Courts in accordance with the provisions of the Act.

[68] The conclusions reached in respect of each of the considerations pursuant to s 24 and particularly the prima facie merits of the case the applicant has under s 21J, lead to the decision that leave should be granted for the applicant to file out of time.

[69] If the result of the substantive hearing is that the shares are valueless as the respondent propounds, the award of costs accruing from the applicant's claim will likely be considered favourably.

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[70] If however the shares are of the value claimed by the applicant, the respondent will likely similarly be responsible.

[71] There is a greater likelihood of injustice arising from disallowing the applicant's application for leave to apply out of time.

**Decision**

[72] Leave is granted to the applicant to file out of time.

[73] Counsel are to confer upon further directions with regard to any further evidence to be filed and a timetable for doing so. Any further affidavits are to be strictly relevant to the proceedings.

[74] A Joint Memorandum is to be filed within 21 days and a Rule 175 conference of 30 minutes duration allocated at the expiration of that period.

[75] The valuers are to confer and to file a joint statement, setting out any matters upon which they agree and those they do not.

[76] Costs are reserved in respect of this preliminary application.

A-M Skellern
Family Court Judge